AN ABRIDGMENT

OF

CASES

ARGUED AND DETERMINED

IN

THE COURTS OF LAW.

227 i 4

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CASES

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IN

The Courts of Law,

DURING THE REIGN OF HIS PRESENT MAJESTY,
KING GEORGE THE THIRD.

WITH TABLES OF THE NAMES OF CASES AND PRINCIPAL MATTERS.

By THOMAS WALTER WILLIAMS, Esq.
OF THE INNER TEMPLE, BARRISTER AT LAW.
AUTHOR OF
THE WHOLE LAW RELATIVE TO THE DUTY AND OFFICE OF A JUSTICE OF THE PEACE.

VOLUME THE FOURTH.

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G R III

AN

ALPHABETICAL TABLE

OF THE

NAMES OF THE CASES COMPRIZED

IN

THIS VOLUME.

A.

ADAMS *v.* Adams, 783
Aguilar *v.* Rodgers, 473
Andre *v.* Fletcher, 298
Anſon, J. *v.* Stuart, 750
Aſpindal *v.* Brown, 735
Aſton *v.* Aſton, 407
Aylet *v.* Jewel, 528

B.

Bach *v.* Longman, 515
Baldwin *v.* Elphinſtone, 125
Ball *v.* Dunſterville, 644
Baptiſte *v.* Cobbold, 711
Barber *v.* French, 373
Barber *v.* Fletcher, 421
Barlow *v.* Norman, 188
Barrington *v.* the King, 576
Barwick *v.* Thompſon, 8
Bates *q. t. v.* Jenkinſon, 156
Baxter *ex dim.* Abrahall *v.* Browne, 73
Bean *v.* Stupart, 437
Beardmore *v.* Fox, 195
Beardmore *v.* Carrington, 532
Beatſon *v.* Haworth, 409
Beau *v.* Bloom, 721
Bell *v.* Stone, 111
Bell *v.* Gilſon, 285
Benſon *v.* Frederick, 535
Bent *v.* Puller, 145
Bentley *v.* Donnelly, 726
Berens *v.* Rucker, 322
Bermon *v.* Woodbridge, 480
Bernardi *v.* Motteux, 455
Berthon *v.* Street, 512
Biddlecombe *v.* Kervel, 517
Binſtead *v.* Buck, 140
Birt *v.* Barlow, 544
Bize *v.* Fletcher, 426
Blackhurſt *v.* Cockell, 437
Boehm *v.* Bell, 293
Bolton *v.* Biſh. Carliſle, 745
Bolton *v.* Richard, 647
Bolton *v.* Puller, 620
Bonafous *v.* Rybot, 511
Boral *v.* Nutt, 440
Booth *v.* Hodgſon, 627
Bowering *v.* Elmſley, 368
Boyce *v.* Whitaker, 762
Brewer *ex dim.* Lord Onſlow *v.* Eaton, 25
Bridges *v.* Hitchcock, 90

Briſtow *v.* Wright and Pugh, 12
Broadhead *v.* Marſhall, 518
Brook *v.* Willet, 708
Brooks *v.* Moravia, 204
Brough *v.* Whitmore, 271
Brown *v.* Dixon, 721
Buckland *v* Barton, 831
Buckley *v.* Buckley, 512
Bulbrook *v.* Goodere, 186
Bull *v.* Tilt, 594
Burleigh *v.* Stibbs, 711
Burnett *v.* Kenſington, 366
Buſby *v.* Watſon, 707

C.

Calvert *v.* Bovil, 460
Camden *v.* Anderſon, 305, 310
Camden *v.* Anderſon, 320
Camden *v.* Cowley, 343, 524
Campbell *v.* Daley, 590
Campbell *v.* Hall, 688
Carter *v.* Bohem, 400
Catling *v.* Skoulding, 160
Cazalet *v.* St. Barbe, 383
Chandler *v.* Roberts, 760
Chapman *v.* Pickerſgill, 722
Chapman *ex dim.* Staverton *v.* Emery, 510
Clark *v.* Stevenſon, 527
Clark *v.* King, 736
Clayton *v.* Blakey, 3
Clements *v.* Waller, 81
Clymer *v.* Littler, 519
Cockſedge *v.* Fanſhaw, 177
Colebrooke *v.* Elliot, 106
Connor *v.* Connor, 699
Cooke *v.* Booth, 89
Cox *v.* Parry, 302
Cracraft *v.* Gledowe, 555
Crauford *v.* Hunter, 289
Crepps *v.* Durden, 205
Cruſoe *ex dim.* Blencowe *v.* Bugby, 92
Cumberland, Duke of, *v.* Praed, 766
Curling *v.* Innes, 730
Cutting *v.* Derby, 30

D.

Da Coſta *v.* Firth, 365
Dacoſta *v.* Newnham, 393
Dalmady *v.* Motteux, 319
Darlington, E. *v.* Pulteney, 804
Davies *v.* Pierce, 17
Davis *v.* Bowſher, 143
Daviſon *ex dim.* Bromley *v.* Stanley, 80
Deey *v.* Shee, 207
Deguino *v.* Bewicke, 449
De Hahan *v.* Hartley, 439
Delaney *v.* Stoddart, 423
Denn de Wroot *v.* Fenn, 728
Denniſon *v.* Modigliani, 355
De Vignier *v.* Swanſon, 286
Devonſhire, D. of, *v.* Cavendiſh, 792
Dickon *v.* Clifton, 720
Dickſon *v.* Fiſher, 544
Dobſon *v.* Herne, 728
Doe *ex dim.* Bayntun *v.* Watton, 55
——— Bedford, Duke of, *v.* Kightly, 21
——— Briſtow *v.* Pegge, 507
——— Cheny *v.* Batten, 26
——— Collins, *v.* Weller, 21
——— Collins *v.* Weller, 38
——— Criſp *v.* Barber, 82
——— Dagget *v.* Snowden, 23
——— Devonſhire, D. of, *v.* Cavendiſh, L. 826
——— Ellis *v.* Sandham, 59
——— Forſter *v.* Wandlaſs, 7
——— Foſter *v.* Williams, 16
——— Freeland *v.* Buſt, 75
——— Gibbons *v.* Pott, 498
——— Martin *v.* Watts, 72
——— Matthews *v.* Jackſon, 549
——— Milborne *v.* Milborne, 801
——— Mitchinſon *v.* Carter, 97
——— Puddicombe *v.* Harris, 21
——— Pulteney *v.* Ldy Cavan, 57
——— Rigge *v.* Bell, 24
——— Shore *v.* Porter, 1
——— Simpſon *v.* Butcher, 70
——— Wyndham *v.* Halcombe, 67
Douglas *v.* Ilram, 706
Drewry *v.* Twiſs, 713
Driſcol *v.* Paſsmore, 429

Driſcol *v.* Bovil, 432
Drummond *v.* Dorant, 755
Duberley *v.* Gunning, 537
Ducker *v.* Wood, 517
Dyer *v.* Bullock, 609

E.

Earle *v.* Harris, 417
Eckhardt *v.* Wilſon, 646
Eddington *v.* Borman, 188
Eden *v.* Parkiſon, 453
Eden and Court *v.* Poole, 271
England *ex dim.* Syburn *v.* Slade, 3
Entick *v.* Carrington, 131
Enys *v.* Donnithorne, 83

F.

Fabrigas v. Moſtyn, 543
Fabrilius *v.* Cock, 518
Fairclaim *ex. dim.* Empſon *v.* Shackleton, 151
Farmer *v.* Legg, 351
Fenwick *v* Fenwick, 595
Ferguſon *v.* Corniſh, 75
Fitzherbert *v.* Mather, 419
Fonnereau *v.* ——, 543
Freeland *v.* Hunt, 726
Freeman *ex dim.* Vernon *v.* Weſt, 77
French *v.* Backhouſe, 280
French *v.* Foulſton, 280

G.

Garrard *v.* Early, 714
Garrels *v.* Kenſington, 469
Gerrard *v.* Clifton, 86
Geyer *v.* Aguilar, 461
Gilbert *v.* Burtonſhaw, 536
Giſt *v.* Maſon, 318
Glover *v.* Black, 267
Goodright *ex dim.* Charter *v.* Cordwent, 25
—— Hall *v.* Richardſon, 74
—— Hare *v.* Cator, 5
—— Stevenſon *v.* Noright, 6
—— Walter *v.* Davids, 96
Goodright *ex d m.* Wynne *v.* Humphreys, 72
Good itle *ex dim.* Alexander *v.* Clavton, 519
—— Clarges *v.* Funucan, 44
—— Gallaway *v.* Herbert, 2
—— Norris *et al. v.* Morgan, 505
—— Ruſſel *v.* Weal, 810
—— Tayſum *v.* Pope, 511
Goodwin *v.* Gibbons, 523
Goſling *v.* Lord Weymouth, 597
Goſlin *v.* Wilcock, 723
Grace *v.* Smith, 611
Graham *v.* Robertſon, 628
Green v. Farmer, 137
Green *v.* Rennett, 701
Grey *v.* Grant, 535
Griffith *v.* Harriſon *et al.* 822
Grindley *v.* Barker, 837
Guliver *ex dim.* Taſker *v.* Burr, 549

H.

Hahn, De, *v.* Hartley, 439
Halton *v.* Lord Thanet, 608
Hamilton *v.* Mendez, 376
Hare *v.* Cator, 705
Harris *q. t. v.* Woolford, 156
Harriſon *v.* Bulcock, 34
—— *v.* Jackſon, 643
—— *v.* Millar, 265
—— *v.* Ruſhforth, 643
—— *v.* Sykes, 643
Harvey *v.* Richards, 753
Harvey *v.* Peake, 759
Havelock *v.* Hancill. 332
Hawkins *v.* Wallis, 732
Haydon *v.* Wilſhere, 484
Heaton *v.* Rucker, 275
Henchett *v.* Kimpſon, 9
Henchman *v.* Offley, 297
Henderſon *v.* Withy, 761
Hervey *v.* Hervey, 483
Hill *v.* Secretan, 280
Hirſt *v.* Smith, 714
Hitchin *v.* Campbell, 749
Hoare *v.* Dawes, 609
Hoare *v.* Parker, 649
Hodges *v.* Sandon, 764

Hodgſon *v.* Richardſon, 397
Holloway *v.* Rakes, 18
Hore *v.* Whitmore, 440
Horton *v.* Beckman, 199
How *v.* Denin, 722
Howell *v.* Mac Ivers, 756
Huckle *v.* Money, 530

I. J.

Jackſon *v.* Duchaire, 548
Jackſon *v.* Fairbank, 159
J'Anſon *v.* Stuart, 750
Jeffery *v.* White, 759
Jenkins *ex dim.* Yate *v.* Church, 70
Johns *v.* Whitley, 84
Johns *v.* Whitley, 738
Johnſton *v.* Sutton, 304
Jonas *v.* Gunning, 203
Jones *ex dim.* Griffiths *v.* Marſh, 24
Jones *v.* Schmole, 274
Jones *v.* Sparrow, 540
Jones *v.* Walker, 781

K.

Keech *v.* Hall, 494
Kemp *v.* Vigne, 345
Kent *v.* Bird, 299
Kenyon *v.* Berthon, 438
Kewley *v.* Ryan, 296
Kilgour *v.* Finlyſon, 644
——— *v.* Galbreath, 644
——— *v.* Harper, 644
Kinder *v.* Paris, 747
The King *v.* Almon, 132, 588
——— Aſkew, 662
——— Atkinſon, 545 (n. 1.)
——— Axbridge, 231
——— Aylett, 545 (n. 2.)
——— Aylett, 650
——— Bankes, 218
——— Bank of England, 238
——— Barker, 209
——— Barrington, 576, 579
——— Baxter, 767
——— Beach, 770
——— Beaton, 594
——— Bland, 515
——— Borthwick, 512
The King *v.* Briſtow, 230
——— Burks, 124
——— Bury, 140
——— Cambridge, Vice Chancellor of, 211
——— Cambridge, 217
——— Cambridge, Mayor of, 244
——— Cheſter, Biſhop of, 233
——— Cheſter, 591
——— Clarke, 647
——— Colcheſter, 240
——— College of Phyſicians, 662, 675, 684
——— Cook, 773
——— Crofsley, 655
——— Croydon, 236
——— Davie *et al.* 606
——— Derby, Juſtices of, 221
——— Dowton, 657
——— Edwards, 543
——— Edyvean, 219
——— Ellames, 758
——— Erle, 229
——— Field, 236
——— Flower, 603
——— Galey, 662
——— Gaſkin, 262
——— Grampond, 216
——— Grampond, 757
——— Grantham, 222
——— Gray's-inn, 239
——— Hart, 112
——— Hawkeſworth, 206
——— Hay, 222
——— Haydon, 661
——— Hollond, 552
——— Holmes, 241
——— Holt, 545
——— Horne, 115
——— Inhabitants of St. Mary, Cheſter, 591
——— Jotham, 210
——— Kearſley, 137
——— Kinnerſley, 112
——— Lamb, 592
——— Land Tax Com. 220
——— Ledbury, 498
——— Leiceſter, Mayor of, 260
——— London, 231
——— London, Biſhop of, 236
——— Lovegrove, 223
——— Lyme Regis, 250, 254, 260

The

The King *v.* May, 769
—— Mayor and Aldermen of London, 176
—— Miller, 593
—— Morgan, 33
—— Morris, 661
—— Norris, 662
—— Northfield, 486
—— Nueys, 662
—— Perry, 589, 591
—— Phillips, 515
—— Phyſicians' College, 662
—— Powell, 768
—— Praed, 543
—— Pratt, 189
—— Shaw, 229
—— Shaw, 780
—— Smollet, 137
—— Spiller, 219
—— Spottiſwoode, 545(n. 3.)
—— St. Anne's, Soho, 221
—— St. Aſaph, 127
—— St. Mary on the Hill, 591
—— St. Peters, Thetford, 237
—— Taunton, 244
—— Tooley, 771
—— Topham, 112
—— Trelawney, 206
—— Warren, 229
—— Webber, 772
—— Wells, Cor. of, 224
—— Wilkes, 556
—— Willis, 487
—— Withers, 131
—— Windham, 214
—— Woodfall, 133
—— Wright, 602
—— Yandell, 578
—— York, Mayor of, 216
—— York, Mayor of, 246
—— Yorkſhire, W. R. 262
—— Younger, 204
King *v.* Walker, 152
—— *q. t. v.* Smith, 208
—— *v.* Marſack, 701
—— *v.* Pippet, 709
Kinnerſley *v.* Orpe, 79
Knight *v.* Bate, 150

L.

Lavabre *v* Wilſon, 426
Lavabre *v.* Walter, 426
Law *v.* Hollingſworth, 348
Leadbeter *v.* Markland, 154
Leader *v.* Moxon, 158
Leeman *v.* Allen, 529
Lees *v.* Smith, 263
Leith *v.* Pope, 541
Leſſee of Clymer *v.* Littler, 519
Lewis *v.* Rucker, 358
Lidderdale *v.* Montroſe, Duke of, 551
Lilly *v.* Ewer, 448
Liſter *v.* Mundell, 518
Lloyd *v.* Maund, 161
Lockyer *v.* Offley, 333
Lockyer *v.* Eaſt-India Company, 176
London, Mayor of, *v.* Lynn Regis, 163
London Wharfs, Caſe of, 196
Lonſdale, Lord, *v.* Littledale, 597
Loraine *v.* Thomlinſon, 479
Lovell *v.* Eaſtaff, 753
Lowry *v.* Bourdien, 308
Ludford *v.* Barber, 39
Lynn Regis *v.* London, 163

M.

Macdowal *v.* Fraſer, 418
Macleiſh *v.* Tate, 87
Macmurdo *v.* Smith, 723
Maddon *ex dim.* Baker *v.* White, 24
Markham *v.* Middleton, (n. 1) 535
Marſh *et ux. v.* Bower *et ux.* 522
Martin *v.* Ford, 779
Martin *v.* Townſhend and Sawbridge, 595
Maſt *v.* Goodſon, 720, 721
Mattiſon *v.* Atkinſon, 744
Mauricet *v.* Brecknock, 536
Mellor *v.* Barber, 698
Meſſenger *v.* Armſtrong, 32
Middlewood *v.* Blakes, 398
Mills *v.* Fletcher, 373
Milward *v.* Thatcher, 549
Mitchell *v.* Cockburn, 265
Mitchell *v.* Edie, 390
Monteſiori *v.* Monteſiori, 485
Montgomery *v.* Egginton, 373

Morewood *v.* Wood, 736
Morgan *v.* Sargent, 727
Moſs *v.* Byram, 356
Moſs *v.* Gallimore, 496
Myers *v.* Edge, 642

N.

Neſbit *v.* Luſhington, 324
Newby *v.* Reed, 373
Nicholſon *v.* Chapman, 140
Nicholſon *v.* Croft, 483
Noble *v.* Kennoway, 278
Norris *v.* Freeman, 525
North *q. t. v.* Smart, 778
Nutt *v.* Bourdieu, 339

O.

Oakapple *ex dim.* Green *v.* Copous, 21

P.

Parker *ex dim.* Walker *v.* Conſtable, 20
Parſons *v.* King, 157
Parker *v.* Anſell, 524
Pawſon *v.* Watſon, 412
Payne *v.* Rogers, 9
Peck *v.* Wood, 191
Peppin *v.* Solomons, 712
Peppin *v.* Shakeſpear, 737
Phyn *v.* Roy. Ex. Aſſ. 335
Planche *v.* Fletcher, 410
Plantamour *v.* Staples, 343
Pleydell *v.* Dorcheſter, Earl of, 521
Pochin *v.* Pawley, 548
Pomery *v.* Partington, 61
Pope *v.* Vaux, 199
Porry *v.* Jackſon, 152
Powley *v.* Walker, 725
Praed *v.* D. of Cumb. 765
Pray *v.* Edie, 279
Pugh *v.* Duke of Leeds, 48

R.

Raban *v.* Plaiſtowe, 596
Radford *q. t. v.* Mackintoſh, 774
——— *v.* Briggs, 776
Rafael *v.* Verelſt, 519
Raſtall *v.* Stratton, 704
Read *v.* Brookman, 741
Reavely *v.* Mainwaring, 522
Reed *v.* Cole, 267
Rees *v.* Abbott, 700
Ren *v.* Bulkeley, 830
Reynolds *v.* Adams, 591.
Rich *v.* Parker, 467
Right *ex dim.* Flower *v.* Darby, 20
——— Baſſett *v.* Thomas, 40
Robertſon *v.* Ewer, 270
Robinſon *v.* Bland, 487
Robinſon *v.* Hardcaſtle, 788, 794
Roe *ex dim.* Bolton, D. of, *v.* Grantham, 783
——— Bree *v.* Lees, 1
——— Buxton *v.* Dunt, 818
——— Gregſon *v.* Harriſon, 93
——— Kaye *v.* Soley, 511
——— Jordan *v.* Ward, 22
——— Parry *v.* Hodgſon, 37
Roſs *v.* Hunter, 337
Rotch *v.* Edie, 385
Rothwell *v.* Cooke, 452
Rouſe *v.* Bardin, 732
Rubery *v.* Jervoiſe, 91
Rucker *v.* Hannay, 162

S.

Salvador *v.* Hopkins, 275
Sampſon *v.* Appleyard, 524
Sangſter *v.* Birkhead, 193
Saville *v.* Robertſon, 634
Saville *v.* Hutchinſon, 634
Senat *v.* Porter, 322
Sharpe *v.* Brice, 541
Shipman *q. t. v.* Henbeſt, 101
Shirley *v.* Wilkinſon, 421 (n)
Short *v.* Pruen, 777
Simond *v.* Boydel, 472
Smith *v.* Bower, 155
Smith *v.* Jamieſon, 633
Smith *v.* Muller, 696
Sone *v.* Aſhton, 33
Southall *v.* Leadbetter, 189
Spong *v.* Hogg, 526
Springs *ex dim.* Titcher *v.* Biles, 815

Stad-

Stadholme *v.* Hodgſon, 162
Stevenſon *v.* Snow, 475
St. John's Col. Oxford, *v.* Murcott, 10
Storey *v.* Robinſon, 783
Strithorſt *v.* Græme, 154
Sutton *v.* Fenn, 698
Swift *ex dim.* Huntley *v.* Gregſon, 812
Syers *v.* Bridge, 433
Sykes *ex dim.* Murgatroyd *v.* ——, 21
Symonds *v.* Ball *et al.* 706

T.

Tatham *v.* Hodgſon, 349
Taylor *v.* Blair, 731
Thelluſon *v.* Fergusſon, 443
Thelluſon *v.* Fletcher, 321
Thelluſon *v.* Staples, 446
Thompſon *v.* Taylor, 341
Tippet *v.* May, 756
Timmins *v.* Rowlinſon, 29
Topping *v.* Ryan, 749
Totty *v.* Neſbitt, 744
Trevor *v.* Wall, 700
Trinity-houſe *v.* Sorſbie, 149
Trott *v.* Welch and Swan, 158
Trumper *v.* Carwardine, 19
Turing *v.* Jones, 714
Tyrie *v.* Fletcher, 476
Tyſon *v.* Gurney, 454

V.

Vallejo *v.* Wheeler, 327
Venables *v.* Morris, 819
Vignier, De, *v.* Swanſon, n. 286
Villers *v.* Monſley, 110

W.

Walker *et al. v.* Birch *et al.* 147
Warne *v.* Varley, 103
Warner *v.* Theobald, 709
Warre *v.* Harbin, 711
Watts *v.* Fullarton, 504
Waugh *v.* Carver, 613
Way *v.* Modigliani, 435
Weaver *v.* Buſh, 730
Webb *v.* Brown, 203
Webb *v.* Thompſon, 451
Webſter *v.* De Taſtet, 321
Weller *et al. v.* Baker, 715
Weſton *v.* Maſon, 754
Weſton *v.* Chapman, 754
Whitcomb *v.* Whing, 159
Wiggleſworth *v.* Dalliſon, 18
Willet *v.* Chambers, 629
Wilkes *v.* Lord Halifax, 697
Wilkinſon *v.* Payne, 521
Wilkinſon *v.* Colley, 31
Williams *v.* Bartholomew, 3
Williams v. Prikhard, 187
Wilſon *v.* Sir Thos. Sewell, 35
Wilſon *v.* Marryatt, 312
Wilſon *v.* Smith, 363
Wilſon *v.* Duckett, 482
Winn *v.* White, 15
Withnell *v.* Gartham, 832
Witterſheim *v.* Carliſle, 159
Wolf *v.* Horncaſtle, 281
Wooldridge *v.* Boydell, 434
Woolley *v.* Cloutman, 202
Woolmer *v.* Muilman, 397
Wright *v.* Fawcett, 243
Wyvill *v.* Shepherd, 704

Y.

Yates *v.* Carliſle, 695, 696
Yea *v.* Fouſaker, 159

Z.

Zenobio *v.* Axtell, 127
Zouch *ex dim.* Ward *v.* Willingale, 26
Zouch *ex dim.* Woolſton *v.* Woolſton, 794

ERRATA.

In page 15, line 7, instead of *Shuter*; read *Shute*.
97, side note, instead of 8 *Ter. Rep.* 51, read 57.
177 side note, read Cockfedge *v.* Fanshaw.
182, line 31, read 3 Levinz, 160.
186, line 18, instead of *on*; read *or*.
—— lines 21 and 22 instead of *Burks*; read *Bucks*.
187, lines 5 and 6 instead of *Burks*; read *Bucks*.
194, line 10, instead of *reimbursing*; read *reimburse*.
—— line 45, note, that the case of Stone *v.* Greenwell was of Mic. Ter. 24 Geo. 3, and is referred to in 3 Ter. Rep. 461.
201, line 10, after the word *had*; read *see 7 Vin. etc.*
203, line 39, after *and*; read *was* amenable.
204, to the second side note, add 5 Ter. Rep. 449.
209, side note, after 3 Burr. 1265. add 1379.
211, side note, instead of 3 Burr. 1645; read 1647.
216, line 1, instead of *comprobetur*; read *comprobatur*.
222, line 30, after *depending*; read *concerning*.
226, line 5, instead of *velere*; read *valere*.
—— 19, read "There is no case *that says* that the *bare* being once absent."
236, last line, read *It appeared that* there was
238, side note, instead of *Doug.* 253; read 523.
240, line 12, *dele* the word but.
—— side note, after Colchester add *Hil. Ter.*
248, line 31. instead of *there*; read *that*.
259, to foot note, add *ante*, 115.
271, side note, instead of 2 6; read 4 *Ter. Rep.* 206.
275, line 47, dele the words *But there*; and read *There* were.
300, side note, instead of *Powry*; read *Lowry*.
320, last line, after the words *Hibbert* v. *Rolleston*, add 3 *Bro. Cha. Cas.* 571.
331, lines 12 and 13, dele the words "The Court on this day ordered another."
336, line 42, instead of *ante*; read *infra*.
452, lines 32 and 36, instead of *ante*; read *infra*.
623, To note at the bottom of the page add; *under title* BANKRUPT *in the general appendix to* this work.
707, side note, instead of 2 *Wilf.* read 2 *Black. Rep.*
748, lines 2 and 3, after the word *plaintiffs*; read "to this plea there was a general demurrer."

AN ABRIDGMENT

OF

C A S E S

ARGUED AND DETERMINED

IN

THE COURTS OF LAW.

Landlord and Tenant.

INTEREST of the Landlord.]—In the case of a tenancy from year to year, as long as both parties please, if the tenant die intestate, his administrator has the same interest in the land which his intestate had. And the lessee of such an administrator may declare in an ejectment on a term for seven years; for there can be no objection, in point of form, against the plaintiff's recovering. The interest of the plaintiff cannot be, in any manner, affected by the length of time stated in the declaration in ejectment, the whole of which is an absolute fiction; and this fiction does not even affect the case of an action for the mesne profits.

Doe *ex dim.* John Shore *v.* Porter, Hil. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 13.

A general parol demise at an annual rent, where the bulk of the farm is inclosed, and a small part in the open common fields, is only a lease from year to year, and not for so long as the usual round of husbandry extends.—On the trial of an ejectment, a special case was reserved, whereby it appeared, that the action was brought by the landlord against his tenant, to recover possession of a farm of about sixty acres in *Austrey*, of which fifty-one were inclosed, and nine in two open fields. The taking was in November, 1767, from old Lady-day preceding, without any fixed term, at 40l. *per annum* rent, payable at Michaelmas and Lady-day, O. S. and the defendant continued in possession, and paid rent till Michaelmas-day, 1776; and on the 7th day of October, 1776, notice was given him to quit at old Lady-day next following.—It was proved, that a custom prevailed in *Austrey*, that when a tenant took a farm, in which there was

Roe *ex dim.* Bree *v.* Lees, Mic. Ter. 18 Geo. 3. C. 2 *Black.* 117 B.

any open field land, more or leſs, for an uncertain term, it was conſidered as a holding from three years to three years. —THE QUESTION was, Whether, as the tenant had entered on the fourth round of three years, he was entitled to hold to the end of that three years, part of the premiſes being open field land? PER CURIAM: A ſpecial agreement of this kind might be very prudent and reaſonable, and, no doubt, would be good in law. We give no deciſive opinion how this caſe would ſtand, if the whole were open field land. When a caſe ſhall happen of mere common field land, it may be worth conſidering, if the courſe of huſbandry is to govern the duration of the leaſe; for how comes it that all the caſes in the books, from *Hen.* 8. to the preſent time (when incloſures were little known), determine ſuch takings, or holdings over, to be only leaſes for one year? And where the courſe of huſbandry is not finiſhed under four years (as in Berks, and other rich countries), how can a general parol taking be conſtrued a leaſe for four years, conſiſtently with the ſtatute of frauds? But the principal part being incloſed, no ſuch doctrine can be maintained: it is not part of the common law. All leaſes for uncertain terms are *prima facie* leaſes at will; it is the reſervation of an annual rent that turns them into leaſes from year to year. It is poſſible that circumſtances may make it a leaſe for a longer term; as where the crop (as of liquorice, madder, &c.) does not come to perfection in leſs than two years. As a cuſtom, the claim of the tenant cannot be ſupported. It is not ſtated to be immemorial, nor probably is ſo: and it is highly unreaſonable, being ſo general, that one rood of arable land in the common field may determine the tenure of an hundred acres of paſture in ſeveralty.—PER TOT. CUR. The claim of the tenant, in the preſent caſe, is unreaſonable, and cannot be allowed.—Poſtea to the plaintiff.

Goodtitle *ex dim.* Gallaway *v.* Herbert, Ea. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 680.

A parol agreement to leaſe lands for four years only, creates a tenancy at will; and, if that tenancy be not determined before the day of the demiſe laid in the declaration, the landlord cannot recover.—On the trial of an ejectment it appeared, that in the ſpring, 1791, it was agreed between the leſſor of the plaintiff and the defendant, that the defendant ſhould hold the farm from Michaelmas, 1791, for four, eight, or twelve years, at a rent of 78l. *per annum*; but there was no memorandum in writing made, nor any leaſe executed. The demiſe was laid on the firſt of October, and poſſeſſion was demanded on the fifth of the ſaid month, but refuſed. Some repairs were done by the tenant, in purſuance of the agreement, three or four days after the agreement was made. The jury found for the defendant; and a rule, calling on the defendant to ſhew cauſe why the verdict ſhould not be ſet aſide, was oppoſed on two grounds; firſt, that

that the defendant had an equitable title, becauſe he had made repairs under the agreement; or, ſecondly, he had a right to retain the poſſeſſion to a day ſubſequent to the demiſe: for the defendant was a tenant at will, and the leſſor's will was not determined till the 5th of October, and the day of the demiſe was laid on the 1ſt of October. PER CURIAM: The ſtatute of frauds ſays, that ſuch an agreement as the preſent ſhall only have the effect of creating a tenancy at will, now a tenant at will is not a treſpaſſer till the will is determined (*Birch* v. *Wright*, *ante*, vol. I. p. 315). Here the tenancy was not determined until after the day of the demiſe in the declaration, and, conſequently, the plaintiff cannot recover.

Clayton v. Blakey, Mic. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 3.

On the trial of an action againſt a tenant for double rent, for holding over after the expiration of his term, and a regular notice to quit. The firſt count of the declaration ſtated a holding under a certain term, determinable on the 12th of May then paſt; and other counts ſtated a holding from year to year, determinable at the ſame period. It appeared in evidence, that the defendant *had held the premiſes for two or three years under a parol demiſe for twenty-one years from the day mentioned*, to which the notice to quit referred; and the ſtatute of frauds directing that any leaſe for more than three years, not reduced into writing, ſhall operate only as a tenancy at will, it was contended at the trial, at the laſt aſſizes for Northumberland, that the holding ſhould have been ſtated according to the legal operation of it, as a tenancy at will; and as there was no count adapted to that ſtatement, that the plaintiff ought to be nonſuited. But the judge overruled the objection, and the plaintiff obtained a verdict. AND, PER CUR. The direction was right, for ſuch a holding now operates as a tenancy from year to year. The meaning of the ſtatute was, that ſuch an agreement ſhould not operate as a term: but what was then conſidered as a tenancy at will has ſince been properly conſtrued to enure as a tenancy from year to year.

England *ex dim.* Syburn v. Slade, Ea. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 682.

And on the trial of an ejectment, brought by the landlord againſt his tenant, it is competent for the defendant to ſhew that the original leaſe, by which the landlord claims to hold the premiſes, is expired; and, therefore, that he has no right to turn him out of poſſeſſion.

Williams, executor of Elizabeth Breedon, v. Bartholomew, Mic. Ter. 39 Geo. 3. C.B. 1 *Pul.* & *Boſ.* 326.

If *A.* tenant for life, ſubject to forfeiture, with remainder over to *B.* grants a leaſe to *C.* for a term of years, and afterwards, apprehending that he has forfeited, acquieſces in *B.*'s claiming and receiving the rent from *C.* the executor of *A.* may, on ſhewing that he acquieſced under a falſe apprehenſion, and that his intereſt was not in point of fact forfeited, recover from *C.* the amount of the rent erroneouſly paid to *B.*—This was covenant for rent; and it appeared,

that on the 2d of February, 1789, *E. Breedon* demiſed to the defendant, to hold from the 29th of September, 1788, for twenty-one years, determinable at the deceaſe of *E. Breedon*, at the yearly rent of 130l.: *E. Breedon* died on the 30th of October, 1793, having made the plaintiff her executor: this action was brought to recover five years' rent, amounting to 650l. which it was alleged became due from the defendant to *E. Breedon* in her life-time. The defendant pleaded; 1ſt, That the defendant, in the life-time of the ſaid *E. Breedon*, to wit, on the 29th of September, 1793, paid to the ſaid *E. Breedon* the ſum of 650l. being the amount of the five years' rent, &c.; 2dly, That the premiſes in queſtion were ſettled on *E. Breedon* by way of jointure, at the time of her marriage with *S. Breedon*, as to the uſe of the ſaid *E. Breedon* for her life, *and ſo long as ſhe ſhould continue ſole and unmarried, from and after the death of the ſaid S. Breedon*, remainder to his right heirs; that on the 24th of November, 1776, *S. Breedon* died; and that, on the 5th of November, 1786, *E. Breedon intermarried with* W. Williams, *the father of the preſent plaintiff*, whereupon her intereſt in the premiſes determined. The replication took iſſue upon the firſt plea, and traverſed the marriage, upon which alſo iſſue was joined. —On the trial it appeared that the premiſes were ſettled on *E. Breedon*, as ſtated in the plea; that, after the death of *S. Breedon*, ſhe clandeſtinely married *W. Williams* at the chapel of the Savoy, but continued to receive the rent for ſome years, *until Dr.* Breedon, *the remainder-man, being informed of the marriage, and that ſhe had forfeited her eſtate thereby, claimed the rent of the defendant, who accordingly paid it to him for the five years in queſtion, with the knowledge and acquieſcence of* E. Breedon. *But it was proved, in anſwer to the plea, that at the time of the intermarriage of* E. Breedon *with* W. Williams, *he had another wife living.* A queſtion being raiſed, Whether theſe facts would ſupport the firſt iſſue? *Heath*, J. was of opinion that they would not, and accordingly, under his direction, a verdict was taken for the plaintiff; but, if the Court ſhould be of opinion that payment by the defendant to Dr. *Breedon*, under the above circumſtances, proved the firſt iſſue, then a verdict on that iſſue was to be entered for the defendant.—PER CURIAM: If money be paid to *A.* by the direction of *B.* it is a good payment to *B.*; *but, if money be paid to* A. *ſimply with the knowledge of* B. *it will not be a payment to* B. Suppoſe that one diſſeiſes another of an eſtate, and continues in poſſeſſion of the rents and profits with the knowledge of the diſſeiſee; will any body ſay that the diſſeiſee ſhall not recover againſt the tenant? *Knowledge will not do, there muſt be conſent, direction, and authority.* Here there clearly was no order. This poor woman thought that ſhe was not entitled to the rent: Dr. *Breedon*,

Breedon, therefore, obtained it in ſpite of her, in conſequence of her perſuaſion, that ſhe was not entitled. If ſhe allows Dr. *Breedon* to receive the rent, under the idea that ſhe has no right, how can we conclude, from that circumſtance, that ſhe would have done the ſame if ſhe had been apprized of her right? It has been argued, that if Dr. *Breedon* had diſtrained and avowed in replevin, the tenant could have made no anſwer: but there is no difficulty in that. Every tenant is bound by his attornment; the defendant might have pleaded that he did not hold as tenant to Dr. *Breedon*; and if Dr. *Breedon* had ſaid, "you have attorned to me," the defendant might have anſwered, "I did that on your miſrepreſentation, "who claimed as remainder-man;" and might have ſhewn, that Mrs. *Breedon* was ſtill alive, and entitled. *If Mrs.* Breedon *had ordered the defendant to pay the money to Dr.* Breedon, *the payment could never afterwards have been queſtioned.* The tenant in that caſe would have had nothing to do with any tranſaction between Mrs. *Breedon* and Dr. *Breedon*, be the title what it might: *if he had obeyed the order of Mrs.* Breedon, *it would have been a payment to her agent.* The next queſtion then is, Whether there be any thing in Mrs. *Breedon*'s conduct which amounts to a confirmation of the payment? Now, to conſtitute that, ſome act muſt appear to have been done by her, with knowledge of her own ſituation. Here a right to the rent was inſiſted upon by Dr. *Breedon*; and Mrs. *Breedon*, being deceived, both in point of law and fact, acquieſced in the payment of that rent to another, to which ſhe was entitled. Her right, therefore, ſtands as it did before Dr. *Breedon*, whoſe claim was clearly adverſe, received any rent at all.

Actual entry is not neceſſary to take advantage, by ejectment, of a clauſe in a leaſe to re-enter, for non-payment of rent. Ld MANSFIELD, CH. J.—I have always taken the diſtinction to be, that where entry is neceſſary *to complete the landlord's title* (as when a power to re-enter is reſerved to him, in caſe of non-payment of rent), there the confeſſion of leaſe, entry, and ouſter, is ſufficient; but that, where it is requiſite, in order *to rebut the defendant's title*, actual entry muſt be made. Ld MANSFIELD afterwards delivered the ultimate opinion of the Court, as follows: We have looked very particularly into the caſes for two hundred years back, and we find a great deal of contrariety on the queſtion, Whether an actual entry is neceſſary, in order to maintain an ejectment on a clauſe of re-entry, for non-payment of rent? But, in the moſt diſtant period, the better opinion has been, that it is not. This was Lord HALE's opinion, and is mentioned as ſuch; and as that of Lord Chief Juſtice SCROGGS, by Lord HOLT, in the caſe of *Little* v. *Heaton*, 1 *An. N. Pr.* 2 Ld *Raym.* 750. 1 *Salk.* 259. *S. C. Holt.* 264. But we look

Goodright, Leſſee of Hare, *v.* Cator, *et al.* Mic. Ter. 21 Geo. 3. B.R. 2 *Doug.* 483.

look upon it as having been fully ſettled, in 1703, by the opinion of all the judges, upon deliberation and conſideration of all the caſes, that actual entry is only neceſſary to avoid a fine (1); and ſo the practice has been ever ſince. The reaſon of the thing is agreeable to the practice, for it is abſurd to entangle men's rights in nets of form without meaning; and an ejectment being a mere creature of the court, framed for the purpoſe of bringing the right to an examination, an actual entry can be of no ſervice. In the caſe of fines it is required by a poſitive rule of law, and clearly neceſſary under the ſtatute of 4 *Anne*, c. 16. § 16. I have a ſtring of all the caſes on this ſubject, but it would be very unentertaining and unneceſſary to ſtate them.—It was alſo contended, that a *demand* of the rent was neceſſary. There ſeemed to be ſome weight in that point, upon the reaſon of the thing; and, on looking into the caſes, it appears to have a foundation in authority (2): but *here*, by the expreſs terms of the leaſe, the demand is diſpenſed with. [The right of re-entry being expreſsly reſerved, if a quarter's rent ſhall be in arrear for twenty-eight days.] The act of 4 *Geo.* 2. is very perplexed; but the meaning certainly only is, that where there is no ſtipulation in the leaſe for entry without demand, you may, notwithſtanding, enter without demand, provided ſix months' rent is in arrear, and there is not a ſufficient diſtreſs; otherwiſe, in ſuch caſes, you muſt make a demand.

Goodright *ex dim.* Stevenſon *v.* Noright, Hil. Ter. 11 Geo. 3 B.R. 2 *Black.* 746.

But if the rent be tendered before the delivery of the declaration in ejectment, the Court will, on motion, ſet aſide the proceedings with coſts. In this caſe the declaration was delivered on the 4th of December, but, on the 7th of November preceding, the tenant in poſſeſſion had tendered his rent, which was refuſed by the leſſor of the plaintiff, becauſe he had put the affair out of his own hands. On the 23d of November it was again tendered, before witneſs; and being again refuſed, the tenant left the money in his landlord's bakehouſe, in his preſence. PER CUR: The tender was made before any notice of the action, and, therefore, the—Rule to ſtay the proceedings was made abſolute.

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(1) *Qu.* If actual entry is not alſo neceſſary, in order to prevent the operation of the ſtatute of limitations, 21 *Jac.* 1. c. 16. Vide *Law of N. Pr.* ed. 1775, p. 102. So held on a trial at bar in *Ford* v. *Grey*, B.R. H. 2 *Anne*, "unleſs "there be ſome ſpecial reaſon to the contrary." 1 *Salk.* 285. Actual entry is alſo neceſſary, in order to enable a perſon, who has recovered in ejectment, to maintain treſpaſs for the meſne profits againſt one who was occupier when the title accrued, but not at the time of the ejectment.—*Law of N. Pr.* ed. 1775, p. 87.

(2) 2 Ld *Raym.* 751, in Marg. Vide alſo *Cro. El.* 15. where it is ſaid to have been held, that in the caſe of land, the demand muſt be on the moſt notorious place of the land; and of a houſe, *in the houſe.*

Where

Where the landlord has a right to re-enter for non-payment of rent, he cannot recover in ejectment at common law, unleſs he demand the rent on the day when it becomes due; nor under the ſtat. 4 *Geo.* 2. c. 28. ſ. 2. if there be a ſufficient diſtreſs on the premiſes.—This was an ejectment for lands in the county of Durham, which the leſſor of the plaintiff held under a leaſe from the dean and chapter of Durham, and which had been under-let by him to the defendant, by an indenture of demiſe, dated the 16th of January, 1795, for a term yet unexpired, reſerving rent, in which was contained the following proviſo: "That if it ſhall happen that the ſaid "yearly rents hereby reſerved, or any part thereof, ſhall be "behind, and unpaid, by the ſpace of thirty days next after "the ſaid days of payment, &c. it ſhall and may be lawful "for the ſaid *J. Foſter*, his executors, &c. into the ſaid "demiſed premiſes to re-enter, &c." There was alſo a covenant on the part of the defendant to pay rent, &c. &c.—On the trial the plaintiff proved *a demand of half a year's rent after the day on which it was due*, and a refuſal on the part of the defendant to pay it, before the re-entry; but it was agreed on both ſides, that *there was a ſufficient diſtreſs on the premiſes during the whole time.* On the part of the defendant it was objected, at the trial, that the leſſor of the plaintiff could not recover, either at common law, or under the ſtatute of the 4 *Geo.* 2. c. 28. ſ. 2; not by the former, *becauſe the rent was not demanded on the day when it became due*, *Co. Lit.* 201. 7 *Rep.* 28; *nor by the latter, becauſe there was a ſufficient diſtreſs on the premiſes.* On the other hand, the plaintiff's counſel relied on the expreſs covenant of the defendant, that the leſſor ſhould re-enter upon the event which had happened, namely, the non-payment of rent when it became due. And to this opinion *Lawrence*, J. inclined at the trial, and directed a verdict for the plaintiff. But upon reporting the caſe, upon a motion for a new trial, he ſaid, that upon re-conſideration of the queſtion, he was not ſatisfied with his former opinion: and he referred to 7 *Co.* 28. where the diſtinction is taken, that upon a diſtreſs for non-payment of rent, a demand at the day is not neceſſary as it is in caſe of a re-entry, where the whole intereſt or eſtate is defeated, or where any ſum, *nomine pœnæ*, is forfeited; in both which caſes the demand ought to be made preciſely at the day, a convenient time before ſun-ſet: in the one caſe, in reſpect of the condition; and in the other, in reſpect of the penalty. But in the caſe of a diſtreſs, he who hath the rent may demand it at what time he will, for no loſs or penalty will thereon enſue, but only a remedy to come at his rent in arrear (1). After cauſe ſhewn againſt the rule for ſetting

Doe *ex dim.* Forſter *v.* Wandlaſs, Hil. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 117.

(1) Vid. *Dy.* 51. b. 68. a. b. and *Goodright* v. *Cator*, *Dougl.* 485. *ante*, p. 5.

aſide the verdict, Lord KENYON, Ch. J. ſaid: There are caſes in the books to this effect: where a leaſe is made for a term of years, determinable on ſuch a thing being done, it determines when that thing is done in the caſe of a chattel intereſt: in the caſe of a freehold leaſe it is only voidable, and ſomething muſt be done by the leſſor, to ſhew his election to put an end to it. But this queſtion ariſes on a power to re-enter. Now at common law great niceties were required in ſuch a caſe; and it was to do away the neceſſity of complying with thoſe requiſites that the act of parliament was paſſed. But this ſhews that all thoſe niceties required by the common law muſt have been purſued before the act, and the ſtatute does not apply to this caſe, becauſe there was a ſufficient diſtreſs on the premiſes. Therefore, the plaintiff muſt reſort to his right at common law; and not having complied with the requiſitions of the common law, he cannot recover.—Rule abſolute.

Barwick *ex dim.* Mayor and Aldermen of Richmond, in Yorkſhire, *v.* Thompſon, *et al.* Hil. Ter. 38 Geo. 3. B R. 7 *Ter. Rep.* 488

If *B.* claiming under *A.* let lands for a year to *C.* and die, and *A.* afterwards bring an ejectment againſt *C.*, *C.* cannot diſpute the title of *A.*—At the trial of this ejectment, which was brought to recover certain premiſes at Richmond, on a demiſe ſtated to have been made to the plaintiff, "by the mayor and aldermen of the borough of Richmond, guardians, and governors of the poſſeſſions, revenues, hereditaments, and goods of the free grammar ſchool of the burgeſſes of the borough and town of Richmond, in Yorkſhire," a verdict was taken for the plaintiff, ſubject to the opinion of the Court. In 1722, the mayor and aldermen, as "guardians and governors," &c. elected Mr. *Cloſe* to be the maſter of the ſchool: in 1732, they, as "guardians," &c. made ſeveral leaſes of the ſchool lands: and in 1750, they made certain ordinances and by-laws for the ſchools; one of which was, that the maſter for the time being ſhould receive the rents and profits of the ſchool lands. *After the death of Mr.* Cloſe, *in* 1750, *they, as guardians and governors, &c. elected Mr.* Temple *to be maſter, who continued in that office until his death, in April,* 1795, *ſince which time no ſucceſſor has been appointed. During Mr.* Temple's *life-time he let the ſchool lands, as the leaſes expired, to ſeveral tenants from year to year, and (among the reſt) the lands in queſtion to the defendants, who paid rent to Mr.* Temple *as long as he lived.* The mayor and aldermen gave regular notice to the defendants to quit. On the behalf of the plaintiff a preliminary objection was made to the defendants' being permitted to diſpute the title of the leſſors of the plaintiff, *becauſe it appeared by the caſe that they claimed under the late Mr.* Temple, *who was appointed by the leſſors of the plaintiff; and that this caſe, therefore, came within the reaſon of the common rule, that a tenant ſhall not be allowed to diſpute the title of the landlord*

lord under whom he holds. And *The Court* were of opinion, that as the defendants held under the late Mr. *Temple*, who was appointed by the mayor and aldermen of Richmond, in the characters of guardians and governors of the free ſchool, they ought not now to diſpute the title of the leſſors of the plaintiff, and that it was immaterial whether the defendants held immediately under the mayor and aldermen, or under the late maſter, who claimed under the mayor and aldermen. They alſo intimated a very ſtrong opinion, that the leſſors of the plaintiff were entitled to recover on the merits of the caſe; for that, though it did not diſtinctly appear how the mayor and aldermen became guardians and governors of this ſchool inſtead of the bailiffs, who were incorporated by a charter of *Elizabeth*, or how the one corporation was connected with the other, yet it appeared, that ſince the year 1704, the mayor and aldermen had, on all occaſions, acted as the truſtees, and had received the rents and profits of the lands in queſtion, either by themſelves, or their agent, the maſter for the time being. *That, after ſuch a length of time, a new charter might even be preſumed; and that, without minutely enquiring into the antiquity of a title, a clear and undiſturbed poſſeſſion for twenty years was, in itſelf, a ſufficient title in an ejectment.*—Poſtea to the plaintiff.

If a perſon, who is ſued by a landlord in the name of his tenant, procure a releaſe from the nominal plaintiff, the Court will order the releaſe to be delivered up, and permit the landlord to proceed.—The plaintiff was tenant of a commonable tenement, and his landlord had brought an action on the caſe, in his name, for an encroachment on the common by incloſure, and had offered to indemnify him againſt all coſts and charges in the action. Pending the ſuit, the defendant procured a releaſe from the plaintiff; upon which the landlord obtained a rule to ſhew cauſe, why this releaſe ſhould not be delivered up to be cancelled, and he be permitted to proceed in the cauſe, in the name of his tenant.—The Court expreſſed great indignation at this attempt of the defendant, to prevent a landlord from trying a right in the name of his tenant, and made the rule abſolute; and Lord MANSFIELD ſaid, that, as to the danger of the defendant's loſing his coſts, *that* would be the proper ſubject of an application for the interference of the Court.

Payne *v.* Rogers, Ea. Ter. 20 Geo. 3. B R. 1 *Dougl.* 406.

The landlord is entitled to one year's rent before the defendant can ſell upon an execution for coſts on a nonſuit.—The defendant had judgment of nonſuit againſt the plaintiff, and, upon a *fieri facias*, took the plaintiff's corn in execution, which was unthreſhed. The landlord immediately gave the ſheriff's bailiff notice that there was 30l. due to him from the plaintiff for one year's rent, and after *this* the bailiff proceeded to threſh the corn, and ſold the ſame for 21l. and upwards; and

Henchett *v.* Kimpſon, Ea. Ter. 2 Geo. 3. C.B. 2 *Wils.* 140.

and now the ſheriff and defendant, upon ſhewing cauſe why they ſhould not pay the landlord one year's rent, inſiſted that a defendant's execution was not within the ſtat. 8 *Anne*, which was made in favour of landlords, but that the ſtatute only extends to executions at the ſuit of plaintiffs; *ſed non allocatur*, for the words, "unleſs the *party*, at whoſe ſuit the "execution is ſued out, ſhall, before the removal of ſuch "goods, pay to the landlord of the premiſes," ſhall be conſtrued to mean either plaintiff or defendant, whoſe judgment and execution it is. But it is inſiſted, that in all events the ſheriff ſhall not be anſwerable to the landlord for more than 21. which the corn was ſold for. This is a matter of importance which ſheriffs' officers ought to underſtand: before this ſtatute, executions took place of all debts that were not *ſpecific liens*, even of rents due to landlords: it was thought hard that landlords ſhould not have ſomething like a *ſpecific lien*, ſo the parliament have given them this remedy for one year's rent, but for no more, becauſe *vigilantibus & non dormientibus jura ſubveniunt.* Neither a plaintiff or defendant has any right to go upon the premiſes; the law gives this entry to the ſheriff only by virtue of the execution; but, after he has notice of rent being due to the landlord, he cannot remove the goods before he has ſatisfied the landlord one year's rent; the landlord ſhall have the like benefit of diſtreſs for one year's rent, as if there had been no execution at all; unleſs the rent be paid, the ſheriff muſt quit, and, if he does not quit, a ſpecial action on the caſe lies againſt him, after notice of the rent due: but there is a ſhorter way by motion to the court, as in the preſent caſe, that the landlord may have reſtitution to the amount of the goods the ſheriff has ſold: the bailiff in this caſe became a wrong-doer immediately after he had notice of rent being due to the landlord. *Per Curiam:* Let the prothonotary take an account of the goods taken in execution, and what they were ſold for, and let the ſheriff be allowed ſuch coſts as incurred before notice given him of the rent due to the landlord, and after all juſt allowances let the reſt of the money be paid by the ſheriff to the landlord.

The Preſident and Scholars of St. John's college, Oxford, *v.* Murcott, Ea. Ter. 37 Geo. 3. B.R. 7 *Ter. R. p.* 259.

A ſheriff's officer, being in poſſeſſion of the tenant's effects under an outlawry, made a diſtreſs for rent, ſold the goods ſo diſtrained, and afterwards the outlawry was reverſed: held, that the officer was liable to pay the produce of the goods to the landlord, in an action for money had and received; and that the goods of a tenant are liable to a year's rent, notwithſtanding an outlawry in a civil ſuit.—On the trial of this action, for money had and received by the defendant to the uſe of the plaintiffs, a verdict was taken for the plaintiffs, ſubject to the opinion of this Court, on the following caſe: On the 21ſt of November, 1791, *W. Grant*, the

the tenant of a farm at Waſperton, in the county of Warwick, under the plaintiffs, at the yearly rent of 166l. was outlawed in an action of treſpaſs on the caſe upon promiſes, at the ſuit of *W. Priddle*. On the 25th of April, 1792, a writ of *capias utlagatum* directed to the ſheriff of the county of Warwick was iſſued againſt *Grant*; on which the ſheriff, on the 7th of May, 1792, iſſued his warrant, directed to the defendant and other perſons, commanding them to ſeize the goods and chattels, lands and tenements, of *Grant*, ſo that the ſheriff might cauſe the ſame to be appraiſed and ſeized into his majeſty's hands: under that warrant the defendant entered upon the farm in the occupation of *Grant*, and took poſſeſſion of all the goods and chattels that *Grant* then had upon the premiſes. The ſheriff then ſummoned a jury to take an inquiſition, by virtue of the writ on the 11th of May; but the inquiſition was then adjourned to the next day, when it was taken. *On the 11th of May* (the defendant being then in poſſeſſion of the farm, and of the goods and chattels of *Grant*, under the ſaid writ), *the Rev.* T. Welſh, *on behalf of the plaintiffs, applied to the defendant, and informed him that a year's rent of the farm was due to the plaintiffs from* Grant, *and that he intended to diſtrain for it: the defendant then offered to make the diſtreſs for the plaintiffs, and ſaid he could do it as well as another*; *Mr.* Welſh *then gave the defendant directions to make the diſtreſs, and accordingly, on the 12th of May, he diſtrained part of the effects already in his poſſeſſion under the writ, but not any of the crops growing on the premiſes.* Being himſelf an auctioneer, he, on the 18th of May, ſold by auction ſufficient to produce the 166l. due for rent, and the expences of making the diſtreſs; and, about a week after the ſale, the defendant told Mr. *Welſh* that the buſineſs was all finiſhed, that he had lodged the money in the hands of his bankers, and it was ready whenever the college choſe to demand it. About a fortnight afterwards. Mr. *Welſh* applied to the defendant for the money, but the defendant then told him, that he had had advice upon the buſineſs, that he apprehended the diſtreſs was not legal, and he would not pay the money. The defendant continued in the occupation of the farm under the writ, and when the crops growing on the farm became ripe reaped them, and got in the harveſt. On the 4th of October, 1792, the outlawry againſt *Grant* was reverſed; on the 24th of October, a writ of *amoveas manus*, on the reverſal of the outlawry, was iſſued; and on the 7th of November, a warrant, iſſued by the ſheriff on the ſaid writ, was delivered to the defendant; and the defendant, on the ſame day, quitted the poſſeſſion of the farm, and the tenant re-entered. In July, 1793, after the defendant had quitted the poſſeſſion of the farm, Mr. *Welſh* again applied to him for

for the 166l.; but the defendant refuſed to pay it, ſaying, that he had expended money in getting in the crops upon the farm, and if *Grant* would pay him for that expence, he would pay the 166l. to the plaintiffs. PER CURIAM: This is a moſt diſhonourable defence to the action. The inſtant this outlawry was reverſed, the judgment of outlawry became mere waſte paper, and the rights of all the parties were reſtored to the ſame ſituation as if no outlawry had taken place. In this caſe the defendant made this diſtreſs for the plaintiffs at his own requeſt; and, having received the money, he objects to pay it over to his employers on another account, with which they have no concern: but, having taken upon himſelf to act as their bailiff, and the bar which before exiſted being now removed by the reverſal of the outlawry, it appears that he has received money for the uſe of the plaintiffs, which, in conſcience, he is not entitled to retain, merely on account of his having ſome demand on the tenant. And with regard to that demand, the defendant is not without a remedy; for if, during the time he was in poſſeſſion under the outlawry, he was put to any expence in reaping and getting in the crops, he may maintain an action againſt the tenant to recover thoſe expences.—The defendant's counſel has taken it for granted, that there is no diſtinction, in this reſpect, between an outlawry at the ſuit of the party, and in the caſe of the king. But in *Greaves* v. *d'Acaſtro*, *Bunb.* 194. *R.* v. *Southerby*, *ib.* 5. and *R.* v. *Pritchard*, *ib.* 269, a diſtinction is taken between proceedings at the ſuit, and for the benefit of the crown (1), and an outlawry in a civil ſuit; and in the latter inſtance it was ruled, that "the landlord ought to be ſatisfied a year's rent, becauſe a *capias utlagatum* at the ſuit of the party is to be conſidered only as a private execution;" and, therefore, even if this outlawry had not been reverſed, the plaintiffs would have been entitled to a year's rent.—Poſtea to the plaintiffs.

Briſtow v. Wright and Pugh, Sheriff of Middleſex, Ea. Ter. 21 Geo. 3. B.R. 2 *Doug.* 665.

In an action againſt the ſheriff, for taking goods without leaving a year's rent, the declaration need not ſtate all the particulars of the demiſe, but if it does, and they are not proved as ſtated, there ſhall be a nonſuit.—This was an action

(1) By ſtat. 8 *An.* c. 14. ſ. 1. it is enacted, that no goods on any meſſuage, lands, &c. leaſed for lives, years, &c. ſhall be liable to be taken, by virtue of any execution, unleſs the party, at whoſe ſuit the execution is ſued out, ſhall, before the removal of ſuch goods from off the premiſes, by virtue of ſuch execution or extent, pay to the landlord all rent due, not exceeding one year's rent. And ſect. 8. contains a proviſo, that nothing in the act ſhall extend to let, hinder, or prejudice, her majeſty, her heirs, or ſucceſſors, in the levying, recovering, or ſeizing of any debts, fines, penalties, or forfeitures; but that it ſhall be lawful for her majeſty, &c. to levy, recover, and ſeize, ſuch debts, fines, penalties, and forfeitures, in the ſame manner as if the act had not been made.

on

on the caſe, againſt the defendants, as ſheriff of Middleſex, on the ſtatute of 8 *Ann.* c. 14. § 1. for taking the goods of one *Pope* in execution, in a houſe let, from year to year, by the plaintiff to *Pope*, without paying or contenting him for a year's rent then due, and of which the defendants, before the removal of the goods, had notice (1). The declaration ſtated the demiſe to be for one year, and from thence from year to year, for ſo long as it ſhould pleaſe the parties, paying, unto the plaintiff, the yearly rent or ſum of, &c. by four even and equal quarterly payments; to wit, at the feaſt of, &c. The principal witneſs proved, that the plaintiff let the houſe by parol, for a year, and that there was no ſtipulation about any time or times for the payment of the rent. It was contended, at the trial, that, *as the plaintiff had laid a demiſe with a reſervation of rent payable quarterly*, he was bound to prove it exactly as laid; and that, having failed in that proof, he ought to be nonſuited. But his lordſhip overruled the objection, being then of opinion, that enough of the demiſe as laid had been proved to entitle the plaintiff to his action. A new trial was moved for, on the ground of a miſdirection. Lord MANSFIELD: I am very free to own, that the ſtrong bias of my mind has always leaned to prevent the manifeſt juſtice of a cauſe from being defeated or delayed by formal ſlips, which ariſe from the inadvertance of gentlemen of the profeſſion; becauſe it is extremely hard on the party to be turned round, and put to expence, from ſuch miſtakes of the counſel or attorney he employs. It is hard alſo on the profeſſion. It was on this ground that I overruled the objection in this caſe; but I am ſince convinced, both on the authorities which I am about to mention, and on the reaſoning in them, that I was wrong, and that it is better, for the ſake of juſtice, that the ſtrict rule ſhould, in this caſe, prevail. I have always thought, and often ſaid, that the rules of pleading are founded in good ſenſe. Their objects are preciſion and brevity. Nothing is more deſirable for the Court than preciſion, nor for the parties than brevity. It is eaſy for a party to ſtate his ground of action. If it is founded on a deed, he need not ſet forth more than that part which is neceſſary to entitle him to recover. If he ſtates what is impertinent, it is an injury to the other party, and may be ſtruck out, and coſts allowed, upon motion (2). I remember a caſe, where, in an action on one covenant, the whole of a very long deed

(1) It ſhould ſeem, in ſuch a caſe as the preſent, that the Court, on motion, would make a rule on the ſheriff to pay the year's rent to the landlord. *Darling* v. *Hill*, B.R.E. 9 *Geo.* 2. *Ca. Temp. Hardw.* 255.

(2) *Vide Price* v. *Fletcher*, B.R.H. 18 *Geo.* 3. *ante*, vol. I. p. 415. *Rex.* v. *May*, *E.* 19 *Geo.* 3. under title PLEADING. *Rex* v. Lord *Walſham*, 25 *Geo.* 3.

was

was ſet forth. The Court referred it to the maſter, and all was ſtruck out except the covenant on which the action was brought, and coſts paid to the amount of 100l. When I ſay that the plaintiff need only ſet forth that part of a deed on which his action is founded, I do not mean to ſay that even that is neceſſary. He is not bound to ſet forth the material parts, in letters and words. It will be ſufficient to ſtate the ſubſtance and legal effect. That is ſhorter, and not liable to miſrecitals, and literal miſtakes. Here, that method might have been followed. *It certainly was not neceſſary to allege this part of the leaſe that relates to the time of payment, in order to maintain the action. But, ſince it has been alleged, it was neceſſary to prove it.* The diſtinction is between that which may be rejected as ſurpluſage (which might have been ſtruck out on motion), and what cannot. Where the declaration contains impertinent matter, foreign to the cauſe, and which the maſter, on a reference to him, would ſtrike out (irrelevant covenants for inſtance), that will be rejected by the Court, and need not be proved. But, if the very ground of the action is miſ-ſtated, as where you undertake to recite that part of a deed on which the action is founded, and it is miſ-recited, that will be fatal. For then, the caſe declared on is different from that which is proved, and you muſt recover *ſecundum allegata et probata.* This will reconcile all the caſes. In the preſent inſtance, the plaintiff undertakes to ſtate the leaſe, and ſtates it falſely. There are many authorities which go to prove this diſtinction. I will mention three, (which are very ſtrong), where matter, which it was unneceſſary to ſet forth, being ſtated, and not proved, the variance was held to be fatal. The firſt is the caſe of *Cudlip* v. *Rundle* (1). There, in an action by a leſſor againſt his tenant, for negligently keeping his fire, by means whereof the houſe was conſumed,—a demiſe to the defendant for ſeven years was ſtated in the declaration; the defendant pleaded, that the plaintiff did not demiſe *modo et formâ*; and iſſue being joined, it appeared, on the finding by the jury, in a ſpecial verdict, to be a leaſe at will. The Court agreed, that the action would have lain againſt the defendant, as tenant at will; but, as the plaintiff had ſtated him to be a leſſee for years, and had proved him tenant at will, the variance was held to be fatal, and there was judgment for the defendant. The next is the caſe of *Savage, qui tam* v. *Smith*, in the Common Pleas (2). That was an action of debt againſt a ſheriff's officer, by an informer. The declaration ſtated a judgment, and a *fieri facias* upon that judgment. The *fieri facias* was

(1) B.R. T. 2 *W. & M. Carth.* 202.
(2) T. 16 *Geo.* 3. 2 *Blackſt.* 1101. *infra*, under title SHERIFF.

given

given in evidence, but not the judgment, and the Court held, that though it might be unneceſſary to aver the judgment, yet, having been averred, it ought to be proved; and my Lord Chief Juſtice *De Grey* expreſsly went upon the diſtinction between immaterial and impertinent averments, and ſaid, that the former muſt be proved. The third caſe is *Shuter* v. *Hornſey*, in this court, Ea. 19 *Geo.* 3. that was an action for double rent, on the ſtatute: the declaration ſtated, a leaſe for three years; but, on the evidence, it appeared, that the leaſe for three years was void, under the ſtatute of frauds; and that the tenant was only from year to year: this was ſufficient for the purpoſe of the action; but a leaſe for three years having been laid, and not proved, the plaintiff was nonſuited; and a rule for ſetting aſide that nonſuit having been obtained, it was, upon the argument of the caſe, diſcharged. Theſe authorities are in point; but, perhaps, notwithſtanding the weight of the caſes, if that doctrine were highly detrimental, and the ſetting it right would be attended with no miſchief, as it is only a mode of practice, it might deſerve conſideration: but I believe it ſtands right, and upon the beſt footing; for it may prevent the ſtuffing of declarations with prolix, unneceſſary matter, becauſe of the danger of failing in the proof; and may lead pleaders to confine themſelves to ſtate the legal effect.—We are all of opinion that the verdict ſhould be ſet aſide, and judgment of nonſuit entered (1).

In an action againſt a tenant for not performing his agreements, the eſtate of the leſſor is an immaterial averment, if the tenant has had the fruit of his leaſe. And agreement to leave a farm as he found it, is an agreement to leave it in tenantable repair, if he found it ſo; and will maintain a declaration ſo laid.—In caſe, the plaintiff, Sir *Rowland Winn*, declared, that the defendant held certain lands of his father, Sir *Rowland Winn*, deceaſed, at 54l. *per annum* rent; and, under agreement, to uſe, or leave the dung, &c. on the premiſes, and to leave the farm, when he quitted it, in as good condition as he found it. That, on the death of old Sir *Rowland*, who was tenant in fee-ſimple, the lands deſcended to the plaintiff in fee, as his ſon and heir; who, on the 13th of February, 1766, agreed to permit and ſuffer the defendant, *White*, to hold the ſame for one year, and ſo from year to year, as long as both parties pleaſed; on the ſame rent, terms and agreements, as he before held the ſame. And aſſigns two breaches of agreement; 1ſt. That the de-

Winn v. White, Mich. Ter. 13 Geo. 3. C.B. 2 *Black. Rep.* 840.

(1) But this ſtrictneſs is only required in the caſes of records, and written contracts; *vide King* v. *Pippet*, 1 *Ter. Rep.* 235. under title PLEADING, and *Gwinnet* v. *Phillips*, 3 *Ter. Rep.* 643. and vol. III. *ante*, p. 267.

fendant,

fendant, at quitting, had ſold the manure. 2. That he did not leave the premiſes in as good condition as he found them. In the ſecond count, the plaintiff declares, on a demiſe by himſelf; with an agreement, that the defendant ſhould leave the farm in tenantable repair; and aſſigns as a breach, that he did not leave it in ſuch tenantable repair. On *non aſſumpſit* pleaded, and trial before *Gould*, Juſtice, at laſt *York* aſſizes, the plaintiff proved, that his father died ſeiſed, and that he was his ſon and heir; but the defendant gave, in evidence, the will of old Sir *Rowland*, which deviſed the premiſes to the plaintiff in tail. It was alſo proved, in evidence, that the agreement was, that the defendant ſhould leave the premiſes in as good condition as he found them; and that he found them in tenantable repair; and there was a verdict for the plaintiff, damages 40l. It was moved for a new trial; becauſe the plaintiff, on the firſt count, had not proved the eſtate which he had laid; being tenant in tail, and not in fee. And, on the ſecond count, he had not proved the agreement as laid; it being, to leave the farm in the ſame condition as he found it, and not (as he ſuggeſts) to leave it in tenantable repair.—PER CURIAM: The true rule is, that on the general iſſue in an action on the caſe, all material averments are denied and put in iſſue, but nothing elſe. The eſtate of the plaintiff is not a material averment; for a leaſe, by tenant in tail, is not void, but only voidable by the iſſue in tail. It has not been, nor could be, avoided, during the life of the leſſor. Nor does it lie in the mouth of the defendant to diſpute its validity, who has enjoyed the fruit of it. This, therefore, being an immaterial averment, the plaintiff (notwithſtanding he is miſtaken in his title) is entitled to recover on the firſt count. As to the ſecond, had the plaintiff failed in ſhewing, that the farm, when *White* took it, was in tenantable repair, there might have been ſome colour in the objection. But, as he proved that *White* agreed to leave the farm in as good condition as he found it, and that he found it in tenantable repair, this amounted to proof, that he agreed to leave it in tenantable repair. And, therefore, upon both counts, the jury did right.

Doe *ex dim.* Foſter *v.* Williams, Tr. Ter. 17 Geo. 3. B. R. *Cowp.* 621.

A tenant, in poſſeſſion, is not a good witneſs to ſupport his landlord's title, becauſe it is to uphold his own poſſeſſion. —On the trial of this ejectment, the defendant, who was landlord of the premiſes, and who was ſet up to defend, inſtead of the tenant (Mrs. *Pearce*), claimed under a Mrs. *Galton*; and, in ſupport of his title, a fine was put in, levied by Mrs. *Galton* in 1772, to ſhew that Mrs. *Galton* was in poſſeſſion at the time of the fine levied. Mrs. *Pearce*, the tenant in poſſeſſion, upon whom the ejectment had been ſerved, was called and offered as a witneſs; but ſhe was objected to, and rejected,

rejected, on the ground that a tenant can never be called as a witneſs to ſupport his own poſſeſſion: AND THE COURT were of the ſame opinion afterwards, on a motion for a new trial; and ſaid, as to the queſtion, whether the evidence of Mrs. *Pearce*, the tenant, in poſſeſſion, was admiſſible, in ſupport of the defendant's title, under whom ſhe held? In *Bourne* v. *Turner*, *Strange*, 632, upon a motion to admit the landlord a defendant, upon an affidavit that the tenant, in poſſeſſion, was a material witneſs for him, the Court refuſed it, ſaying, he was liable for the meſne profits; and, therefore, if the motion was granted, it would not make the tenant a witneſs. A tenant in poſſeſſion cannot be a witneſs to ſupport his own poſſeſſion; therefore, the teſtimony of Mrs. *Pearce* in this caſe was properly rejected.

But declarations, by tenants, are admiſſible evidence after their death, to ſhew that a certain piece of land is parcel of the eſtate which they occupied; and proof that they exerciſed acts of ownerſhip in it, not reſiſted by contrary evidence, is deciſive.—On the trial of an action of replevin. The defendants, in their cognizance, ſtated, that the *locus in quo* had been immemorially a part and parcel of a certain tenement of land called Bulchyſtullen ſheep-walk, of which *Benjamin Holloway*, and others before, &c. were ſeized in their demeſne as of fee; and then ſtated a demiſe to *T. Hugh*, for a year, and ſo from year to year, as whoſe bailiffs they acknowledged taking the cattle, &c. as a diſtreſs for damage feaſant. In the ſecond cognizance they derived a title to *T. Hugh* from *Margaret Price* of the ſame premiſes, and acknowledged, &c. as his bailiffs. The pleas in bar traverſed the *locus in quo*, being part and parcel of the ſaid tenement of land called Bulchyſtullen; on which iſſues were taken in the replication. This cauſe was tried at the laſt ſpring great ſeſſions at Cardigan, before Mr. *Beard*, when, after the evidence on the part of the defendant was cloſed, the plaintiff's counſel offered to prove, in evidence, that "*Hugh John Griffiths*, and "*John Griffiths* his father, who were reſpectively tenants of "Bulchyſtullen and Llyaſt Nant Glaſs, of which Ochorir is a "part, both deceaſed, did reſpectively, while in the occupa-"tion of the premiſes, declare that they rented Llyaſt Nant "Glaſs of one *Matthew Evans*, who was never the owner of "*Bulchyſtullen*, which has for a long time belonged to the family "of *Price*; that *H. J. Griffiths* declared he paid the ſame *M.* "*Evans* five ſhillings yearly, and a quarter of mutton, for the "ſaid Llyaſt Nant Glaſs; that he declared he was then going "to pay the ſaid rent, to the ſaid *John Evans*, for the ſaid "Llyaſt Nant Glaſs; that he ordered his ſervant to herd ſome "cattle at Llyaſt Nant Glaſs, ſaying he could not otherwiſe "afford to pay *M. Evans* his rent; that *John Griffiths* pre-"vented a certain perſon from cutting ruſhes on Llyaſt Nant "Glaſs;

Davies v. Pierce, *et al.* Tr. Ter. 27 Geo. 3. B. R. 2 *Ter. Rep.* 53.

" Glaſs; and threatened that he would tell *M. Evans*, his land-
" lord, of his cutting the ſaid ruſhes; and once took the ruſhes
" from the ſaid perſon, and told him they belonged to *M.*
" *Evans:* that, about forty years ago, one *Thomas Hugh*
" rented Llyaſt Nant Glaſs for one year, and declared that he
" paid rent either to *M. Evans* or his mother." The defendant's counſel objecting to the admiſſibility of this evidence, the learned judge refuſed to admit it, and the jury gave a verdict for the defendants: whereupon the plaintiff's counſel excepted to the judge's opinion, and tendered a bill of exceptions to him, which he ſigned—The proceedings were brought here by a writ of error; and, in the laſt term, Mr. *Beard* appeared in this Court, and acknowledged his ſeal to the bill of exceptions; and the Court, without argument, were clearly of opinion that the evidence was admiſſible; and ASHHURST, J. ſaid, that the fact of cutting the ruſhes was deciſive; and BULLER, J. added, that the other queſtion, relative to the tenant's declaring that he paid rent for the premiſes in queſtion, had been determined in the caſe of *Holloway* v. *Rakes*, M. 12 *Geo.* 3. B.R.; and *Doe dem. Foſter* v. *Williams* (*ante*, p. 16.) In the former the leſſor claimed as deviſee in remainder, under a will, 27 years ago, under which there was no poſſeſſion; and, therefore, ſeiſin in the deviſor was neceſſary to be proved. For this purpoſe a witneſs was called to ſpeak to the declarations of the tenant in poſſeſſion at that time, that he held as tenant to the deviſor: a new trial was moved for on the inadmiſſibility of this evidence; and it was objected that this was mere hearſay evidence, and that the party making the declaration was not upon oath. But the Court held the evidence properly admitted, and the rather ſo, as it did not appear that the defendant had any ſort of right; and, probably, might have come in under the tenant who acknowledged the right of the deviſor, as he was of the ſame name with the tenant; and ſuch confeſſion would certainly be binding on all who claimed under him who made it.

Wiggleſworth v. Dalliſon, *et al.* Tr. Ter. 19 Geo. 3. B.R. 1 *Doug.* 201.

Way-going crop.] A cuſtom that tenants, whether by parole or deed, ſhall have the way-going crop after the expiration of their terms, is good.—A cuſtom was pleaded in the following words, viz. " That, within the pariſh of Hibaldſtow,
" there now is, and from time whereof the memory of man
" is not to the contrary, there hath been a certain ancient
" and laudable cuſtom, there uſed and approved of, that is to
" ſay, that *every tenant and farmer, of any lands within the*
" *ſame pariſh, for any term of years which hath expired on the*
" *firſt day of May in any year, hath been uſed and accuſtomed,*
" *and of right ought to have, take, and enjoy, to his own uſe,*
" *and to reap, cut, and carry away, his way-going crop,* THAT
" IS TO SAY, *all the corn growing upon the ſaid lands which*
" *hath,*

"*hath, before the expiration of ſuch term, been ſown by ſuch* "*tenant, upon any part of ſuch lands,* NOT EXCEEDING A "REASONABLE QUANTITY THEREOF *in proportion to the* "*reſidue of ſuch lands,* ACCORDING TO THE COURSE AND "USAGE OF HUSBANDRY IN THE SAME PARISH, and "which hath been left ſtanding and growing upon ſuch lands "at the expiration of ſuch term of years." On a motion in arreſt of judgment, three objections were made on the part of the defendant, viz. 1ſt. That the cuſtom was unreaſonable. 2dly, That it was uncertain. 3dly, That it was repugnant to the deed under which the plaintiff had held, being a leaſe by deed, and not by parol (1).—After an elaborate argument, THE COURT took time to conſider; and now Lord MANSFIELD, Ch. J. delivered their opinion; as follows: Lord MANSFIELD, Ch. J. We have thought of this caſe, and we are all of opinion, that the cuſtom is good. It is juſt, for he who ſows, ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, againſt the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to ceaſe, becauſe it is held to be their fault or folly to have ſown, when they knew their intereſt would expire before they could reap. But the cuſtom of a particular place may rectify what otherwiſe would be imprudence or folly. The leaſe being by deed, does not vary the caſe. The cuſtom does not alter or contradict the agreement in the leaſe; it only ſuperadds a right which is conſequential to the taking, as a heriot may be due by cuſtom, although not mentioned in the grant or leaſe.—Rule diſcharged.—Judgment was accordingly entered for the plaintiff, upon which a writ of error was brought in the Exchequer Chamber, and the defendant aſſigned for errors, "That the cuſtom contained and "ſet forth, &c. is a cuſtom void in law, and is contrary to, "and inconſiſtent with, the ſaid indenture of leaſe in the ſaid "replication mentioned." The caſe was argued at Serjeant's-Inn before the judges of C. B. and the Barons of Exchequer. The objection to the reaſonableneſs of the cuſtom was abandoned; and, in T. 21 G. 3. (27th June, 1781), Lord Loughborough delivered the unanimous opinion of the Court

(1) In *Trumper* v. *Carwardine*, ſummer aſſizes at Hereford, 1769, the plaintiff brought an action on the caſe, and declared on a cuſtom in Herefordſhire, for tenants who quit their farms at Chriſtmas, or Candlemas, to reap the corn ſown the preceding autumn; and YATES, Juſtice, held that the cuſtom could not legally extend to leſſees by deed, though it might prevail, by implication, in the caſe of parol agreements. That, in the caſe of a leaſe by deed, both parties are bound by the expreſs agreements contained in it, as that the term ſhall expire at ſuch a day, &c. and, therefore, all implication is taken away.

of Exchequer Chamber, that the cuſtom was good; and the judgment was affirmed (1).

Parker, *ex dim.* Walker, *v.* Conſtable, Mic. Ter. 10 Geo. 3. C.B. 3 *Wiſ.* 25.

Notice to quit.] Half a year's notice to quit poſſeſſion muſt be given to a tenant at will, and before the end of that time an ejectment will not lie to turn him out of the farm.

Right *ex d'm.* Flower *v.* Darby and Briſtow, Ea Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 159.

And in the caſe of a tenancy from year to year, there muſt be half a year's notice to quit, ending at the expiration of the year.—On the trial of an ejectment a verdict was found for the plaintiff, ſubject to the opinion of the Court on the following caſe: That the leſſor of the plaintiff was ſeiſed in fee of the premiſes in queſtion. That on the 11th day of May, 1781, the defendant *Darby* took the premiſes, which are a houſe in Saliſbury, and occupied them as a public-houſe from that time, under a parol demiſe, at 10l. *per annum*; the rent to commence from Midſummer then next following. The defendant, *Darby*, let part of the premiſes to the defendant *Briſtow*. That on the 26th of March, 1785, the defendant, *Darby*, was ſerved with a notice to quit on the 29th of September following.—THE QUESTION was, Whether the rule which requires that half a year's notice ſhould be given to a tenant at will, before an ejectment can be brought, requires alſo that ſuch notice ſhould expire at the end of the year. PER CURIAM: When a leaſe is determinable on a certain event, or at a particular period, no notice to quit is neceſſary, becauſe both parties are equally apprized of the determination of the term (2). If there be a leaſe for a year, and by conſent of both parties the tenant continue in poſſeſſion afterwards, the law implies a tacit renovation of the contract. They are ſuppoſed to have renewed the old agreement, which was to hold for a year. But then it is neceſſary, for the ſake of convenience, that, if either party ſhould be inclined to change his mind, he ſhould give the other half a year's notice before the expiration of the next, or any following year: now this is a notice to quit in the middle of the year, and therefore not binding, as it is contrary to the agreement. As to the caſe of lodgings, that depends on a particular contract, and is an exception to the general rule. The agreement between the parties may be for a month, or leſs time, and there, to be ſure, much ſhorter notice would be ſufficient, where the tenant has held over the time agreed upon, than in the other caſe. But there is no diſtinction in reaſon between houſes and lands, as to the time of giving notice to quit. It is neceſſary that both ſhould be governed by one rule. The moment the year began, the

(1) See *Brown* v. *Delahay*, *ante*, vol. III. p. 261.
(2) *Vide Roe d. Jordan* v. *Ward*, *infra*, p. 22.

defendant

defendant had a right to hold to the end of that year; therefore there ſhould have been half a year's notice to quit before the end of the term. This gives riſe to another objection in this caſe, upon the diſtinction between ſix months and half a year. The caſe in the year-books requires half a year's notice; but here there is leſs than half a year's notice, and, therefore, it is bad on that ground alſo.—Judgment for the defendant (1).

Notice to quit at Midſummer was given to a tenant holding from Michaelmas, and it was held that he might inſiſt on the inſufficiency of the notice at the trial, though he did not make any objection at the time when it was ſerved and ſaid,—"I pay rent enough already, and it is hard to uſe me thus." FOR PER CURIAM: The defendant did not thereby waive the objection. His anſwer, when he received the notice, proved the reverſe; for it was the anſwer of an angry man.

Oakapple *ex dim.* Green *v.* Copous, Tr. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 361.

The defendant, who was tenant to the leſſor of the plaintiff, objected to the notice to quit, which was ſerved juſt before Michaelmas, 1795, and was to quit, "at Lady-day, "which will be in the year 1795," and the plaintiff was nonſuited. Afterwards on a motion to ſet the nonſuit aſide, Lord KENYON, Ch. J. ſaid, The time when the notice was given, and the words in it "which will be," manifeſtly ſhewed that this was a notice to quit at the then next Lady-day; and the conduct of the parties alſo ſhewed that they ſo conſidered it. Then the year 1795, in the notice, may be rejected as an impoſſible year. PER CURIAM—Rule abſolute.

Doe *ex dim.* Duke of Bedford *v.* Kightly, Mich. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 63.

Where a tenant for life grants a leaſe for years, which is void againſt the remainder-man, and the latter before he elects to avoid it, receives rent from the tenant, whereby a tenancy from year to year is created; yet this is with reference to the old term, and, therefore, a half-year's notice to quit from the remainder-man, ending with the old year, is good. In

Doe *ex dim.* Collins *v.* Weller, Hil. Ter. 38 Geo. 3. 7 *Ter. Rep.* 478.

(1) Where one in remainder, after the expiration of an eſtate for life, gave notice to the tenant to quit on a certain day, and afterwards accepted half a year's rent. *Blackſtone*, J. at York ſummer aſſizes, 1774, held, that ſuch acceptance, being only evidence of a holding from year to year, was rebutted by the previous notice to quit; and, therefore, the notice remains good. *Sykes dem. Margatroyd* and *Wilkes v.* —— 1 *Ter. Rep.* 161.

And in an ejectment, brought by Mr *Duncombe*, he could not prove the time when the term commenced; and the tenant proving it to be different from the time to quit mentioned in the notice, the plaintiff was nonſuited. *Cor.* Lord *Mansfield* at G. H. *Ibid.*

Alſo in ejectment, *Eyre*, Baron, held a notice to quit at Lady-day to be *primâ facie* evidence of a holding from Lady-day to Lady-day, till the contrary was ſhewn. *Doe dem. Puddicombe* v. *Harris.* Summer aſſizes, 1784, at Dorcheſter.

this caſe the tenant for life had granted a leaſe for 21 years, commencing from the 25th of March, 1780, and died on the 4th of December, 1795; the leſſor of the plaintiff, who was entitled to the reverſion in fee, after having accepted rent from the defendant, accruing after the death of the tenant, for life, gave him half a year's notice to quit, ending at Lady-day. And it was contended, that although the leſſor of the plaintiff, claiming as remainder-man, might elect to avoid the leaſe; yet, having ſince accepted rent from the defendant, whereby the latter became tenant from year to year, ſuch tenancy muſt be taken, to commence from the 4th of December, 1795, when the tenant for life died, till when the former leaſe ſubſiſted; and, conſequently, that the notice to quit at Lady-day, 1797, was irregular. *The judge* over-ruled the objection, and a verdict was taken for the leſſor of the plaintiff, with liberty for the defendant to move to ſet it aſide, and to enter a nonſuit, in caſe the Court ſhould think the objections well founded; BUT, THE COURT were clearly of opinion, that there was no foundation for the objection; and that the acceptance of the rent, by the leſſor of the plaintiff, had relation to the old contract, and not to any new agreement (1).

Roe *ex dim.* Jordan *v.* Ward, Hil. Ter. 29 Geo 3 C.B. 1 *Hen. Black.* 97.

The like had been before determined by the court of Common Pleas. In this caſe *John Jordan* was tenant for life; *remainder to his ſon, the leſſor of the plaintiff*, for life; remainders over. *John Jordan*, the father, on the 22d of June, 1785, made a leaſe of the premiſes by indenture, to the defendant, for 21 years, to commence from old Lady-day, which was the 5th of April then laſt; on which day the defendant had entered. *On the 30th of September*, 1785, *John Jordan*, the father, died; on whoſe death, the eſtate came to the leſſor of the plaintiff, his ſon. The defendant continued in poſſeſſion, and paid rent to the leſſor of the plaintiff, after the death of his father, for two years together, on old Lady-day and old Michaelmas-day. Before old Michaelmas-day, 1787, the leſſor of the plaintiff gave the defendant notice to quit on old Lady-day, the 5th of April then next; and on his refuſing to quit brought this action. An objection was made at the trial, that the notice to quit on the 5th of April was bad; that it ought to have been on the 30th of September, the end of the year, dated from the death of *John Jordan*, the father; all the defendant's intereſt derived from the leaſe having ceaſed on that event, as *John Jordan*, the father, had no power to make a leaſe to en-

(1) *Vid. infra*, title LEASE, *Doe* v. *Watts*: and *Sykes* d. *Morgatroyde* v. ——, *ante*, p. 21. (n. 1.)

dure

dure beyond his own life.—A verdict was found for the defendant; which being moved to be ſet aſide—PER CURIAM: The notice to quit on the 5th of April was proper, as payment of the rent had been made on that day. It was alſo fair and juſt in the leſſor of the plaintiff, to give the tenant notice to quit when his year ended, that the courſe of his huſbandry might not be diſturbed. The defendant was tenant at ſufferance, on the death of the tenant for life; and the rent being paid on the 5th of April, was evidence of an agreement to hold from that day; as there was no expreſs agreement between the leſſor of the plaintiff and the defendant, relating to the premiſes, given in evidence. The payment of rent by one, and the acceptance of it by the other, on the ſame day on which the defendant originally entered, was ſufficient evidence of a relation back between them; and though the indenture itſelf was made on the 22d of June, it related back to the 5th of April. Although the title of the defendant, under the indenture, ended on the 30th of September, yet the payment of rent on the 5th of April, was evidence of an agreement that he ſhould continue to hold in the ſame manner as he did by the indenture; inſomuch, that if, in the leaſe, there had been covenants for particular modes of huſbandry, and the defendant, after the death of the tenant for life, had neglected to perform them, the leſſor of the plaintiff might have maintained an action on the caſe againſt him, ſtated the covenants, and then averred an agreement to perform them, according to the terms of the original leaſe; of which agreement, the continuing to pay rent on the 5th of April for two years together, would have been good evidence.—Rule abſolute, without coſts.

An agreement to take a farm, the arable from old Candlemas, the paſture from old Lady-day, and the meadow from old May-day, paying rent half-yearly, at *old Michaelmas* and *Lady-day*, is ſubſtantially a taking of the whole from old Lady-day; and notice to quit, delivered before old Michaelmas, is ſufficient to determine the tenancy.—In this caſe it was contended, that the notice to quit ought to have been given on the 13th of Auguſt, being ſix months previous to the time when the firſt part of the term expired. SED PER CUR. It was ſettled by all the judges about ten years ago, to avoid diverſity of opinions, and for general convenience, that in tenancies from year to year (which theſe kinds of holdings over are held to be), there muſt be ſix months notice on either ſide to quit, according to the ancient law, except where any ſpecial agreement, or the cuſtom of particular places, intervene. The true conſtruction of ſuch an agreement as this now in queſtion is, that it is a holding from Lady-day to Lady-day; and, though part of the farm is to be entered upon and quitted at old Candlemas, February 13, and other

Doe *ex dim.* Dagget, *v.* Snowden, Mich. Ter. 19 Geo. 3. C. B. 2 *Black. Rep.* 1224.

part not till old May-day, May 12, yet that is no more than the cuſtom of moſt counties would have directed, without any ſpecial words for that purpoſe, in a taking from old Lady-day, the 5th of April, viz. that the arable land ſhall be entered upon at Candlemas, to prepare it for the Lent corn, and the meadows not till May-day, when they are uſually heyned for hay.

Doe *ex dim.* Rigge *v.* Bell, Mic. Ter. 34 Geo. 3. B.R. 3 *Ter. Rep.* 471.

On the trial of this ejectment it appeared, that in January, 1790, *Wilkinſon*, as agent for the leſſor of the plaintiff, let the farm in queſtion, called *Hague*'s farm, to the defendant for ſeven years, by parol. The defendant was to enter when the former tenant quitted, namely, on the land at old Lady-day, and the houſe on the 25th of May following; and he was to quit at Candlemas. The defendant entered accordingly, and paid rent. A notice to quit at Lady-day laſt was ſerved on the 22d of September, 1792.—The defendant's counſel objected, that the notice to quit was inſufficient, the holding being from Candlemas, and the notice requiring the defendant to quit at Lady-day:—and the plaintiff was nonſuited. It was afterwards moved to ſet the nonſuit aſide. SED PER CURIAM: Though the agreement be void by the ſtatute of frauds, as to the duration of the leaſe, it muſt regulate the terms on which the tenancy ſubſiſts in other reſpects, as to the rent, the time of the year when the tenant is to quit, &c. So, where a tenant holds over after the expiration of his term, without having entered into any new contract, he holds upon the former terms. Now in this caſe it was agreed, that the defendant ſhould quit at Candlemas; and, though the agreement is void, as to the number of years for which the defendant was to hold, if the leſſor chooſe to determine the tenancy before the expiration of the ſeven years, he can only put an end to it at Candlemas.—Rule diſcharged.

Maddon *ex dim.* Baker *et al. v.* White *et al.* Mic. Ter. 28 Geo. 3 B.R. 2 *Ter Rep* 159.

And where an infant becomes entitled to the reverſion of an eſtate leaſed from year to year, he cannot eject the tenant without giving the ſame notice as the original leſſor muſt have given.

Jones *ex dim.* Griffiths *v* Marſh, Mic Ter 32 Geo 3. B R. 4 *Ter. Rep.* 464.

On the trial of an ejectment, the only queſtion reſerved was, Whether the defendant had been ſerved with due notice to quit? It appeared, that the notice had been ſerved on the defendant's maid ſervant at his houſe, which was not ſituated upon the demiſed premiſes, and the contents explained to her at the time: but there was no evidence that it ever came to the defendant's hands, except as above. As this notice was to determine an intereſt in lands, it was objected that it was not ſufficient. PER CURIAM: This is different from the caſes of perſonal proceſs: but in every caſe of the ſervice of a notice, leaving it at the dwelling-houſe of the party, has always been deemed ſufficient; ſo, wherever the legiſlature has

has enacted, that before a party ſhall be affected by any act, notice ſhall be given to him, leaving that notice at his houſe is ſufficient. So alſo in the caſe of an attorney's bill, or notice of a declaration being filed. And, indeed, in ſome inſtances of proceſs, leaving it at the houſe is ſufficient; as a *ſubpœna* out of the court of Chancery, or a *quo minus* out of the Exchequer. In general, the difference is between proceſs to bring the party into contempt, and a notice of this kind; the former of which only need be perſonally ſerved on him.

If a landlord receive rent, due after the expiration of a notice to quit, it is a waiver of that notice.—On the trial of this ejectment it appeared, that the leſſor of the plaintiff gave the defendant, who was his tenant from year to year, regular notice to quit at old Michaelmas, 1792, but that, afterwards, the defendant paid him half a year's rent, due on the 5th of April, 1793, which (it was contended on behalf of the defendant) was a waiver of the notice to quit. The judge left it to the jury to ſay, whether the money were received as rent; in which caſe they ſhould conſider it as an acknowledgement of the tenancy after the expiration of the notice to quit, and ſhould find a verdict for the defendant: or as a ſatisfaction for damages paid by the defendant as a treſpaſſer, in which caſe they ſhould find a verdict for the plaintiff: and he added, that he thought that the circumſtance of the ejectment having been brought in 1793, and not tried till 1795, was an additional reaſon to induce them to believe that the leſſor of the plaintiff had waived his notice to quit. The jury found a verdict for the defendant, which being moved to be ſet aſide, on the authority of *Doe* d. *Cheney* v. *Batten*, *infra*, p. 26. and *Brewer* d. Lord *Onſlow* v. *Eaton* (1); in the latter of which it was held, that the leſſor of the plaintiff had not waived his re-entry on a forfeiture incurred by non-payment of rent, by taking an inſufficient diſtreſs for that rent; and Lord *Manſfield*, Ch. J. ſaid, "It is like the receipt of rent after the demiſe, about which there was ſo long a puzzle. That is now finally ſettled to be no objection. It is receiving what the landlord might recover in an action for the meſne profits." Ld KENYON, Ch. J.—If the defendant had paid, and the leſſor of the plaintiff had received, the money as a ſatisfaction for the injury done by the defendant, in continuing on the plaintiff's land as a treſpaſſer, then the plaintiff might have recovered in ejectment. But if it were paid *eo nomine* as rent, and received as ſuch, and the jury have found that it was ſo, I cannot aſſent to the

Goodright *ex dim.* Charter v. Cordwent, Ea Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 219.

(1) E. 23 *Geo.* 3. B.R. on a motion for a new trial, the point having been reſerved at the trial.

doctrine

doctrine laid down in the cases cited, that *the receipt of rent*, accruing after the expiration of the notice to quit, is not a waiver of it; for, according to that doctrine, the same person might stand in the relation of tenant and trespasser to his landlord at the same time. This case has frequently occurred at *Nisi Prius*, and has always been determined agreeably to the opinion of the judge at this trial, without being disputed.—Rule refused.

Zouch *ex dim.* Ward *v.* Willingale, Hil. Ter. 30 Geo. 3. C.B. 1 *Hen. Black.* 311.

Also a distress taken for rent, accrued after the expiration of a notice to quit, is a waiver of the notice.—On the trial of this ejectment, the plaintiff was nonsuited on the following circumstances: on the 19th of March, 1788, he gave the defendant notice to quit at Michaelmas-day next, &c. The defendant not having quitted possession, in pursuance of the notice, on the 24th of February, 1789, the lessor of the plaintiff distrained for a year and a quarter's rent, due at Christmas, 1788, viz. for the year ending at the expiration of the notice to quit, and the quarter from that time to Christmas, during which the defendant held over. A rule having been obtained to shew cause, why the nonsuit should not be set aside, and a verdict entered for the plaintiff, or a new trial granted; and cause shewn. Lord LOUGHBOROUGH, Ch. J.—The taking a distress was an act not to be qualified, and an express confirmation of the tenancy. GOULD, J.—In the mere acceptance of rent, the *quo animo* is to be left to the jury, agreeable to Lord *Mansfield*'s doctrine in the case in *Cowper:* but the distress was, in this case, an act not to be qualified, and amounted to a confirmation of the tenancy. WILSON, J.—The mere acceptance of money is equivocal; it may be in satisfaction for a trespass, or it may be for rent; and in an action of trespass for mesne profits, accord and satisfaction may be pleaded in bar, if rent has been accepted. There is no doubt but that the plaintiff would not have been precluded by taking a distress, if, instead of the year and a quarter, it had been only for rent due at Michaelmas, because the statute 8 *Anne*, c. 14. s. 6 & 7. says, that a distress may be taken within six months after the determination of a lease, provided the interest of the landlord and the possession of the tenant continue: the law in this respect being altered since the time of Lord *Coke*, when the old notion prevailed, that a distress could not be taken, unless the same relation subsisted between the parties. —Rule discharged.

Doe *ex dim.* Cheny *v.* Batten, Hil. Ter. 15 Geo. 3. B.R. *Cowp.* 243.

But the mere acceptance of rent by a landlord, for occupation subsequent to the time when the tenant ought to have quitted according to the notice given him for that purpose, is not, of itself, a waiver on the part of the landlord of such notice, but matter of evidence only to be left to the jury, under the circumstances of the case.—On the trial of this ejectment

ejectment it appeared, that the defendant was tenant at will to the leſſor of the plaintiff, who, to determine the tenancy, gave notice, at Lady-day, to the defendant to quit at Michaelmas. The defendant not quitting at Michaelmas, the plaintiff brought this ejectment, and laid the demiſe on the 30th of September: the defendant appeared and pleaded. Some time after the plea was put in, the leſſor of the plaintiff received of the defendant a quarter's rent, due at Chriſtmas. It was inſiſted, that this ſubſequent acceptance of rent, ſubſequently due, was a waiver of the notice, and tantamount to an agreement that the defendant ſhould continue tenant. The judge (Lord *Mansfield*) ſaid, he took the practice to be ſo, though, in his own opinion, it was unreaſonable, and he directed the jury to find for the defendant, which they did: afterwards, a new trial being moved for, the point was fully argued. Lord MANSFIELD, Ch. J.—Upon examination, it does not appear that we are precluded, by authority, or any eſtabliſhed practice, from judging agreeable to the reaſon of the caſe. An ejectment is a moſt beneficial remedy for the recovery of lands: it is a remedy by fiction of law, and, therefore, ſhould be applied to the purpoſes that will beſt anſwer the ends of juſtice. In ejectment, the plaintiff in his declaration ſtates, that on ſuch a day he had title to the poſſeſſion of ſuch lands; and upon the trial he is bound to prove, that ſuch title was in him at the time ſo ſpecified. The title of the plaintiff, in this caſe, accrued by giving ſix months' notice to the defendant to quit, which it was in proof had been duly given: indeed, there is no diſpute but that, at the time the demiſe is ſtated to have been made, the leſſor of the plaintiff had a right to the poſſeſſion; and ſo he had at the time of the plea pleaded. The ſingle queſtion is, Whether the landlord has, by any ſubſequent act or agreement, waived ſuch his right, and conſented that the tenant ſhould continue the poſſeſſion? If he has, he will be bound by ſuch agreement: as to that, the fact in this caſe is, that the landlord has received rent, *eo nomine*, for a quarter of a year, which became due after the time of the demiſe in the declaration laid. But ſuppoſe the landlord had accepted this rent under terms, or made an expreſs declaration, that he did not mean to waive the notice, and that, notwithſtanding his acceptance or receipt of the rent, he ſhould ſtill inſiſt upon the poſſeſſion; or ſuppoſe any fraud or contrivance on the part of the tenant in paying it; clearly, under ſuch circumſtances, the plaintiff ought not to be barred of his right to recover: but all theſe are facts which ought to be left to the conſideration of the jury. The queſtion, therefore, is, *quo animo*, the rent was received, and what the real intention of both parties was? If the truth of the caſe is, that both parties intended the tenancy ſhould continue, there is an end of the plaintiff's

plaintiff's title; if not, the landlord is not barred of his remedy by ejectment: as, where the leſſor of the plaintiff, after the time laid in the demiſe, agreed to accept the ſingle inſtead of the double rent, which, by the ſtat. 4 *Geo.* 2. c. 28. he was entitled to. This very point was determined in a caſe of *Gilder* ex dim. *Gilder* v. *Gildoe*, at Saliſbury aſſizes, 1754, before Baron SMYTHE: there the ſingle rent had been received by the landlord, ſubſequent to the time of the demiſe laid; and the objection now inſiſted on was made, but the baron overruled it. A caſe was afterwards reſerved for the opinion of B.R. when the Court held it to be no bar, and that it ought not to preclude the plaintiff from recovering in ejectment. I entirely agree with that opinion: the ſtatute gives double rent, if the tenant continues in poſſeſſion after the notice to quit; but ſtill it is to be received as rent. What then is the caſe where the landlord accepts the ſingle rent only? The taking half, when he is entitled to an action for the whole, is an act of lenity; but it does not import a conſent, that the tenant ſhall continue in poſſeſſion, or a waiver by the landlord of his remedy by ejectment. There is another caſe, which was tried at Launceſton aſſizes: the objection taken in that caſe was, that the leſſor of the plaintiff in ejectment had likewiſe brought an action for uſe and occupation of the very ſame premiſes, for rent which had accrued ſubſequent to the time of the demiſe. This action ſtood ready for trial at the ſame aſſizes. In arguing the objection which is now made, it was ſaid, that the action was an action founded on promiſes, and a ſuppoſed permiſſion by the plaintiff to the defendant to occupy; therefore, an acknowledgment on the part of the plaintiff, that he was his tenant, and, conſequently, a waiver of his notice: but the objection was overruled, and the plaintiff recovered, firſt in the ejectment, and afterwards in the action for uſe and occupation. It was holden, that one of the remedies was not a waiver of the other, becauſe they were brought for ſeveral demands; to both of which the plaintiff was entitled, conſequently the one could be no waiver of the other; for, after recovery of the poſſeſſion, the plaintiff was entitled to the profits for uſe and occupation, if he thought fit to ſue for them; therefore, in point of law, the mere acceptance of rent is not, in itſelf, a bar: but if there were a doubt, whether the poſſeſſion was by fraud, or in conſequence of a new agreement; or whether the acceptance of the rent was mutually intended or underſtood as a waiver of the notice: that is a fact which ought to be left to the jury to determine: it was not left in this caſe, and, therefore, there ought to be a new trial. ASTON, J. agreed, and ſaid, I think the acceptance of a ſingle quarter's rent is only a waiver of the landlord's right to double rent under the ſtat. 4 *Geo.* 2. and does not

not neceſſarily imply a conſent that the tenancy ſhould continue. Where an ejectment has been brought on the ſtat. 4 *Geo.* 2. c. 28. ſ. 2. for the forfeiture of a leaſe, there being half a year's rent in arrear, and no ſufficient diſtreſs on the premiſes; there, acceptance of rent afterwards by the landlord has, I believe, been held a waiver of the forfeiture of the leaſe; which may well be, for it is a penalty, and by accepting the rent the party waives the penalty. But this caſe is very different: for here the acceptance of ſingle rent is only a waiver of his right to double; therefore, a new trial ought to be granted. WILLES, J. of the ſame opinion. ASHHURST, J.—Whether the acceptance of rent after the time laid in the demiſe is, or is not, a waiver of the notice, depends upon the intention of the parties, which is a matter of fact, and, therefore, to be left to the jury. If the landlord accepts it only as a compenſation for the double rent which the ſtatute ſays he ſhall have a right to, it is a waiver of that only: but it does not waive his right to the poſſeſſion of the premiſes, which is entirely a diſtinct and different thing.—Rule for a new trial abſolute.

Action for double rent.]—Parol notice to quit, by a tenant under a parol leaſe, is ſufficient.—The plaintiff held the premiſes for one year, from the 5th of April, 1760, and ſo from year to year, as long as both parties ſhould pleaſe; *but ſuch demiſe was only by parol*; and the *notice*, proved to be given by the plaintiff to the defendant, "to quit on the 5th of April, 1761," was only a *parol* one, and not "in writing." THE QUESTIONS were, 1ſt, Whether the plaintiff was liable to pay double rent for not quitting, after having given a notice to do ſo *by* PAROL *only?* 2dly, Whether, as the plaintiff held under a *parol demiſe*, as tenant from year to year, this is *ſuch a holding* as is within the ſtat. 11 *Geo.* 2. c. 19. ſ. 18. ſo as to ſubject the plaintiff to *double* rent, for his not quitting after having given notice "that he would do ſo?" PER CURIAM (after two arguments): In conſtruing acts of parliament made in *pari materia*, all of them ought to be conſidered as *one ſyſtem.* The act 4 *Geo.* 2. c. 28. requires notice in writing; therefore it was contended, that on the ſecond act 11 *Geo.* 2. c. 19. the notice ought alſo to be in writing.—But, on conſidering both theſe acts together, it will appear, that though the caſe intended to be provided againſt under the former act, is both inconvenient to the landlord, and vexatious in the tenant; yet on the latter act, the caſe is ſtill *ſtronger* againſt the tenant, as being more vexatious, where he himſelf gives notice, and then departs from it. In the 4 *Geo.* 2. the proviſion was for thoſe caſes where the *landlord gave the tenant notice to quit.* This of the 11th of *Geo.* 2. provides for the caſe of the TENANT's *giving his landlord the notice of his intention*

Timmins v. Rowlinſon, Hil. Ter. 5 Geo. 3. B.R. 3 *Burr.* 1603. 1 *Black. Rep.* 533.

intention to quit, and not delivering up poſſeſſion according to it. There is no reaſon to confine this power given to tenants by the latter act, of quitting their leaſes upon notice, to *written notices.* The words of it are general: *this* act does not ſay, that the notice ſhall be *in writing.* The legiſlature were then conſidering the former act, which *was* tied down to a notice *in writing*, to be given by the landlord: but they purpoſely left it out here.—It is ſaid, "that parol notice "may be very difficult to prove." But the difficulty of *proof* of a parol notice is not a ſufficient anſwer; for here the notice is, in fact, traverſed and proved: 'tis clearly within the words, and 'tis alſo within the meaning, and within the reaſon of the act, and within the juſtice of the caſe.—As to the queſtion, Whether *this claſs* of tenants be within the act of 11 *Geo.* 2. c. 19. ſ. 18? They are both within the *preamble*, and the *enacting* part of this ſection. In the country, leaſes at will, in the *ſtrict* legal notion of a leaſe at will, being found extremely inconvenient, exiſt only notionally, and were ſucceeded by another ſpecies of contract, which was leſs inconvenient. At firſt it was, indeed, ſettled to be for a year certain; and then the landlord might turn the tenant out at the end of the year. It is now eſtabliſhed, that if a tenant takes from year to year, *either* party muſt give a *reaſonable* notice, before the end of the year, though that reaſonable notice *varies* according to the cuſtom of different counties.—This practice, eſtabliſhed by judges upon circuits, does make them "tenants, having power to determine their "leaſes, by giving notice to quit," in the words of the preamble, § 11. And it is immaterial, whether the leaſe be for one or more years, or in writing, or not in writing. But the words of the enacting clauſe are much more large and liberal; the words there uſed are: "In caſe *any* tenant, or "tenants, ſhall give notice of his, her, or their intention to "quit the premiſes, by him, her, or them, holden, at a time "*mentioned* in ſuch notice; and ſhall not accordingly deliver "up the poſſeſſion thereof at the time in ſuch notice con-"tained; that then, &c." It is, clearly, equally within the miſchief intended to be remedied, and it is within the *words* of the *preamble.* But, at leaſt, it is within both the *words* and *meaning* of the *enacting* clauſe.—Therefore the landlord muſt have the double rent.

Cutting *v.* Derby, Ea. Ter. 16 Geo. 3. C.B. 2 *Black. Rep.* 1075.

Notice to quit under the ſtatute of 4 *Geo.* 2. may be previous to the expiration of the leaſe.—In an action for double annual value of a farm, under the ſtatute 4 *Geo.* 2. c. 28. the caſe was: one Mr. *Hunt* granted a leaſe of the farm to one *Weſt* for eleven years, from the 10th of October, 1763, at 103l. *per annum*, and deviſed the rent and reverſion to the plaintiff and Mr. *James Safford*, and their heirs, as tenants in common. *Weſt* entered and held till February, 1772, when he aſſigned to the defendant, who

who entered accordingly. On the 30th of September, 1773, the plaintiff gave a written notice to the defendant to quit his undivided moiety at the expiration of the term, on the 10th of October, 1774; and again repeated the like notice on the 7th of October, 1774, or to pay double value. On the 10th of October, 1774, at twelve at noon, the plaintiff went on the premiſes, and demanded poſſeſſion, which was refuſed; and again in the afternoon, and the ſame evening, he turned a ſcore of lambs on the premiſes, which, on the 11th of October, the defendant turned off, and held the premiſes till the 10th of October, 1775. The jury gave a verdict for double the yearly value of the moiety, and it was afterwards moved for a new trial, becauſe, 1ſt, By the ſtatute, notice to quit muſt be given *after*, and not *before*, the expiration of the term; 2dly, The leaſe did not expire till midnight, and poſſeſſion was demanded in the preceding afternoon. PER CURIAM: The notice to quit may be previous to the expiration of the term: it prevents ſurprize, and is moſt for the benefit of both landlord and tenant. The only objection to it is the order in which the words ſtand in the act of parliament, which weighs little againſt the ſenſe and convenience of the other conſtruction. The ſecond objection is, that the notice to quit, and demand of poſſeſſion, are on the 10th of October, whereas the leaſe did not expire till the 11th. At the utmoſt, the leaſe expired, and the tenant ought to quit the minute after midnight; for, though the rent is demandable at ſunſet, yet it is not due, nor does the leaſe expire till midnight. 1 *Saund.* 287. If ſo, the notice is a little premature; but this is only the fraction of a ſecond; and the Court will not grant a new trial on ſuch a frivolous objection; for a new trial ought always to be founded on the true juſtice of the caſe, which is with the plaintiff, and not on little quirks and niceties.

Afterwards it was moved in arreſt of judgment, that *one tenant in common cannot maintain a perſonal action without his companion.* And for this were cited 1 *Inſt.* 195. b. *Litt.* ſect. 311. 315. 316. 1 *Sid.* 157. But *per Cur.* Where one entire injury is done to both tenants in common, they ſhall have one entire remedy; but where the injury is ſeparate, they may have ſeveral actions. One tenant in common may bring an ejectment for his moiety, and make himſelf tenant in common with the leſſee of the other. The preſent action ſtands in the place of an ejectment, but is more beneficial and effectual.—Rule refuſed.

The ſame Cauſe, 2 *Black. Rep.* 1077.

And the tenant will be liable to double rent under the ſtat. 4 *Geo.* 2. c. 28. though the notice to quit be only from a perſon appointed receiver by the court of Chancery.—This was an action of debt on the ſtat. 4 *Geo.* 2. c. 28. and it appeared in evidence that the plaintiff, as executor, was in poſſeſſion of the premiſes,

Wilkinſon *v.* Colley, Hil. Ter. 11 Geo. 3. B.R. 5 *Burr.* 2694.

premiſes, and continued to receive the rents and profits until the 25th of March, 1767, when a bill being filed againſt him in the court of Chancery, on the part of infant children, an order was made, appointing *Henry Mytton* the receiver of the rents and profits of the premiſes, with liberty to let and ſet the ſame, with the approbation of the maſter, as there ſhould be occaſion. *The defendant was tenant of the premiſes for a term of years, which expired on the 25th of March,* 1769, *at the yearly rent of* 106l. The defendant paid the rent for the premiſes to the plaintiff, as executor, to the 25th of March, 1767; and from that time to the 25th of March, 1769, to the ſaid *Henry Mytton*, the receiver.—*The ſaid* Henry Mytton, *on the 7th of May*, 1768, *delivered a notice, in writing, to the defendant, to quit the lands and tenements*, of which he was appointed receiver by the court of Chancery, at Lady-day next. On application to the court of Chancery, an order was made in the cauſe, on a ſuggeſtion that the defendant had refuſed to quit the poſſeſſion, that the plaintiff in that ſaid cauſe might be at liberty to bring an action againſt the defendant for double rent, in the name of the plaintiff, againſt the defendant. It was objected, 1ſt, that this notice was not given by the landlord, nor by any agent of his *thereunto lawfully authorized*, but by Mr. *Mytton* alone, the receiver under the order of Chancery, without mentioning the landlord at all; 2dly, that a *demand* was neceſſary, as well as notice in writing; 3dly, that as the notice was "to quit the poſſeſſion at a fixed time," ſomebody ought to have attended to receive it. BUT THE COURT held, that the receiver was an agent for the landlord, lawfully authorized for this purpoſe; and that the notice, in writing, was itſelf a ſufficient demand. They held this to be a *remedial* law: the penalty is given to the party aggrieved. —Poſtea to the plaintiff.

Meſſenger v. Armſtrong, Mic. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 53.

This was an action for double rent. The firſt count of the declaration ſtated, that the plaintiff, at Whitſuntide, 1781, demiſed a certain meſſuage and tenement to the defendant for three years, at the yearly rent of five guineas *per annum*. That the plaintiff, before the determination of the leaſe, gave the defendant notice to quit at Whitſuntide, 1784; that the defendant held over, and that double rent became due from Whitſuntide, 1784.—The ſecond count ſtated another notice, ſerved on the 3d of June (after the expiration of the firſt notice to quit at Whitſuntide), to quit at the Martinmas following, *or to pay double rent*.—On the trial before HEATH, J. the defendant's counſel contended, that the firſt notice was waived by the ſecond; but the judge thought that, as the double rent was incurred before the ſecond notice, the plaintiff ought to recover. And a verdict was taken for the plaintiff for double rent from the expiration of the firſt

first notice. It was moved to set aside the verdict for a misdirection of the judge. SED PER CURIAM: Where a term is to end on a precise day, there is no occasion for a notice to quit, because both parties are apprized that, unless they come to a fresh agreement, there is an end of the lease. Here it ended at Whitsuntide; the landlord, before the time expired, told the tenant, "You know you are to quit;" the meaning of that is, "If you do not quit, I will insist on my double "rent." And he gave him a second notice afterwards, wherein he said, in so many express words, what was before to be collected by intendment.—Rule discharged.

Tenants removing goods.]—Justices, either of the county from which tenants fraudulently remove goods, or of that in which they are concealed, may convict the offenders in their respective counties.—On a conviction under the stat. 11 *Geo.* 2. c. 19. for fraudulently and clandestinely removing goods to prevent the landlord from distraining; it was objected at sessions, that, it appearing upon the face of the conviction, that it had been made by two justices of the county in which the goods were found, and not of the county from whence they were removed, that court, upon the ground of a defect of jurisdiction, and that the justices of one county could have no cognizance of a matter arising in another, quashed the conviction. These proceedings being now removed by *certiorari*, WILLES, J. intimated, and it seemed to be agreed by the Court, that the statute gives an authority to the justices of the respective counties, within which either offence under this act was proved to have been committed. BUT THE COURT thought that the conviction was bad on another ground, as no evidence was stated in it; and, as no special case was returned, they held that it must be taken, that the conviction was quashed at the sessions for that defect; for that the law presumes, that an inferior jurisdiction acts rightly, unless the contrary appears.—Order of sessions, quashing the conviction, affirmed. Rex *v.* Morgan, Hil. Ter. 22 Geo. 3. B.R. *Cald.* 156.

Land-Tax.

A PERSON possessed of a freehold *office* may act as a commissioner of the land-tax under the qualification of his office.—On the trial of an action of debt for 100l. brought against the marshal of the King's-bench, on the land-tax act, for acting as a commissioner for the county of Surrey, without being properly qualified. A verdict was given for the plaintiff for 50l. but subject to the opinion of the Court. He was assessed to the land-tax in the county of Surrey, Sone *v.* Ashton, Hil. Ter. 2 Geo. 3. B.R. 3 *Burr.* 1287.

as follows, viz. "For the priſon of the King's-bench, houſe, "lands, garden, and common ſide, 300l.; for his *office and* "*perquiſites*, as marſhal, 200l.;" in all 500l.: which aſſeſſment was, on an appeal, reduced to 300l. viz. "For the "priſon of the King's-bench, priſon-houſe, land, garden, "and common ſide, 250l. for the *office and perquiſites*, as "marſhal, 50l." For the plaintiff it was contended, that the marſhal had *no qualification*, either from the priſon, houſe, land, garden, and common ſide, or from his office and perquiſites, as marſhal, to act as a commiſſioner of the land-tax; for, the qualification required by the land-tax act muſt ariſe out of LANDS and TENEMENTS, not out of *offices or perquiſites*. That the freehold of the priſon, houſe, lands, garden, and common ſide, is in the CROWN: they are the crown's property. That the marſhal has no FREEHOLD in the *priſon, houſe*, lands, garden, &c. though he has, indeed, a qualified freehold in his OFFICE. SED PER CURIAM: Is not his *office* a TENEMENT? and he has a qualified freehold in it. He is qualified, both within the *words*, and within the *intention*, of the ſtatute. Is not the maſter of the rolls qualified for the houſes which belong to him in the right of his office? The maſter of St. *Catharine*'s has ſat in parliament, under the qualification of his office.—Poſtea to the defendant.

Harriſon *v.* Bulcock *al.* Hil. Ter. 28 Geo. 3. K.B. 1 *Hen. Black.* 68.

A houſe within the limits of an hoſpital, appropriated to an officer of the hoſpital for the time being, *is not aſſeſſable to the land-tax*.—On the trial of an action of treſpaſs, for taking the goods of the plaintiff, a verdict was taken for the plaintiff, ſubject to the opinion of the Court on the following caſe: the plaintiff, at the time when the goods were taken, was treaſurer of *Guy*'s hoſpital, in the pariſh of St. *Thomas*, Southwark. By an aſſeſſment made on the 19th of May, 1786, he was aſſeſſed to the land-tax for the houſe in which he lived. Five of the defendants were commiſſioners, and the other two collectors. The plaintiff appealed to the commiſſioners againſt the rate, who diſmiſſed his appeal. On his refuſing to pay the ſum aſſeſſed, the goods in queſtion were taken under a warrant of diſtreſs. The houſe in which the plaintiff lived has been conſtantly occupied by the treaſurer for the time being, for whoſe ſole uſe it was erected; and the plaintiff paid no rent for it, but occupied it as incident to his office.—On behalf of the plaintiff it was urged, that the 4th of *W.* & *M.* c. 1. ſ. 25. contains a protection to the ſite of hoſpitals, which has been inſerted in all the land-tax bills which have been paſſed ſince the revolution, with the material addition of "*any of the buildings within the walls or limits of the hoſpital.*" PER CURIAM: This being a building within the limits of the hoſpital, not let nor yielding any profit, but in the occupation of a neceſſary officer, comes under the exemption of the act.

act. That there might be no ambiguity in the word *ſite*, the legiſlature goes on to ſay, "any of the buildings within "the walls or limits of the ſaid colleges, halls, and hoſpitals." None of the buildings, therefore, within thoſe limits, are chargeable, unleſs they are charged as ſuch, in ſome other clauſe of the act, and no ſuch clauſe is to be found.—The tax muſt be either on the owner or tenant of the hoſpital, but the plaintiff is neither owner nor tenant. As to the objection to the juriſdiction of the Court, on the ground that the Court has no juriſdiction in the preſent caſe, the twentieth ſection of the act having made the appeal to the commiſſioners final; it is of no weight, for the appeal to the commiſſioners is only final, when the queſtion ariſes, as to the *quantum* of the tax, and whether lands belonging to hoſpitals, &c. were aſſeſſed as ſuch in the fourth year of *William* and *Mary*, or have been purchaſed ſince that time. —Judgment for the plaintiff.

Leaſes.

What perſons may demiſe.]—The maſter of the rolls may grant as many concurrent leaſes as he pleaſes, during the laſt ſeven years of a former leaſe, and may, at any time, take a ſurrender, and renew for twenty-one years.—This was a queſtion concerning the validity of two leaſes made by Sir *Thomas Clarke*, late maſter of the rolls; one, in 1755; the other, in 1762. A feigned iſſue was ſettled, and a ſpecial verdict found upon it. The ſpecial verdict found, that by the act of parliament, made on the 25th of April, *anno* 12 *Car. Regis*, 2*di*. No. 49, after reciting that, "as former "maſters of the rolls had no power to grant leaſes for ſuch "terms as might encourage tenants to build and to repair, the "eſtate was much out of repair; therefore, the maſters of "the rolls for the time being were empowered to grant "leaſes for forty-one years, to commence from the making, "reſerving twenty ſhillings rent at leaſt, for every parcel of "ground on which any new houſe ſhall be built, and the "uſual rent, where there is no proviſion for new building. "*Provided that, after the premiſes have been once letten, ac-*"*cording to the power aforeſaid, the maſter of the rolls ſhall* "*not grant, or make, any new or concurrent leaſe, until* "*within ſeven years of the expiration of the leaſe then in being,* "*nor for any leſs rent than upon the former leaſe, nor for any* "*longer term than twenty-one years.*" That, on the 9th of October, 1738, Mr. *Verney* was made maſter of the rolls; and, on the 8th of March, 1740, demiſed the premiſes to

Wilſon, widow, *v.* Sir Thomas Sewell, knt. Maſter of the Rolls, Mic. Ter. 7 Geo. 3. B.R. 4 *Burr.* 1975. 1 *Black.* 617.

Robert Harley and *Charles Frewen*, for twenty-one years from the making, at 3l. rent.—That, on the 29th of May, 1754, Sir *Thomas Clarke* was made maſter of the rolls; and on the 9th of June, 1755, granted a concurrent leaſe of the premiſes to *Charles Deaves* and *John Harriſon* for twenty-one years from the making. Afterwards, on the 5th of January, 1762, Sir *Thomas Clarke* granted another leaſe of the premiſes to *Samuel Seddon* and *Charles Deaves* (who had ſurvived the ſaid *John Harriſon*), reciting the leaſe of the 8th of March, 1740, and that the ſame was within leſs than ſeven years of expiring, for twenty-one years from the making.—That *Charles Deaves*, by indenture bearing date the 4th of January, 1762, did ſurrender to Sir *Thomas Clarke* nine leaſes, dated the 29th of Auguſt, 1754, and thirty other leaſes, dated the 9th of June, 1755 (including the leaſe in queſtion), all which were granted in truſt for Sir *Thomas Clarke*, who had directed the ſame to be ſurrendered, and all his intereſt under the ſaid leaſes, or otherwiſe howſoever, to enable him to grant new leaſes: but that the ſaid ſurrender (though dated the 4th of January, 1762), was not, in fact, executed till the 5th of June, 1764. That Sir *Thomas Sewel*, the defendant, was made maſter of the rolls on the 4th of December, 1764. THE VERY SHORT STATE OF THE CASE IS NO MORE THAN THIS: Mr. *Verney* made a leaſe for twenty-one years, from the 18th of March, 1740, which would, conſequently, expire on the 18th of March, 1761. Sir *Thomas Clarke* made a leaſe of the ſame premiſes on the 9th of June, 1755, for twenty-one years, in truſt for himſelf; and on the 5th of January, 1762, he made another leaſe of the ſame premiſes for twenty-one years, in truſt for himſelf. On the 5th of June, 1764, there was an actual ſurrender, duly executed and accepted, of the leaſe of 1755. Sir *Thomas Clarke* died. Sir *Thomas Sewell*, now maſter of the rolls, diſputes the validity of either of theſe two leaſes, of 1755, or 1762. All this matter appeared at full length, upon the ſpecial verdict. THE QUESTIONS were three: FIRST, Whether the leaſe, being made in *truſt for himſelf*, was not a fraud upon the truſt, and therefore void? SECONDLY, Whether the leaſe of 1762 was not void, becauſe there were *more than ſeven* years to run of the *leaſe of* 1755? THIRDLY, If the leaſe of 1762 was void, whether the leaſe of 1755 was not abſolutely gone, either by the *implied* ſurrender in 1762, or the *expreſs* ſurrender in 1764? THE COURT delivered their opinions *ſeriatim*. As to the firſt point, they held, that its being *in truſt for himſelf* was *no* objection. It makes no difference, with regard to the ſucceſſor; he will receive the accuſtomed rent; and, if the leaſe is in all other reſpects regular, it ſignifies nothing to the ſucceſſor, whether one perſon or another gets the beneficial profit upon it.—As to the

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ſecond point (which turned upon the conſtruction of the act of parliament of 12 *C.* 2.), they all held, that the leaſe of 1762 was a good, *valid*, and *ſubſiſting* leaſe. They thought that the words "*new*" and "concurrent," which are uſed in the act of parliament, meant the ſame thing (except Mr. Juſtice *Hewitt*, who did not deliver any opinion on this queſtion). They did not think it neceſſary that the former leaſe muſt be *run out* within ſeven years of its expiration, by *effluxion of time*, but that a former leaſe might be *ſurrendered* at any time, and that a *ſurrender* was as much within the given power, and within the intention of the legiſlature, as effluxion of time; and that they meant no more than to give every maſter of the rolls, for the future, a protection from being incumbered for a longer time than twenty-one years, by the leaſes of predeceſſors. They thought, conſequently, that this leaſe of 1762 did not break in upon the power, as it does not charge the reverſion longer than twenty-one years in the whole. And it was obſerved by Lord *Mansfield*, and by Mr. Juſtice *Hewitt*, that as this eſtate was in *houſes*, it might happen to be very inconvenient, if the tenants might not ſurrender their leaſes within leſs than the laſt ſeven years of their terms, in order to rebuild their houſes, in caſes where it might be neceſſary. And it ſeemed to be their opinion, that the maſter of the rolls might take ſurrenders, and make regrants, *toties quoties*; and that his having executed the power once did not prevent him from repeating it.—As to the third point, they held the acceptance of the leaſe in 1762 to be an (1) implied ſurrender of the old leaſe in 1755. But they ſeemed to agree, that *if* the leaſe of 1762 had *not* been a good leaſe, then the acceptance of it would *not* have implied a ſurrender of the former one of 1755. For, it was not reaſonable in itſelf, nor could it be the intent of the parties, that an acceptance of a bad leaſe ſhould be an implied ſurrender of a *good* one. This is not only agreeable to principles and common ſenſe, but has been determined: it was ſo reſolved in the caſe of *Lloyd* and *Gregory* (which is beſt reported in Sir *Wm. Jones*, 405, 406), (2). If a ſurrender is intended for a particular purpoſe, and that purpoſe, the only motive of it, fails, the ſurrender ought to fail too. *Per Curiam:* Judgment for the plaintiff, upon the iſſue on the validity of the leaſe of 1762; and for the defendant, upon the iſſue of the validity of the leaſe of 1755.

The Court were all clearly of opinion, that a teſtamentary guardian of an infant cannot make a leaſe of the infant's lands, and that a leaſe in ſuch caſe is abſolutely void.

Roe *ex dim.* Parry *v.* Hodgſon, Hil. Ter. 1 Geo. 3. C.B. 2 *Wils.* 129, 135

(1) V. *Co. Litt.* 338. *Hutton*, 104. *Watt* v. *Maydewell.*

(2) See alſo the caſes cited at the end of *Watt* v. *Maydewell*, in *Hutt.* 105.

Doe *ex dim.* Collins *v.* Weller, Hil. Ter. 7 *Ter. Rep.* 478.

In ejectment for a meſſuage the queſtion turned on this point, viz. WHETHER a leaſe of the premiſes, from huſband and wife (under which laſt the leſſor of the plaintiff claimed), was a valid leaſe? It appeared, that in Auguſt, 1771, *Jane Palmer*, afterwards *Jane Butcher*, being ſeiſed in fee, previous to, and in contemplation of, her marriage to *Charles Butcher*, by leaſe and releaſe conveyed the ſame to truſtees, and their heirs, to the uſe of herſelf in fee, until the marriage; and, afterwards, to the uſe of herſelf for life: remainder to the uſe of ſuch perſons, and for ſuch eſtates, as ſhe, notwithſtanding her coverture, ſhould, by deed or will, executed in the preſence of three witneſſes, appoint: and, for want of ſuch appointment to herſelf in fee, *the marriage took place, and the leaſe in queſtion was afterwards granted by the huſband and wife, atteſted by two witneſſes only.* The huſband died, after which the wife received rent of the defendant for the premiſes accruing after the huſband's death. The wife died on the 4th of Dec. 1795, having, by a will, duly executed during the life-time of her huſband, and prior to the leaſe, deviſed the premiſes to the leſſor of the plaintiff, in fee. Since her death the leſſor of the plaintiff, after having accepted rent from the defendant after the death of Mrs. *Butcher*, gave him half a year's notice to quit.—It was objected, by the defendant, at the trial, that the leaſe by the huſband and wife, of the wife's land, was not void as to the wife, but merely voidable after ſhe was *diſcovert*; and that the wife had confirmed it by accepting rent accruing after her huſband's death. The judge over-ruled the objection, and there was a verdict for the leſſor of the plaintiff: BUT, PER CURIAM (on a motion for a new trial), The reverſion in fee being in the wife at the time of the leaſe executed, makes an end of this queſtion; for the leaſe being only voidable, her receipt of rent, after her huſband's death, confirmed it (1); and her will, which was ambulatory till her death, cannot vary the caſe; for it could have no operation during her life-time; and any act which was afterwards done by her, inconſiſtent with her will, was, *pro tanto*, a revocation of it: if, indeed, the queſtion had been upon the power of appointment, the leaſe, not being atteſted conformable thereto, could not have been ſupported in a court of law; yet, even then being granted for a valuable conſideration, and merely defective in point of form, a court of equity would have interfered, and directed a proper leaſe to be granted. In *Rattle* v. *Popham*, 2 *Strange*, 992. though Lord *Hardwicke*, in a court of law, held himſelf bound to decide againſt a leaſe, not duly executed according to a power reſerved, yet Lord *Talbot*, pre-

(1) See *Goodright* ex dim. v. *Straphan*, *ante*, vol. II. p. 310.

ſiding

ſiding in the court of Chancery, upon a bill filed by the leſſee, decreed the leaſe to be binding on the parties, and made the defendant pay all the coſts in law and equity.—Rule abſolute.

A tenant for life, and the reverſioner, granted a leaſe to *A.*; but the reverſioner being then an infant, did not execute it. *A.* entered and enjoyed, and two years after the death of the tenant for life, the other leſſor (the reverſioner) being then of age, executed the leaſe, and afterwards brought an action againſt the leſſee for breach of covenant: BUT the Court held, that upon the death of the tenant for life, the leaſe became totally void.—This was covenant, and the declaration ſet forth a leaſe, dated the —— day of ——; whereby certain coal mines were demiſed by *John Bracebridge Ludford* (the *tenant for life*) and *John Ludford (the reverſioner)* to the defendant, at a certain rent reſerved to the ſaid *John Bracebridge Ludford*, and his aſſigns, during his life-time; and, after his deceaſe, in like manner for the remainder of the term to the ſaid *John Ludford*, his heirs and aſſigns. The declaration then ſtated, that by virtue of the ſaid demiſe, the ſaid defendant entered, &c. That the ſaid *John Bracebridge Ludford*, afterwards, to wit, on the 1ſt of March, 1776, died; and that he, the ſaid *John Ludford* (the plaintiff), after he attained his age of 21 years, to wit, on the 1ſt of February, 1779, at, &c. did duly execute and confirm the ſaid leaſe for the remainder of the ſaid term; and then aſſigned five breaches. PLEAS: no rent in arrear to each of the five breaches; 6thly, that the ſaid *John Ludford* did not, at the time of making the leaſe, in the declaration mentioned by the ſaid *J. B. Ludford*, nor at any time during his life-time, nor for a long time, to wit, the ſpace of two years after his death, execute the ſaid leaſe; and that upon the death of the ſaid *J. B. Ludford*, the ſaid leaſe and demiſe did, before any of the rent and money in the ſaid declaration mentioned became due or payable, to wit, on the ſaid 1ſt day of March, in the ſaid year 1776, when the ſaid *J. B. Ludford* ſo died, ceaſe and determine, &c. There were two other pleas. Replication to the 1ſt, 2d, 3d, 4th, 5th, and 7th pleas; and iſſues thereon. General demurrer to the 6th and 8th pleas; and joinder in demurrer.—For the plaintiff it was contended, as to the 6th plea, that the defendant was eſtopped by his indenture from pleading ſuch a plea, becauſe it was averring a fact contrary to the indenture; though it might have been different if it had been by deed poll. But, ſuppoſing he is not eſtopped, there was no fact introduced into this plea to ſhew the date of the leaſe material; for that the material fact was, Whether there were any rent in arrear or not?—For the defendant it was inſiſted, in ſupport of the ſixth plea, that it appears on the record, that *John Bracebridge Ludford* was tenant for life, and that

Ludford v. Barber, Hil. Ter. 26 Geo. 3. B R. 1 *Ter. Rep.* 86.

the plaintiff was the reverſioner. That the declaration ſtated that *John Bracebridge Ludford* died on the 1ſt of *March*, 1776; and that the plaintiff, after he attained his age of 21 years, to wit, on the 1ſt of *February*, 1779, executed the leaſe; conſequently, that the leaſe was not executed by the plaintiff till two years after the death of the tenant for life: ſo that it appeared, on the face of the declaration, that the leaſe was not executed as it imports to be. But this was, originally, a leaſe by the tenant for life: and was ſuch a leaſe as he had no right to grant; for he could only grant a leaſe for his own life; and, the moment he died, the leaſe was at an end. PER CURIAM: There ought to have been a re-execution by the leſſee after the father's death. This leaſe is abſolutely void, and the plaintiff need not have given notice in ejectment againſt the defendant. The Court cannot go on the doctrine of eſtoppel in this caſe, becauſe it is admitted, by the plaintiff's own ſhewing, on theſe pleadings, that the plaintiff did not execute till two years after the death of the tenant for life. Here *A.* was tenant for life, and *B.* the reverſioner; *A.* only executed a leaſe, in which they were both named; therefore, on *A.*'s death, it was totally void. Then it muſt be contended for the plaintiff, that, if *B.* executed it any time afterwards, it ſhould bind the leſſee. But the reverſioner can never ſet up ſuch leaſe againſt the leſſee, for it is not his covenant.—Judgment for the defendant.

Right *et al.* Francis Baſſet, Eſq. *v.* Thomas *et al.* Mic. Ter. 4 Geo. 3. B.R 3 *Burr.* 1424. 1 *Black. Rep.* 465.

Leaſing powers.] A power to make leaſes for years is to be liberally conſtrued.—This was a caſe reſerved upon an ejectment. It turned upon the conſtruction of a power: AND THE QUESTION was, "Whether the *power was or was* "*not well executed?*" on the following caſe. *John Pendarves Baſſet*, being ſeiſed in fee, in conſideration of an intended marriage between him and Mrs. *Ann Prideaux*, conveyed to truſtees and their heirs, to the uſe of himſelf and his heirs till the marriage; then, of himſelf for life; remainder to the truſtees, to preſerve contingent remainders; and, after his own death, then remainder to ſecure a rent-charge to his intended wife for her life; remainder, to the firſt and other ſons of the marriage, in tail male; remainder, to ſuch uſes as he ſhould, by deed or will, appoint; remainder, for want of ſuch appointment, to the heirs of his body, in tail male; remainder to his brother *Francis Baſſet*, the leſſor of the plaintiff, for life; remainder to the firſt and other ſons of the ſaid *Francis Baſſet*, in tail male; remainder to himſelf, his heirs and aſſigns for ever: which ſeveral eſtates and limitations aforeſaid, are ſubject to a proviſo, "That it ſhould be "lawful for himſelf and *Francis Baſſet*, during their reſpective "lives, and the ſon and ſons of their reſpective bodies, and the "heirs male of ſuch ſon and ſons, and his own heirs male,

as

" as they ſhould be ſeverally and ſucceſſively in the poſſeſſion " of the freehold by virtue of the limitations aforeſaid; and " for the ſaid truſtees, and the ſurvivors and ſurvivor of them, " and the heirs of ſuch ſurvivor, during the minority of any " ſuch ſon or ſons, or iſſue male; at any time or times, by " any deed or deeds, to be ſigned and ſealed by him or " them reſpectively, in the preſence of two or more credible " witneſſes, to demiſe, leaſe, or grant, to any perſon or per- " ſons, either in poſſeſſion or reverſion, for one life, or for " two or three lives, or for any number of years determinable " on the death of any one, two, or three perſon or perſons to " be named in every ſuch leaſe, all or any part of the ſaid " premiſes which had been uſually ſo demiſed and letten; ſo " as there ſhould be no more than three lives in being at any " one time, of, or on, any one leaſe or demiſe ſo to be made " and granted; and ſo as upon every ſuch leaſe or demiſe ſo " to be made, there ſhould be reſerved ſo much or more " yearly rent as then was, or had been, given or received " for the ſame premiſes within 20 years then laſt paſt; or a " proportionable rent, where a greater or leſſer part of any " farms or tenements, either ſeparately or apart, or together " with any other part or parcel of the ſaid premiſes or other " lands, ſhould be demiſed or be payable quarterly or other- " wiſe; and to continue during the eſtate and term thereby " granted, and to be incident and go along with the reverſion " and remainder expectant on ſuch leaſes reſpectively, with " uſual covenants on the leſſee's part; and ſo as no ſuch " leaſe ſhould be diſpuniſhable of waſte; and ſo as in every " ſuch leaſe there ſhould be a condition of re-entry for non- " payment of rent, and for waſte; and ſo as every leſſee " ſhould execute a counterpart of ſuch leaſe. And it was, " by the ſaid indenture, declared and agreed, that all ſuch " leaſes, grants, and ſetts, as ſhould be made by virtue " thereof, ſhould be good, valid, and effectual, in the law, " to all intents and purpoſes; and that the reſpective leſſees, " their executors, &c. ſhould and might hold and enjoy the " ſeveral, &c. to them reſpectively demiſed, for the reſpec- " tive terms and eſtate for which ſuch leaſe ſhould be made." The marriage was ſolemnized in 1737; and the ſaid *John Pendarves Baſſet* died on the 19th of September, 1739, without making any appointment of the premiſes; leaving his wife *enceinte* with a ſon, who was born on the 22d of May, 1740, and was baptized *John Prideaux*, and became entitled to an eſtate tail in the premiſes, ſubject to the ſaid rent-charge to his mother, and ſuch other incumbrances as then affected the premiſes. By an order of the court of Chancery, *Chriſtopher Hawkins*, eſq. was appointed receiver; and was empowered to make contracts for leaſes for one, two, or three life or lives, or years determinable thereon, of all

ſuch

ſuch parts of the ſaid eſtates as had been uſually ſo granted, and to fill up and renew the lives in the ſaid leaſes, and to receive the fines payable thereon. In purſuance of which order, the ſaid Mr. *Hawkins* contracted with *Nicholas Treſidder*, for a leaſe of four fields, &c. parcel of the premiſes in queſtion; which, by the death of *Henry Pendarves*, were then fallen into poſſeſſion; for 99 years, if *Mary*, the wife of the ſaid *Nicholas Treſidder*, his ſon, and *Ann* his daughter, or either of them, ſhould ſo long live; in conſideration of a fine of 175l. to be paid as hereinafter mentioned, and the yearly rent of 13s. 4d. and 13s. 4d. for a heriot. Accordingly, by an indenture of leaſe, bearing date on the 24th of June, 1742, and made between the ſurviving truſtees in the ſaid ſettlement on the one part, and the ſaid *Nicholas Treſidder* on the other part, reciting the ſaid proviſo and power of leaſing in the ſaid ſettlement contained, and the appointment of Mr. *Hawkins* as above mentioned, and the ſaid contract made by him with the ſaid *Treſidder*, with the approbation of the maſter in chancery, the ſaid ſurviving truſtees, in purſuance of the ſaid power, and in conſideration of 87l. 10s. then paid to Mr. *Hawkins* by *Treſidder*, and of 87l. 10s. more, to be paid in ſix months, and of the rents and covenants thereinafter mentioned, and with the approbation of the ſaid maſter, demiſed, leaſed, and granted to the ſaid *Nicholas Treſidder*, his executors, adminiſtrators, and aſſigns, all thoſe four fields, &c.; to hold for 99 years, if *Mary*, the wife of the ſaid *N. T. Nicholas*, his ſon, and *Ann* his daughter, or any of them, ſhould ſo long live; yielding and paying, therefore, yearly, the rent of 13s. 4d. payable quarterly during the ſaid term, and 13s. 4d. in lieu of a heriot, or relief, at or after the ſeveral and reſpective deaths of the ſaid *Mary*, *Nicholas*, and *Ann*; and alſo repairing, &c. And in the ſaid indenture is contained a proviſo, that if the 87l. 10s. ſhould not be paid within the ſtipulated time; or if the yearly ſum of 13s. 4d. or any other the ſaid reſervations and agreements ſhould be behind and unpaid, and unperformed, in part or in all, one year after the ſame ought to be paid or performed; or if the ſaid *N. T.*, his executors, &c. ſhall do or ſuffer any waſte on the ſaid premiſes; then it ſhould be lawful to all and every perſon or perſons, who, for the time being, ſhall be entitled to the reverſion of the ſaid premiſes, to re-enter, and the ſame to have again, as in his and their former right and eſtate. And the ſaid *Nicholas Treſidder* executed a counterpart of the ſaid leaſe: and the laſt-mentioned 87l. 10s. was duly paid at the ſtipulated time. And *N. T.* and *Nicholas* his ſon, are ſtill living. On the 17th of May, 1756, the ſaid *John Prideaux Baſſet* died an infant under 17, inteſtate, without iſſue, and unmarried: whereupon the leſſor of the plaintiff, who is remainder-man under the limi-

tations

tations in the ſettlement, and alſo heir at law to his nephew, the ſaid *John Prideaux Baſſet*, and heir general to the ſaid *John Pendarves Baſſet*, claims the premiſes in queſtion, by virtue of the ſaid remainder to him limited as aforeſaid. Then the caſe ſtates, that there were contained in the deed of ſettlement, ſeveral tenements other than the Barton of Pendarves, which were enjoyed by the ſaid *John Pendarves Baſſet* and his anceſtors, at and before the ſaid 11th of April, 1737, by leaſing the ſame, from time to time, reſpectively, for terms of 99 years; each of ſuch terms being determinable reſpectively on the expiration of three lives: and that there were ſeveral other tenements in the ſaid deed of ſettlement likewiſe contained, which were, on the ſaid 11th day of *April*, and had been, before that time, holden of the ſaid *John Pendarves Baſſet*, and his anceſtors, to farm, by leaſes, at a rack-rent. Then there are ſtated ſeveral old leaſes of the Barton of Pendarves, &c. as far back as Queen *Elizabeth*'s time; and reciting others in *Henry* VIIIth's time; ſome for terms of years, and ſome for 99 years, determinable on three lives, at different rents; and that on the 15th of September, 1631, the fee-ſimple of the ſaid Barton of Pendarves was conveyed to *William Pendarves*; and, by him, afterwards (in 1738) to *Samuel Pendarves*; and, in 1738, on the death of *Thomas Pendarves*, came into the poſſeſſion of the ſaid *John Pendarves Baſſet*. And an indenture tripartite is ſtated, bearing date the 15th of December, 1638, whereby the ſaid *Samuel Pendarves*, in conſideration of natural love and fatherly affection to his ſecond ſon, *Thomas Pendarves*, and for his better advancement, livelihood, and maintenance, covenanted to ſtand ſeiſed to the uſe of the ſaid *Samuel*, for life; then, of the ſaid *Thomas Pendarves*, his executors, &c. for 99 years, if the ſaid *Thomas*, or any woman he ſhould marry, or any iſſue of his body ſhould ſo long live; paying yearly unto the heirs and aſſigns of the ſaid *Samuel*, the yearly rent of 4l. payable quarterly; with covenants on the part of *Thomas*, "to pay the rent, and repair the premiſes." It was ſtated, that the rent reſerved on the ſaid leaſe of the 24th of June, 1742, to *Nicholas Treſidder*, is more than a proportionable part of the rent reſerved for the whole Barton in the deed of the 15th December, 1638. The ſaid *Francis Baſſet* demiſed the premiſes to the plaintiff; under which demiſe, the plaintiff entered, and was poſſeſſed: and, being ſo poſſeſſed, the defendants entered, and ejected him. The queſtion was, "Whether the leaſe, bearing date the 24th of "June, 1742, and made to the ſaid *Nicholas Treſidder*, be a "good and effectual leaſe, by virtue of the power hereia-"before mentioned as part of the deed of ſettlement made the "12th of April, 1737? and thereupon, 'Whether the plain-"tiff ought to recover?'"—PER CURIAM: This is as plain a caſe as poſſibly can be, on the part of the defendant. Here

is an eſtate ſettled on a marriage, in ſtrict ſettlement; and a power reſerved to the guardians and truſtees for infants, "to "demiſe, leaſe, and grant, for one, two, or three lives, or "for any number of years determinable on three lives in "being, any part, &c. uſually ſo demiſed, and reſerving the "uſual rent." Now there is no doubt but theſe lands had been uſually leaſed for lives; and the uſual profit made by fines. But it is objected, "that the laſt leaſe was made by "covenant to ſtand ſeiſed, &c." A covenant "to ſtand "ſeiſed," entered into by the owner, is a leaſe. But it is ſaid, "that this is by way of proviſion for a younger "child." THE ANSWER is, that this is every day's experience; nothing is ſo common as the making theſe leaſes for the benefit of younger children. And it would be very inconvenient were it otherwiſe. For if the truſtees were obliged to let the lands at a rack-rent, it might be quite inconſiſtent with the nature of theſe eſtates. Powers are derived from equity; and ought, even at law, to be conſtrued equitably. And this is the caſe of an infant tenant in tail; who ſhall have all advantages of enjoying his eſtate. And theſe lands have been uſually ſo demiſed, even from the time of Queen *Elizabeth*.—JUDGMENT for the DEFENDANTS.

Goodtitle, leſſee of Charges, and Earl Ferrers, v. Funucan, Hil. Ter. 21 Geo. 3. B.R. 2 *Doug.* 564.

Where there is a power to grant leaſes in poſſeſſion, but not by way of reverſion or future intereſt, a leaſe *per verba de præſenti* is not contrary to the power, although the eſtate, at the time of granting the leaſe, was held by tenants at will, or from year to year, if, at the time, they receive directions from the grantor of the leaſe to pay their rent to the leſſee.

Alſo under a power to leaſe all manors, meſſuages, lands, &c. ſo as there be reſerved as much rent as is now paid for the ſame, ſuch parts of the eſtate enumerated in the power as have never been demiſed may be let.

The facts of this caſe were theſe: *Waſhington*, the laſt Earl *Ferrers*, was tenant for life, under a ſettlement made in 1741, in which there was the following power: "That it ſhall be "lawful for the tenants for life, reſpectively, from time to time, "and at all times during their reſpective natural lives, and when "they ſhall reſpectively come into, *and be in, the actual poſ-* "*ſeſſion of the aforeſaid manors and premiſes*, by virtue of the "limitations aforeſaid, by indentures, under their hands and "ſeals, to demiſe all or any of *the ſaid manors, meſſuages, lands,* "*tenements, and hereditaments*, hereinbefore mentioned, or "any part thereof, to any perſon or perſons whomſoever, "*in poſſeſſion, but not by way of reverſion or future intereſt*, for "the term of 21 years abſolute, or any leſſer abſolute term; "or for any term or number of years determinable upon one, "two, or three lives, ſo as, *upon every ſuch leaſe or leaſes,* "*reſpectively*, there be reſerved and made payable, during the "continuance of ſuch leaſe or leaſes, reſpectively, to be in- "cident to, and go along with, the immediate reverſion, or "remainder

" remainder of the premiſes ſo leaſed, *ſo much, or as great* " *yearly rents as, or more than now is, and are paid* and yielded, " or agreed to be paid and yielded, for the ſame, or propor- " tionably for any part thereof." All the lands comprized in the ſettlement that lay in the pariſh of *Sutton St. Anne's* (except about thirteen or fourteen acres, and two or three cottages), were part of a large common field. In 1774, an act of parliament paſſed for incloſing this common, and an allotment was made to Earl *Waſhington*, in lieu of his intereſt in the common. On the 15th of March, 1775, before the incloſure took place, his agent, by his lordſhip's authority, let the new allotted lands, by agreement in writing, to three perſons, *Palmer*, *Branley*, and *Jelley*, at the value ſet upon them by the commiſſioners under the act of parliament, to occupy till the 10th of March, 1776. On the 17th of Auguſt, 1775, Earl *Waſhington*, by indenture, reciting the power demiſed to the defendant, *Editha Maria Funucan*, for 99 years from Lady-day then laſt paſt, if ſhe ſhould ſo long live, at the yearly rent of 134l. (which was recited to be more than was paid for the demiſed premiſes, at the time of the ſettlement), *all the manors and fiſhery*, with the rights, &c. and the meſſuages, lands, &c. in *Sutton St. Anne's*, then in the occupation of *Palmer*, *Bramley*, aad *Jelley*, as under-tenants of the ſaid *Editha*, or in whoſe poſſeſſion ſoever the ſame then were, or had been. The defendant covenanted to pay half the land-tax (amounting to about 7l. 10s.) and the earl covenanted, for himſelf, *his heirs*, *executors*, *adminiſtrators*, *and aſſigns*, to free the defendant from tithes, and from levies and payments for the church. The rights to ſhoot and fiſh were reſerved to the leſſor, and thoſe in remainder. By the enclofure act, the lands were diſcharged from tithes, and an allotment in lieu thereof made to the rector. The manors, or manerial rights, had never been let before. The fiſhery had been let before, but was not at the time of the ſettlement. Since that time, it had been again let at 15s. The 134l. payable by the defendant, was about 30l. more than the demiſed premiſes had ever produced before. That part not comprehended in the agreement above mentioned, with *Palmer*, *Bramley*, and *Jelley*, was, at the time of the leaſe, in the occupation of tenants at will. At the time of making the leaſe, the Earl directed the occupiers to pay their rent to the defendant; and they, accordingly, did pay her all the rent which accrued afterwards. After the death of Earl *Waſhington*, an ejectment was brought againſt Mrs. *Funucan*, to recover the demiſed premiſes, and a verdict found for the plaintiff. But a new trial having been granted, the cauſe came on, before EYRE, *Baron*, at the laſt lent aſſizes for the county of Nottingham, who left it to the jury, Whether the attornment of the occupiers to the defendant, in conſequence of the directions given them at the time of making the indenture,

indenture, did not amount to a ſurrender by them; and whether they were not to be conſidered as having become, thereby, parties to the leaſe; and as having put the defendant in poſſeſſion? and the jury were of opinion with the defendant, and found a general verdict for her. In Eaſter term, 20 *George* III. a rule for a new trial was again granted; and, in that term, the caſe was argued by ſeveral counſel on a ſide. In laſt Michaelmas term it was again argued: AND THE COURT took time to conſider. Afterwards Ld MANSFIELD, CH. J. delivered the opinion of the Court, to the following effect: There are three objections made to the validity of this leaſe. 1. That it was a leaſe in reverſion: 2. That the manors and fiſhery are not within the power, becauſe they paid no rent at the time of the ſettlement. 3. That the covenants are not ſo beneficial to the landlord as thoſe in the ancient leaſes.—1. On the firſt head, it was contended, as to the old incloſed lands, that there is no ſuch thing now as a tenant at will; that Earl *Ferrers* could not have brought an ejectment for thoſe lands, without giving ſix months notice; and that whoever cannot maintain an action of ejectment, is not in poſſeſſion; and, as to the new allotted lands, that there were ſeveral months of the term, under the agreement, ſtill to run. But *three* anſwers were given to this objection, every one of which, if valid, is deciſive. The *firſt* is, that the tenants agreed to this leaſe, and ſurrendered their poſſeſſion, before the execution of it, in order to make it valid. This was expreſsly left, by Mr. *Baron* EYRE, to the jury; who found, that the defendant was in poſſeſſion at the time of the execution. The *ſecond* anſwer is, that if the jury had not found the defendant to have been in poſſeſſion, ſtill this would be good as a concurrent leaſe. For this *Read* v. *Naſh* (1) was cited, where, under a proviſo to grant leaſes *only for* 21 *years*, a leaſe had been granted in 4 *Phlip* and *Mary* for 21 years, and afterwards, 18 *Eliz.* a year before the expiration of the leaſe, another was granted, of the ſame premiſes, for 21 years, to begin *preſently*, and it was held, that the ſecond leaſe was good. The reaſon given is a ſtrong one, viz. that the inheritance was not charged, in the whole, with more than twenty-one years (2). No authority was cited againſt this caſe, nor any anſwer given to the reaſoning in it. The words of 13 *Eliz.* c. 10. as ſtrongly require eccleſiaſtical leaſes to be in poſſeſſion, and not in reverſion, as thoſe in this, or any of the common powers to tenant for life; yet, in the caſe of *Fox* v. *Collyer* (3), all the judges held, that

(1) B. R. T. 31 *El.* 1 *Leon.* 147. (2) *Leon.* 148.

(3) *Com. Scacc. T.* 25 *El.* 1 *Anderſ.* 65. The reporter ſays, "*it had long depended in judgment.*" and the leaſe muſt have been granted ſome time between 13 and 18 *Eliz.*

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an immediate leaſe for 21 years, of premiſes, on which there was a ſubſiſting leaſe for four years, was good. The 18th of *Eliz.* c. 11. reſtrained the right to make ſuch concurrent leaſes, to caſes where the old leaſe had not more than three years to run. The *third* anſwer is, that, in reſpect of the power, all the ſubſiſting leaſes were leaſes at will; there was no out-ſtanding leaſe, as againſt the remainder-man; he would not have been bound to give the tenants notice to quit, but might have entered upon them immediately; for, except in the caſe of leaſes under the power (and theſe were not, in many reſpects, according to it), the poſſeſſion would devolve upon him the inſtant of the death of the tenant for life. Therefore, we are all of opinion againſt the firſt objection. 2. As to the ſecond point; powers are now a common modification of property in land; and, as ſuch, are to be carried into effect according to the intention of thoſe who create them. There is no ground, or reaſon, of equity or policy, between the tenant for life, and the remainder-man, for leaning on either ſide. It is apparent, from the ſtatutes of 32 *Hen.* VIII. and 13 *Eliz.* c. 10. that the legiſlature *meant* to confine the authority to let, to lands which had been *formerly* letten, and were capable of producing profit. This is the true conſtruction, if not from expreſs words uſed, yet by neceſſary implication. In the caſe of *Bagot* v. *Oughton*, *Fortes.* 332. 8 *Mod.* 249. which has been much relied on, the nature of the thing ſhewed, that the power could not be meant to extend to letting the ancient manor-houſe at all; much leſs to letting it without reſerving any rent. In *a family ſettlement* of an eſtate, conſiſting of ſome ground, always occupied together with the ſeat, and of lands let to tenants upon rents reſerved, the qualification annexed to the power of leaſing, that the ancient rent muſt be reſerved, manifeſtly *excludes* the manſion-houſe, and lands about it, never let. No man could intend to authorize a tenant for life to deprive the repreſentative of the family of the uſe of the manſion-houſe. The words, in ſuch a caſe, ſhew, that the power is meant to extend only to what has been uſually let. By that means the heir enjoys all the premiſes in the ſettlement, juſt as they were held and enjoyed by his anceſtor, the tenant for life: he has the occupation of what was always occupied, and the rent of what was always let. We all, therefore, agree, as to the rectitude of the deciſion in *Bagot* v. *Oughton.* The nature of the thing ſpoke the intent, as forcibly as the moſt direct words could have done. It was demonſtration. But, where no intent appears, where nothing ariſes from the nature of the thing, the rule laid down by Lord HOLT, in the caſe of *Winter* v. *Loveday*, as reported in *Carthew*, applies, viz. "that where a qualification

tion is annexed to a power of leaſing, which, if obſerved, goes in deſtruction of the power, the law will diſpenſe with ſuch qualification (1)." So, in *Cumberford*'s caſe, 2 *Rol. Abr.* 262. pl. 15. the reaſoning was, that, the power being to let *all*, it would go in deſtruction of the power to reſtrain the tenant for life from letting part, becauſe it had not been let before; and it was there obſerved, that the caſe did not reſemble leaſes under 32 *Hen.* VIII. and 13 *Eliz.* *Walker* v. *Wakeman*, 1 *Vent.* 294. 2 *Lev.* 150. is another caſe equally ſtrong. Thus ſtand the authorities. Now, to apply them to the preſent caſe. The power is expreſs to demiſe the manors and fiſheries. They are particularly mentioned in the ſettlement, and the power goes to the whole. They pay, under this leaſe, as great a yearly rent, as at the time of the ſettlement, for they paid nothing then. The *words*, therefore, are complied with, and this objection could only ſtand upon *intent*. But, we think, no ſuch intent appears. The manors are nominal—of no value—no object of yearly income. The fiſhery only worth 15s. a year. They are convenient to the leſſee, living on the land, and of no uſe to the remainder-man. The right of ſhooting and fiſhing is reſerved to him. For my own part, I think the intent was, to give leave to demiſe all, reſerving as much rent, in the whole, as had been paid before; and, in fact, 30l. more has been reſerved. 3. The third objection, as to the covenants, was not much relied on, and does not require much conſideration. The power makes no mention of covenants. The ground, therefore, muſt be, that the preſent covenants are a fraud on the power, by leſſening the value of the reſervation; but, on conſidering them fully, it appears, that what is thrown on the landlord, is compenſated by what is paid by the tenant. She is to pay half the land-tax. As to the church-dues, the covenant ſeems to be collateral, and not to go with the land, nor to bind the remainder-man; reſembling a covenant for quiet enjoyment. But, if it did go with the land, there is no pretence of fraud on the power. The 30l. is *bonâ fide* reſerved as an increaſed rent. What is ſtipulated, with regard to tithes, is of no conſequence, ſince none are payable. Upon the whole, we are all of opinion, that there is no ground for a new trial. The rule diſcharged.

Pugh *et ux.* v. Duke of Leeds, Mic. Ter. 18 Geo. 3. B.R. *Cowp.* 714.

A leaſe to hold *from the date*, or *from the day of the date*, may include the day of the date, and ſo be conſidered as a leaſe in poſſeſſion, and not to commence in *future*.—This

(1) *Carth.* 427. 429. *Mod.* 147. 151.

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was an iſſue, to try whether a leaſe made by one *Godolphin Edwards* to *Elizabeth Pugh*, the plaintiff's wife, and only daughter of the ſaid *Godolphin Edwards*, by virtue, and in purſuance of, a power reſerved to him under his marriage ſettlement, was a good and valid leaſe: the power reſerved was, *to leaſe the premiſes for any term or terms of years, not exceeding twenty-one years in poſſeſſion, and not in reverſion, remainder, or expectancy, reſerving the beſt improved rent*, &c. The *habendem* of the leaſe made was in theſe words: "to hold to the ſaid *Elizabeth*, her executors, &c. *from the day of the date* of the ſaid indenture of leaſe." The facts upon which a verdict was found for the plaintiff, ſubject to the opinion of the Court, were as follows: "*Godolphin Edwards* "being ſeiſed, and in poſſeſſion, executed the leaſe, and a "counterpart thereof was executed by the leſſee: the rent "of 57l. reſerved by the leaſe, was the moſt and beſt im- "proved yearly rent that could be reaſonably had for the "premiſes; and the ſaid leaſe was, in every other reſpect, "made agreeably to the power reſerved to the ſaid *Godolphin* "*Edwards*, excepting in the commencement of the term in "the ſaid leaſe mentioned." UPON WHICH the queſtion ſubmitted to the Court was, Whether the ſaid leaſe, being made to commence *from the day of the date* thereof, the ſame was a leaſe in poſſeſſion duly executed, according to the terms of the abovementioned power? And it turned upon this, Whether to commence from the day of the date in this deed, was to be conſtrued incluſive or excluſive of the day of its date? Lord MANSFIELD, Ch. J. delivered the opinion of the Court: I WILL FIRST conſider it as ſuppoſing this a new queſtion, and that there never had exiſted any litigation concerning it. In that light, the whole will turn upon a conſtruction of the particle *from*: the power requires no preciſe form to deſcribe the commencement of the leaſe; the law requires no *technical* form; all that is required is only enough to ſhew that it is a leaſe in poſſeſſion, and not in reverſion; and, therefore, if the words uſed are ſufficient for that purpoſe, the leaſe will be a good and valid leaſe.—In grammatical ſtrictneſs, and in the niceſt propriety of ſpeech that the Engliſh language admits of, the ſenſe of the word *from* muſt always depend upon the context and ſubject-matter, whether it ſhall be conſtrued incluſive or excluſive of the *terminus a quo*. If the parties in the preſent caſe had added the word *incluſive*, or *excluſive*, the matter would have been very clear. If they had ſaid, from the day of the date *incluſive*, the term would have commenced immediately; if they had ſaid, from the day of the date *excluſive*, it would have commenced the next day. But let us ſee whether the context and ſubject-matter in this caſe do not ſhew, that the conſtruction here ſhould be *incluſive*, as demonſtrably as if

the word *incluſive* had been added. This is a leaſe made under a power; the leaſe refers to the power; and the power requires that the leaſe ſhould be a leaſe in poſſeſſion: the validity of it depends upon its being in poſſeſſion, and it is made as a proviſion for an only daughter; he muſt, therefore, intend to make a good leaſe. The expreſſion, then, compared with the circumſtances, is as ſtrong, in reſpect of what his intention was, as if he had ſaid, in expreſs words, "I mean it as a leaſe in poſſeſſion;" "I mean it ſhall be ſo conſtrued:" if it is ſo conſtrued, the word "*from*" muſt be *incluſive*. This conſtruction is to ſupport the deeds of the parties, to give effect to their intention, and to protect property: the other is a ſubtlety to overturn property, and to defeat the intention of parties, without anſwering any one good end or purpoſe whatſoever; and though courts of juſtice are ſometimes obliged to decide againſt the convenience, and even againſt the ſeeming right of private perſons, yet it is always in favour of ſome greater public benefit; but here to conſtrue "from the day of the date" to be excluſive, can only be to defeat the intention of the parties. If ſuch a conſtruction were right, it would hold good, ſuppoſing the leſſee had laid out ever ſo much money upon the eſtate, and all would be alike defeated, by a mere blunder of the attorney, or his clerk.—SECONDLY, I will conſider this queſtion upon the authorities, all of which ſhew the great uncertainty of the meaning, and the impoſſibility of putting an abſolute ſenſe to hold good in all caſes. The firſt caſe, in point of time, was in Mic. 4 *El. Dyer*, 218, b. *Moore*, 40; this was a queſtion that aroſe upon the ſtatute of inrolments, 27 *Hen.* 8. c. 16. which ſays, "that the inrolment ſhall be made within ſix months *next after* the date of the deed." The indenture in queſtion bore date the 9th of October, 1557; it was inrolled in Chancery on the 21ſt of March, 1558, which was the laſt day of the ſix months, reckoning twenty-eight days to each month, and making the day of the date *excluſive*. The Court held, that the indenture was well inrolled, and that the words, "*next after the date of the deed*," were excluſive of the day of the date. This deciſion was in favour and in ſupport of the deed, otherwiſe it would have been void; and yet it has been determined, that in a note of hand, payable ten days after ſight, the day of the ſight is incluſive (*Belloſis* v. *Heſter*, 1 Ld *Raym.* 281. 2 *Lut.* 1589), becauſe of the ſubject-matter, that there ſhould be no further time to make the demand; and yet *after the day*, and *after ſight*, is preciſely the ſame in language.—The next caſe is *Clayton*'s caſe, 5 *Co.* 1. Mic. 27 *El.*; the point in queſtion was the meaning of the words, *from henceforth*, which were accounted from the day of the delivery, and as much as to ſay *from* the *making*: but the Court held, that from the making was incluſive, and from the day of the making was

excluſive,

xluſive.—The next is Tr. 39 *Eliz.* 5 *Co.* 90. *Barwick*'s caſe, which was a demiſe of a freehold leaſe by letters patent, *habendum a die confectionis literarum patentium:* the day of the date was held to be excluſive, and the letters patent therefore void. In *Mic.* 4 *Jac. Cro. Jac.* 135. *Oſborn* v. *Ryder*, "from the date" was held to be incluſive, and different from the time or day of the date, which is excluſive. In Trinity term, 8 *Jac. Cro. Jac.* 258. *Llewellyn* v. *Williams*, it was held, "that from the date," and "from the day of the date," meant both exactly the ſame thing, and both excluſive of the day. The next caſe, in order of time, is Tr. 9 *Jac.* 1. 1 *Bulſ.* 177. the very year afterwards; and there it is ſaid by *Fleming*, that *from the date includes the day*, and from the day of the date *excludes it.* Now thus the caſes ſtand down to the 14th of *James*; they are *yes* and *no*, and a medium between them; but in Tr. 14 *Jac.* 1 *Rol. Rep.* 387. 3 *Bulſ.* 204. *Coke*, Chief Juſtice, and the whole Court, in the caſe of *Bacon* v. *Waller*, held agreeably to *Llewellyn*'s caſe, Tr. 8 *Jac.* that *from the date*, and *from the day of the date*, meant both exactly the ſame thing, and both were excluſive.—Thus it ſtood then for ſettled law, by theſe two ſolemnly adjudged caſes, that both meant exactly the ſame thing. So it ſtood, likewiſe, at the time of the publication of *Coke*'s Commentary on *Littleton*, which was about ten years afterwards; and ſo clear was Lord *Coke* in his opinion, that the point was ſettled by thoſe two judgments, that he adopts the judgment in poſitive words, without reſtriction or qualification; and in *Co. Lit.* 46. b. he lays it down as text law, that both mean the ſame thing, and that both are excluſive. So it ſeems to have ſtood down to Trinity, 24 *Car.* 1; at that time mankind began to revolt at ſuch a doctrine: there, in the caſe of *Corniſh* v. *Cawſey*, *Aleyn*, 77. *Stile*, 118. in an action of debt againſt an executrix, the plaintiff declared on a leaſe, "from the day of the date," for ſeven years. The leaſe was in theſe words: "*from the day of the date*, for the term of ſeven years, from *henceforth*, next, and immediately following," with a great many other words. It was contended, that though *from the day of the date* was excluſive, yet the words, *from henceforth*, &c. being added, made it incluſive: and this was objected as a variance between the declaration and the deed. The Court left it to the jury; the jury threw it back upon the Court, and brought in a ſpecial verdict, ſtating the leaſe *verbatim:* and then the Court held that, according to the authorities, *from the day of the date* was excluſive, and, therefore, the plaintiff had miſtaken his leaſe; but, at the ſame time, they ſeemed ſhocked at its being ſo; for, ſay the Court, "if there was a queſtion upon letters patent, like *Barwick*'s caſe, to make the patent good, the jury might find they were made the laſt inſtant of the day." This they obſerved, to

get rid of the force of a wrong determination. Juſt ſo Sir *Eardley Wilmot* once did, in a caſe that came before him: he left it to the jury to find that livery of ſeiſin was made the laſt moment of the day.—The authorities, therefore, of *Co. Lit.* 46. b. *Bacon* v. *Waller*, 3 *Bulſ.* 204. 1 *Rol. Rep.* 387. and *Llewellyn* v. *Williams*, *Cro. Jac.* 258. were, at that time, grumbled at, as being againſt the ſenſe of mankind, againſt convenience, and againſt juſtice, and founded upon ſubtleties that even the ſchoolmen would have been aſhamed of. The doctrine they eſtabliſhed was, that both meant the ſame thing, and both were excluſive. With reſpect to their both meaning the ſame thing, unqueſtionably they are right; for what is "the date?" The date is a memorandum of the day when the deed was delivered: in Latin it is *datum*, and *datum tali die* is *delivered on ſuch a day*. Then, in point of law, there is no faction of a day; it is an indiviſible point: What is the *day of the date?* It is *the day the deed is delivered.* The date, therefore, being alſo defined to be the day the deed is delivered, *the date* and *the day of the date* muſt be the ſame thing: the *day* of the date is only a ſuperfluous expreſſion. It is impoſſible, in common ſenſe, to diſtinguiſh the one from the other; *date* does not mean the hour or the minute, but the day of delivery, and in law there is no fraction of a day.—As to the other point, that *from* ſhall, in all caſes, be conſtrued to be excluſive, it is contrary to the common ſignification of language: and for courts of juſtice to determine words againſt the intention of parties, and againſt the generally-received ſenſe and acceptation of the words themſelves, is laying a ſnare to entrap mankind. Uſage decides upon the force of language, and, with reſpect to this word, has imprinted on the underſtandings of men in general, in their tranſactions in life, the ſenſe that I now put upon it, whilſt courts of law underſtand it in a totally different ſenſe. —Thus it ſtood down to the ſixth year of *W.* & *M.*; a caſe then happened of conſiderable property, and not merely a queſtion of pleading. *Hatter* v. *Aſh*, 3 *Lev.* 438. 1 Ld *Raym.* 84. It aroſe upon a prebendal leaſe, to commence *from the date* of the indenture: the ſucceſſor wiſhed to avoid it, on the ground of its being a leaſe to commence *in futuro.* The caſe was ſeveral times argued; againſt the leaſe, upon the weight of authorities; and in favour of it, upon the ground of the intention of the parties, *ut res magis valeat quam pereat.* After ſeveral arguments, *Treby*, Ch. J. at firſt, from the ſtrength of reaſon, was for ſupporting the leaſe; and then, ſtaggered by the weight of authorities, changed his opinion; but when the judgment was given he abſented himſelf. *Powell*, jun. at firſt followed the authorities, but afterwards came over to reaſon; and, at laſt, it was agreed by *Neville* and the two *Powells*, that *from the date* ought to be conſtrued incluſive, and, therefore, that the leaſe was good.—Now, though

though there was ſomething ſaid in the argument, as to the diſtinction between the date and the day of the date, the authorities ſaid they were the ſame; and yet this determination went to the matter of right in the queſtion, and ſupported the leaſe.—The next caſe after this was Trinity, 11 *W.* 3. 1 Ld *Raym.* 480. It was upon a policy of inſurance, dated the 3d of September, 1697, upon the life of Sir *Robert Howard* for a year, *from the day of the date* of the policy. Sir *Robert* died upon the 3d of September, 1698, at one o'clock in the morning; and *Holt*, Ch. J. held, that from the day of the date was excluſive; but he held that the inſurer was liable, becauſe in law there is no fraction of a day, and Sir *Robert* died at one o'clock in the morning, whereas, to vacate the policy, he ſhould have lived till twelve o'clock at night. In that caſe there was no argument to be drawn from the ſubject-matter, for, in the policy, it was totally indifferent when it ſhould begin; the argument rather was, that it ſhould begin the day after: in the next place, it would have included the inſurance if it had begun that day. Lord Ch. J. *Holt* ſeems to have conſidered it as a favourable caſe for the inſured, otherwiſe he would not have had recourſe to the old maxim of law, that there is no fraction of a day; he cited a caſe, 1 *Salk.* 44, *anon.* where it was held, that if a man lived to the eve of the anniverſary of his birth, no longer even than till one o'clock in the morning of that day, and made his will, by having touched the verge of the day, it was the ſame as if he had completed the whole day, and the will was declared a good one: that exiſted as law; but *Holt*, in his application of it, turned it the other way. I look upon this caſe as of very little authority, there being no argument from the ſubject-matter. Another caſe happened ſince, in Hil. 4 *Ann. Seignorett* v. *Noguire*, 2 Ld *Raym.* 1241. In this caſe, upon a point in pleading, the whole Court held that, to aver that a contract was to commence *with the day of the date*, was the ſame thing as to aver that it commenced *from the day of the date*. *Holt*, Ch. J. ſaid, that from the date was *incluſive*, and ſo was the ſame as *with the date*, but that from the day of the date was *excluſive*: but *Powell* ſaid, that "from the date," and "from the day of the date," had been adjudged to be the ſame in the Common Pleas. That caſe in the Common Pleas is not to be found: it could not be the caſe of *Hatter* v. *Aſh*. But all the Court determined, that "from the day of the date" was the ſame as "with the day of the date," and incluſive. If "from the date," therefore, is incluſive, it muſt be the ſame as "from the day of the date."—There is alſo a caſe furniſhed from the notes of Mr. Juſtice *Aſton*, *Thompſon* v. *Vanbeek*, before Ld *Hardwicke*, Mic. 1736; and the rule laid down by Lord *Hardwicke* in that caſe ſhews,

that he went upon the ſame principle, and reaſoned juſt as I do now, that the conſtruction muſt always depend upon the ſubject-matter. That caſe was never determined, but as it ſtood was this: it was an action on the ſtatute of uſury; the declaration ſaid, "giving day of payment *from* the 26th." Upon the evidence it appeared, that the bond was given on the 27th. The queſtion was, Whether, as the declaration ſtated, "giving day of payment *from* the 26th," this was a variance? That depended upon whether the word *from* ſhould be conſtrued *incluſive* of the 26th, or *excluſive*. What Lord *Hardwicke* ſaid was this: The computation is to be made from the time of the act done; and, though there are a variety of conſtructions of the word *from*, yet it depends entirely upon the nature of the thing; and that it ſhould ſo depend is the right rule. The conſideration for the intereſt paid is giving day of payment: I think it includes the day, and my reaſon is, that it would be a ſtrange conſtruction to ſay, that the day of payment ſhall be antecedent to the time of advancing the money; ſo, *ut res magis valeat quam pereat*, it is incluſive; but the caſe was never decided.—Thus ſtood all the authorities down to the year 1743; there then happened a caſe of great litigation in the Exchequer, which aroſe thus: Lord *Pembroke* had got a leaſe from the crown, of a ſpot of ground in privy garden, and had built a houſe upon it at a great expence; the Counteſs of *Portland* had alſo a leaſe of an adjoining ſpot, and had built her houſe next to Lord *Pembroke*'s. There was another houſe belonging to the Ducheſs of *Portland* adjoinining Lady *Portland*'s; all three held under the crown. Between the three houſes and the river Thames there was a terrace, which had been part of the queen's garden: neither of them thought of applying for the terrace, and it would have been thought invidious to have done ſo: it was to be in common.—Upon the circumſtance of this terrace, Lord *Pembroke* laid out a conſiderable ſum of money upon his houſe: at the expiration, however, of her leaſe, the Counteſs of *Portland* applied to renew, and a new leaſe of fifty years was granted, in which, without notice to Lord *Pembroke*, ſhe got the terrace inſerted and added. When Lord *Pembroke* heard of it he was much offended, but ſtill more ſo at the uſe that was made of it, for the Counteſs planted trees, which, if they had grown up, would have intercepted Lord *Pembroke*'s view. Lord *Pembroke* wanted to avoid this leaſe, not to take away Lady *Portland*'s houſe, but to get back the terrace, and leave it in the ſtate it was before. Application was accordingly made to the officers of the crown about it, and at laſt the attorney-general was directed to file an information for the terrace; and an information was accordingly filed in the Exchequer. A variety of objections were made to different flaws ſuppoſed

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in the leaſe; but the principal objection was founded upon the civil-liſt act, 1 *Ann.* ſtat. 1. c. 7. which directs, "that all leaſes to be granted of any of the crown lands ſhall be void, unleſs made to commence *from the date, or making*;" this leaſe was made to commence from the day of the date, or making. Upon this it was argued for the crown, "that the date and the day of the making were incluſive, and that the act of parliament had expreſsly declared the leaſe ſhould be in thoſe terms; but that from the day of the date was *excluſive*, and, therefore, the leaſe was void for the variance." On the part of the Counteſs it was contended, that "from the date," and "from the day of the date," were both the ſame. Upon the argument all the caſes were cited that have been now cited, except the two I have mentioned. Sir *Thomas Parker* and Mr. Baron *Reynolds* were of opinion with the objection, that it was a void leaſe, becauſe it commenced *in futuro*. The two other barons were of a different opinion upon this point; but, upon another point, they were of opinion the leaſe was void: Sir *Thomas Parker* and Mr. Baron *Reynolds* to the contrary: ſo that, for different reaſons, they were all of opinion the leaſe was void. Upon a caſe, *Doe* ex dim. *Bayntun* v. *Watton* (1), this caſe between Lord

(1) *Doe* ex dim. *Bayntun* v. *Watton*, et al. Mic. Ter. 15 *Geo.* 3. B.R. *Cowp.* 189.—On the trial of this ejectment there was a verdict for the plaintiff, ſubject to the opinion of the Court on the following caſe: "*Stucley Bayntun* was tenant for life under the will of *Jane Bayntun*; "and the will contained a clauſe, giving to *Stucley Bayntun* power to "grant leaſes for the term of twenty-one years, or under, or for any "number or term of years, determinable upon one, two, or three lives, "*in poſſeſſion*, and not *in reverſion*." *Stucley Bayntun*, on the 21ſt of January, 1772, granted a leaſe of the premiſes in queſtion to *Anne Surman*, to hold unto the ſaid *Anne Surman*, her executors, adminiſtrators, and aſſigns, FROM THE DAY OF THE DATE THEREOF, for and during, &c.—The plaintiff objected, that this leaſe, being made to commence *from the day of the date*, was a leaſe in reverſion, and not in poſſeſſion, and, therefore, not purſuant to the power.—On the behalf of the defendant, the caſes cited in the above caſe of *Pugh* v. *The Duke of Leeds*, were mentioned, and likewiſe *Freeman* ex dim. *Vernon* v. *Weſt*, 2 *Wils.* 165. and p. 77, *infra*. And *Aſhhurſt*, J. obſerved that, in that caſe, Mr. Juſtice *Wilmot* left it to the jury to ſay, whether they would not preſume that livery of ſeizin was made ſubſequent to the leaſe.—The counſel for the plaintiff contended, that the diſtinction which univerſally prevails through all the caſes is, that a leaſe, to commence *from the date*, includes the day, but a leaſe, to commence *from the day of the date*, as in the preſent caſe, excludes the day of the leaſe; and the caſe of the Counteſs of *Portland* was cited, as in point. It was alſo obſerved, that the caſe cited from *Wilſon* muſt be a miſtake. Ld MANSFIELD, Ch. J.—*I* think it muſt be ſo, and the other authorities are, I am afraid, too ſtrong to get over; at the ſame time I am ſorry that there ever exiſted a determination which avoided a fair leaſe, by conſtruing from the day of the date to exclude the day of the date, becauſe it may be taken either way.

Lord *Pembroke* and the Counteſs of *Portland* was mentioned: upon memory, as the judgment appeared to me in ſo unfavourable a light, I took it for granted, that the Court had been, as it were, compelled by the weight and force of authorities: but now, after having determined the caſe of *Doe* v. *Watton*, as I then did (out of a great veneration for Sir *Thomas Parker*, and becauſe I did not care to ſet up an opinion of my own mind againſt a ſolemn judgment), I change my opinion; my reaſons are as follows: I peruſed a very elaborate report of the Counteſs of *Portland*'s caſe, *intended, by Sir* Thomas Parker, *to have been inſerted in his book of reports*; there I ſaw how the authorities ſtood, how the reaſoning ſtood, and I likewiſe found another thing mentioned in that caſe; it is this, the parties concerned had ſearched all the leaſes, from the time of the civil-liſt act, down to the moment of that upon which the queſtion was then in agitation; and they were nearly half the one way, and half the other: eighty were granted "from the date, or making," and above ſeventy "from the day of the date, or making:" all theſe leaſes had paſſed the great ſeal, and likewiſe the ſeal of the Exchequer. The argument drawn from this circumſtance was, that uſage ſhould get the better, and prevail over the act of parliament, which was, in fact, an admiſſion at the ſame time, by implication, that "from the day of the date" was contrary to the act. It ſtruck me in a different light, which is, that the queſtion turned upon the conſtruction of the Engliſh words, and what ſenſe they bore: if I was right, nothing can be ſo ſtrong, as that all the officers of the crown, who had been concerned in making theſe leaſes, looked upon the words as ſynonimous, and ſuffered them to paſs and repaſs unnoticed. It is demonſtration, that by uſing both indifferently they underſtood them to be both the ſame thing. I mentioned this to Sir *Thomas Parker*, and found my opinion ſupported by Sir *Eardley Wilmot*. Sir *Thomas Parker* gave ſo far way to it, that he had doubts upon the determination; *he therefore ſuppreſſed the report of The Attorney-General* v. *The Counteſs of Portland*; and I would not have produced it upon this occaſion, but that he

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It would have been a very right principle of law to have ſaid, if the one conſtruction will render the leaſe good, and the other will make it void, the conſtruction which makes the leaſe good ſhall prevail, becauſe it muſt manifeſtly have been the intention of all parties that the leaſe ſhould be a valid and effectual leaſe. I applaud Lord Chief Juſtice *Wilmot*, for leaving it to the jury to preſume livery of ſeizin the laſt moment of the day; and if this caſe could be determined that way, I certainly ſhould wiſh for it, but it cannot. ASTON, J.—I think it a very hard caſe, but the authorities are too many to be got over. The caſe in *Wilſon* muſt be a miſtake. *Willes*, J. and *Aſhhurſt*, J. concurred. —Judgment for the leſſor of the plaintiff.

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has given me leave to mention his name, as approving of the preſent determination: this relieves me from the difficulty I ſhould have had in differing from his authority. To CONCLUDE:—*the ground of the opinion and judgment which I now deliver is, that "from" may, in the vulgar uſe, and even in the ſtrict propriety of language, mean either incluſive or excluſive; that the parties neceſſarily underſtood and uſed it in that ſenſe, which made their deed effectual: that courts of juſtice are to conſtrue the words, ſo as to effectuate their deeds, and not to deſtroy them, more eſpecially where the words themſelves abſtractedly may admit of either meaning.*—If there was nothing more in the queſtion, than that all the law officers concerned had, in the abovementioned caſes, conſidered the two expreſſions as ſynonimous, that would be ſufficient to guide my opinion.—Let there be judgment for the plaintiff.

Doe *ex dim.* Pulteney *v.* Lady Cavan, Ea. Ter. 34 Geo. 3. B R. 5 *Ter. Rep.* 567.

But if the leaſe of a tenant for life, who has power of leaſing under certain conditions, varies from them in the intereſt demiſed, or the rent reſerved, it cannot be ſupported againſt the remainder-man.—On the trial of this ejectment a ſpecial verdict was found, in ſubſtance, as follows: in April, 1685, Sir *Wm. Pulteney*, being ſeiſed in fee of the premiſes in queſtion, deviſed to his wife for life; remainder to his ſon, *William Pulteney*, for life; remainder to his grandſon, *William. Pulteney*, ſon of his ſaid ſon, *William Pulteney* (afterwards Earl of *Bath*), for life; remainder to truſtees to preſerve contingent remainders; remainder to the firſt and other ſons of his grandſon, *William*, ſucceſſively in tail male; remainder to the ſecond and other ſons of the deviſor's ſaid ſon, *William*, ſucceſſively in tail male; remainder to the deviſor's ſon, *John*, for life; remainder to the deviſor's grandſon, *Daniel*, for life; remainder to truſtees, &c. remainder to *Daniel*'s firſt and other ſons ſucceſſively in tail male; remainder to the deviſor's grandſon, *Henry*, for life; remainder to truſtees to ſupport contingent remainders, &c. with ſeveral remainders over, long ſince ſpent; remainder to the deviſor and the heirs of his body; remainder to the deviſor's ſons, *William*, *John*, *Charles*, and *Thomas*, ſucceſſively in tail general, remainder to *Henry Guy* in fee. The deviſor alſo gave a power to his ſon *William*, or to any other perſon who ſhould become ſeiſed of the freehold under the limitations in the will, to leaſe all or any part of the premiſes "*for any number of years, not exceeding forty years, in poſſeſſion, and not in reverſion, ſo as upon ſuch leaſe there ſhould be a yearly reſerved rent, of three parts in four parts, to be divided according to the full improved value, &c. and ſo that ſuch leaſe and leaſes were not diſpuniſhable of waſte.*" It then ſtated, that the deviſor died in September, 1691, and that his ſon *William* became ſeiſed under the will; and that, during his life, in February, 1710, *H. Guy* deviſed the reverſion in fee of the premiſes in queſtion to *Wm. Pulteney*, the grandſon, for life, with divers remainders

remainders over. That *Wm. Pulteney*, the ſon, died in 1715, leaving only two ſons, *William Pulteney* (the grandſon of Sir *William*, and afterwards Earl of *Bath*) and *Harry Pulteney*, afterwards General *Pulteney*; and that *William*, Earl of *Bath*, then became ſeiſed for life, and alſo of the ultimate remainder in fee under the will of *H. Guy*. The verdict then ſet forth an act of parliament, 5 *Geo.* 1. to enable the perſons who ſhould become ſeiſed under Sir *Wm. Pulteney's* will to make leaſes for ſixty-one years in poſſeſſion, and not in reverſion, reſerving for the firſt year ſuch rent as the leſſor choſe, and for the remainder of the leaſe not leſs than *three parts in four of the higheſt yearly rent that*, at the time of making ſuch leaſe, could be gotten for the ſame.—It then ſtated, that *William Pulteney*, the grandſon (Earl of *Bath*), in Auguſt, 1731, demiſed the premiſes in queſtion to *B. Timbrell* for ſixty years, in conſideration of 63l. and of the annual rent of 10l. 2s. 6d. *being three parts in four of the higheſt rent that could then be had for the ſame.* That in January, 1753, the Earl of *Bath*, and his ſon, Lord Viſcount *Pulteney*, ſuffered a recovery of the premiſes in queſtion, the uſes of which were declared to be to the Earl of *Bath* for life, remainder to the uſe of ſuch perſon as he and his ſon ſhould, *by deed*, &c. appoint; and in default of appointment, to the ſame uſes, and upon the ſame truſts, &c. as they were ſubject to before the recovery. That in April, 1763, Lord Viſcount *Pulteney* died unmarried; that in July, 1764, the Earl of *Bath* died without iſſue, having, by will, deviſed the premiſes in queſtion to his brother, General *H. Pulteney*, in fee; and that, before the 30th of April, 1765, the term granted to *B. Timbrell* became veſted in Colonel *Lambert*. It then ſtated, that on the 30th of April, 1765, General *(Harry) Pulteney, who was then ſeiſed of the premiſes in queſtion, demiſed to Colonel* Lambert *for thirty-four years, to commence at the expiration of the former leaſe of ſixty years, in conſideration of* 135l. *and of the annual rent of* 10l. 2s. 6d.; *but it was alſo ſtated, that in* 1791 *the premiſes in queſtion were reaſonably worth the yearly rent of* 112l. *clear of the land tax*, and under the leſſee's covenants for repairing, inſuring from fire, &c. or the annual rent of 120l. including thoſe; *and that, in* 1765, *they were worth the yearly rent of* 85l. *clear of land-tax*, repairs, &c. It then ſet forth, that in 1767 *H. Pulteney* died without iſſue, and that the heirs male of the body of Sir *William Pulteney* became extinct; whereupon *Frances Pulteney* deceaſed, the late wife of the leſſor of the plaintiff, became ſeiſed as the only daughter and heir of *D. Pulteney*, who was the ſurviving ſon and heir of *John Pulteney*, the ſecond ſon of Sir *William Pulteney*; that, in 1782, *Frances Pulteney* died, on which the leſſor of the plaintiff became tenant by the curteſy, they having had a daughter;

that,

that, after *H. Pulteney*'s death, the leſſor of the plaintiff, and his wife, *Frances*, during her life-time, and the leſſor of the plaintiff ſince, received, till the year 1791, the yearly rent of 10l. 2s. 6d. from the defendant, who is the executrix of Colonel *Lambert*.—On the behalf of the plaintiff it was obſerved, that it was not neceſſary now to diſcuſs a queſtion, which was formerly agitated, whether or not General *Pulteney* had the fee-ſimple in the premiſes in queſtion at the time when he granted the leaſe in 1765, under the Earl of *Bath*'s will, becauſe it had been already decided (1) that Lord *Bath*'s will was not a due execution of the power which was veſted in him, of appointing *by deed*; and, therefore, General *Pulteney*'s authority to grant leaſes was derived from the will of Sir *W. Pulteney*, enlarged by the ſtat. 5 *Geo.* 1. THE COUNSEL, who was to have argued for the defendant, admitted, that if the Court conſidered the determination in *Cowper*, on Lord *Bath*'s will, to be concluſive on that point, and that General *Pulteney* had, conſequently, only a power of leaſing under Sir *W. Pulteney*'s will, and the act of parliament; the leaſe of 1765 was void, becauſe it did not purſue the power, in reſpect of the rent reſerved. PER CURIAM: It is impoſſible to get over the deciſion in the caſe alluded to in *Cowper*; and then, as General *Pulteney* derived his power of leaſing from the will of Sir *W. Pulteney*, the leaſe granted by him in 1765 cannot be ſupported, becauſe it did not comply with the conditions impoſed. The objections to the leaſe are unanſwerable, *but I can find none.* General *Pulteney* had the power of leaſing on two conditions: but he complied with neither; and, therefore, the leaſe granted by him is void.—Judgment for the plaintiff.

Under a power to a tenant for life to leaſe for years, reſerving the uſual rent and covenants, a leaſe made by him, containing a proviſo, that in caſe the premiſes ſhall be blown down or burned, the leſſor ſhall rebuild, otherwiſe the rent to ceaſe, is void; the jury finding that ſuch a covenant is unuſual.—On the trial of an ejectment, a verdict was taken for the leſſors of the plaintiff, ſubject to the opinion of the Court on a caſe ſtated. *Henrietta Ellis* being ſeiſed in fee of the premiſes in queſtion, by her will, dated the 11th of February, 1783, gave and deviſed the ſame unto her brother, *H. Ellis*, for life, without impeachment of waſte; and, after his deceaſe, in caſe he died without iſſue, then to *John Ellis*, one of the leſſors of the plaintiff, upon truſt to ſell the ſame for certain purpoſes therein mentioned. In which will is contained the following proviſo: "Provided alſo, and my "further will and meaning is, and I do hereby appoint,

Doe *ex dim.* Ellis and Medwin *v.* Sandham, Ea. Ter. 27 Geo. 3. B R. 1 *Ter. Rep.* 705.

(1) Vide *The Earl of Darlington* v. *Pulteney*, *Cowp.* 260. inſerted under the title POWERS, *infra*.

"that

" that it ſhall and may be lawful to and for my ſaid brother, " *H. Ellis*, from time to time, during his eſtate for life in " the reſpective hereditaments and premiſes aforeſaid, by " indenture under his hand and ſeal, to demiſe or leaſe the " ſame, or any part thereof, to any perſon or perſons, for " any term or number of years, not exceeding twenty-one " years, to take effect in poſſeſſion, and not in reverſion, or " by way of future intereſt, ſo as, in every ſuch leaſe or " leaſes, there be reſerved and made *payable, half-yearly,* " *during the continuance thereof reſpectively, the beſt and moſt-* " *approved yearly rent*, or rents, that can or may be gotten for " the ſame, without taking for any ſuch leaſe or leaſes any " fine, premium, or foregift; and ſo as *none of the ſaid leaſes* " *be made diſmuniſhable of waſte*; and that *in every ſuch leaſe* " *there be contained* USUAL AND REASONABLE COVE- " NANTS, and a clauſe of re-entry for non-payment of the " rent or rents thereby to be reſerved; and ſo as the re- " ſpective leſſees execute counterparts of ſuch leaſes." *Henry Ellis*, purſuant to the power, on the 1ſt of April, 1785, demiſed the premiſes to the defendant for twenty-one years; in which leaſe was contained a covenant on the part of the leſſee, " to keep the premiſes in tenantable repair (accidents " by fire or tempeſt excepted), and to yield them up at the " expiration of the leaſe to the perſon entitled, without com- " mitting any waſte, ſpoil, or deſtruction." The leaſe alſo contained the following covenant on the part of *H. Ellis*, the leſſor: " And alſo, that in caſe the ſaid demiſed buildings " and premiſes, or any part thereof, with the appurtenances, " ſhall be blown down by violent ſtorms and tempeſts, or " burned down by lightning, or other accidental fire, during " the ſaid term; that then the ſaid *H. Ellis*, or his aſſigns, or " the perſon, or perſons, who, for the time being, ſhall be " entitled to the freehold and inheritance, his, or their heirs " and aſſigns, ſhall and will repair or rebuild the ſame im- " mediately, or *in default thereof, the ſaid* W. Sandham, *his* " *executors, &c. ſhall be at liberty to quit the aforeſaid premiſes,* " *and be forthwith diſcharged from payment of the yearly rent* " *aforeſaid.*" *H. Ellis* died in November, 1785; in June, 1786, *John Ellis* ſold the premiſes in queſtion to *T. C. Medwin*, the other leſſor of the plaintiff, for 300l. The jury found that the rent reſerved by the leaſe was an adequate rent for the premiſes in queſtion, and alſo that the firſt covenant was an uſual covenant on the part of the leſſee; but that the laſt covenant was an *unuſual and unheard-of covenant* on the part of the leſſor. THE QUESTION was, Whether the leſſors of the plaintiff were entitled to recover? which turned upon the queſtion, Whether the inſertion of the ſecond covenant, which the jury have found to be unuſual, did not render the leaſe void? PER CURIAM: A leaſe muſt be

either

either good or bad in its creation. Here the particular terms, under which the power is given to the tenant for life, are preſcribed in the power itſelf. He has the power of granting leaſes, provided the uſual covenants are inſerted: but here it is expreſsly found that the covenant in queſtion is unuſual. Then the queſtion is, Whether this avoids the leaſe itſelf, or only that particular covenant?—It being expreſsly required, that the tenant ſhould execute his power in a particular manner, that becomes a condition precedent, and if it be not complied with, the power never ariſes. In truth, he has no power to leaſe at all, unleſs it be executed in the form preſcribed; and, upon his death, the leaſe is void, unleſs he has ſtrictly purſued the power. Here it is manifeſt that the leaſe was not made purſuant to the power, for it is not in the uſual form. This leaſe was void in its creation, and the reverſioner has a right to take advantage of it. Many caſes have decided the preſent queſtion, and particularly one from the Oxford circuit; there, an improper covenant was inſerted in the leaſe, executed under a ſpecial power, which it was determined avoided the leaſe itſelf. It has been argued, that the covenant only is void; but the ſame reaſon which avoids the covenant vacates the leaſe itſelf, becauſe it is not warranted by the power under which it was granted. The defendant's argument, if it prove any thing, proves this, that no leaſe, executed under a power, could be bad, except from the *omiſſion* of ſome covenant required, becauſe each covenant, which is contrary to that power, might be rejected; but that would be contrary to all the adjudged caſes on the ſubject. The leaſe muſt be taken to be good or bad on the face of it. Now this leaſe, on the face of it, imports to bind the reverſioner as well as the tenant for life; but, inaſmuch as the tenant for life has exceeded the power, the leaſe cannot bind the reverſioner, and is therefore void. Another argument, which has been uſed for the defendant, is likewiſe without foundation; for a leſſee is obliged to pay rent, even though the premiſes ſhould be burned down.—Poſtea to the plaintiff.

So where power was given to the tenant in poſſeſſion to let *all or any part* of the premiſes, ſo as the uſual rents be reſerved, a leaſe of *tithes*, which had never been let before, was held void. —This was an action of covenant. The declaration ſtated, that by an indenture, dated the 3d of January, 1764, *M. Grylls*, in conſideration of 30l. demiſed to *J. Pomery*, a moiety of the tithes of corn and grain in St. Nyot, in Cornwall, for 99 years, if the plaintiff ſhould ſo long live, to commence from, and immediately after, the deaths of *J. Pomery* and *E. Carlyon*, at the rents of 19s. payable quarterly, two capons yearly, and a heriot of 40s. on the death of the plaintiff, he dying

T. Pomery, Aſſignee of J. Pomery, *v.* Partington, *et al.* Executors of M. Grylls, Tr. Ter. 30 Geo. 3. B R. 3 *Ter. Rep* 665.

dying tenant in poſſeſſion. That the leaſe contained a covenant by *M. Grylls*, warranting title to *J. Pomery*, his executors, &c. The declaration then ſtated the deaths of *J. Pomery* and *E. Carlyon*, on which the plaintiff became poſſeſſed of the moiety of the tithes. That one *C. Grylls*, being ſeiſed in fee of the moiety of the ſaid tithes, by will, dated the 23d of April, 1726, deviſed all his manors, meſſuages, lands, tenements, and hereditaments, with their appurtenances, to his wife *Mary Grylls*, for life; remainder to truſtees to the uſe of *William Grylls*, for life; remainder to the uſe of *R. Grylls*, the eldeſt ſon of *William*, for life; remainder to the uſe of his firſt, and other ſons, &c. in tail male; remainder to the uſe of *M. Grylls* (the leſſor), ſecond ſon of *W. Grylls*, for life; remainder to the uſe of his firſt, and other ſons, in tail male; remainder to the deviſor's own right heirs. That the deviſor declared his intent to be, that notwithſtanding any uſe or eſtate therein limited, *it ſhould and might be lawful to and for the ſaid* W. Grylls, *for and during the term of his natural life, and afterwards to and for all and every other perſon or perſons to whom the lands and premiſes aforeſaid ſhould, by virtue of the limitations aforeſaid, come and deſcend, as the ſame ſhould happen, at his and their wills and pleaſure, from time to time, and at all times, by any deed or deeds indented, under their hands and ſeals reſpectively, to grant, demiſe, and* LEASE ALL OR ANY OF THE SAID MANORS, PARTS OF MANORS, *meſſuages, lands, tenements, and hereditaments, to any perſon or perſons whomſoever, for one, two, or three life or lives, or for the term of* 99 *years, to be determinable on the deaths of one, two, or three perſon or perſons, either in poſſeſſion or reverſion*; SO AS THE USUAL RENTS, *and other yearly payments, dues, reſervations, and heriots, be, from time to time, reſerved and made due and payable yearly, to ſuch perſon and perſons to whom the next and immediate reverſion and inheritance of the ſaid premiſes ſhould, by virtue of the limitations and uſes thereinbefore mentioned, from time to time, appertain and belong; and ſo as there ſhould not be, at any one time, any greater or larger eſtate upon any* ONE TENEMENT, *or part of a tenement, ſo leaſed, demiſed, and granted, than for three lives, or for* 99 *years, determinable on the deaths of one, two, or three perſon or perſons, either in poſſeſſion or reverſion; and ſo as ſuch leaſe or leaſes ſhould not be made diſpuniſhable of waſte.* The declaration then ſtated, that after the deceaſe of *Charles Grylls*, the ſaid *Mary*, *William*, and *Robert Grylls*, were ſucceſſively ſeiſed of the ſeveral and reſpective eſtates above deviſed to them; and that *R. Grylls*, being ſo ſeiſed, on the 29th of September, 1742, made the demiſe of the premiſes in the above indenture, mentioned for 99 years, determinable (as is therein mentioned) on the deaths of *J. Pomery* and *Elizabeth*

Elizabeth Carlyon. That *R. Grylls* afterwards died, without iſſue of his body; whereupon the ſaid *Matthew Grylls* became ſeiſed of the reverſion of the moiety of the ſaid tithes for the term of his life, the remainder thereof belonging in the manner by the above will limited; and being ſo ſeiſed, demiſed the ſame to the ſaid *J. Pomery*, in manner above ſet forth, and during the term therein, died without iſſue male of his body. That *W. Grylls* had no other ſons beſides the ſaid *Robert* and *Mathew*. That after the death of *Mathew*, one *Richard Gerveys Grylls*, claiming title to the ſaid moiety, as right heir of *Charles Grylls*, the deviſor, he being the grandſon of *Gerveys Grylls*, the brother of *Charles Grylls*, brought an ejectment againſt the preſent plaintiff for the recovery of the moiety of the ſaid tithes, inaſmuch as the ſaid *Mathew* had not good and ſufficient right, &c. to grant and demiſe the ſame, according to the form and effect of the above leaſe; and, in *Michaelmas* term, 1785, obtained a judgment againſt the preſent plaintiff for the recovery thereof, who was thereupon ejected, &c. To this declaration the defendants pleaded, firſt, that the indenture was the deed of *Matthew Grylls*; 2dly, that *Mathew Grylls* had good and ſufficient right to grant and demiſe the ſaid tithes, according to the tenure and effect of the ſaid indenture; and, 3dly, that the plaintiff was not ejected, &c.: upon which iſſues were joined. At the trial a verdict was found for the plaintiff, ſubject to the opinion of the Court on the following caſe. *Charles Grylls* was, at the time of making his will, ſeiſed in fee of the moiety of the tithes, and of certain manors, lands, tenements, and hereditaments, and deviſed in the manner ſtated in the declaration. The indenture of demiſe, on which the action was brought, and a counterpart thereof, were duly executed, &c. *Mary*, *William*, *Robert*, and *Mathew Grylls*, in the will mentioned, were reſpectively ſeiſed of the ſaid tithes, and died before the demiſe in the declaration in the ejectment herein mentioned. *Robert* and *Mathew* died without iſſue male; and *William* had no other ſon beſide the ſaid *Robert* and *Mathew*. At the time of making the leaſe, on which this action was brought, there was no ſubſiſting leaſe of the tithes. *Richard Gerveys Grylls*, the grandſon, being the right heir of the deviſor, obtained a verdict in the ejectment on the 25th of July, 1785; and, in the following term, ſigned judgment, and ſued out his writ of *habere facias poſſeſſionem*, which was duly executed. At the time of making the will of *Charles Grylls*, part of the premiſes thereby deviſed in the manner ſtated in the declaration, and not comprized in the leaſe on which this action is brought, had been uſually demiſed, reſerving rents, and other yearly payments, dues, reſervations, and heriots: but *the moiety of the ſaid tithes*

tithes was never leaſed before the making of the will of *Charles Grylls*. The preſent defendants had notice of the ejectment, brought by the ſaid *R. Gerveys Grylls*, on the 11th day of July, 1785: that cauſe was tried at Bodmin on the 25th of the ſame month, and a verdict found for the leſſor of the plaintiff. It was proved at the trial of this cauſe, that the value of the moiety of the ſaid tithes was 30l. *per annum:* and it was contended, on the part of the plaintiff, that the mode of eſtimating the damage ſuſtained by him, if he were entitled to recover, was to aſcertain the value of the intereſt in the ſaid term contained in the indenture, on which the action is brought, at the time of the death of *Mathew Grylls*, and to add to the amount thereof the coſts of defending the ejectment, by which mode of eſtimation of the damages the ſame amount to 500l. On the part of the defendants it was inſiſted, that the plaintiff was only entitled to recover the ſum of 30l. being the fine paid on the making of the leaſe, the intereſt thereof calculated to the time of the judgment, and the coſts of defending the ejectment, which ſums amount to 125l. 17s. 2d. FOR THE PLAINTIFF it was contended, that he was entitled to recover, on the ground that *Mathew Grylls* had no power to make the leaſe in queſtion. Lord KENYON, Ch. J. When I firſt read over this caſe I confeſs I entertained no doubt upon the queſtion; but when *Comberford*'s caſe, 2 *Rol. Abr.* 262. pl. 15. was ſtated at the bar, I wiſhed to ſee on what ground the Court proceeded in determining it. For if certain legal ideas be annexed to certain technical words, as in the caſe of limitations of real eſtates, it would be extremely dangerous to depart from the ſenſe given to them by the law, however apparent the intention of the parties might be to the contrary. Now in looking into that caſe, the rule will be found to be clear and undoubted: but the counſel, who argued *Goodtitle* v. *Funucan* (*ante*, 44), in ſtating *Comberford*'s caſe, omitted the moſt important words, namely, that the intention of the parties was to govern. If that be the rule, and the judges, in conſtruing the particular words of different powers, have appeared to make contradictory deciſions at different times, it is not that they have denied the general rule, but becauſe ſome of them have erred in the application of the general rule to the particular caſe before them. For in all the caſes they profeſs to determine upon the intention of the parties. It is not neceſſary to go into all the caſes which have been cited; becauſe they are all arranged in *Goodtitle* v. *Funucan*, and the due effect given to them by Lord *Manſfield*; from all which he at laſts extracts the general rule, that the conſtruction of theſe powers muſt be governed by the intention of the parties. And in applying that rule to the caſe of *Baggot* v. *Oughton*, he ſaid "in a family ſettle-

"ment

" ment of an eſtate, conſiſting of ſome ground always occu-
" pied, together with the ſeat, and of lands let to tenants
" upon rents reſerved, the qualification annexed to the power
" of leaſing, that the ancient rent muſt be reſerved, mani-
" feſtly *excludes the manſion-houſe*, and lands about it, never
" let. No man could intend to authorize a tenant for life to
" deprive the repreſentative of the family of the uſe of the
" manſion-houſe. The words in ſuch a caſe ſhew, that the
" power is meant to extend only to what has been uſually
" let. By that means the heir enjoys all the premiſes in the
" ſettlement, juſt as they were held by his anceſtor, the
" tenant for life; he has the occupation of what was always
" occupied, and the rent of what was always let." Now the whole of this reaſoning applies moſt pointedly to the caſe before us. Theſe tithes never have been let, but have always been occupied by the poſſeſſor of the eſtate. Therefore I do not think that the caſe of *Baggot* v. *Oughton* can be diſtinguiſhed from this in principle. That caſe afterwards went to the Houſe of Lords, though I do not find it in *Bro.* Parl. Caſes (1). This is the broad ground on which I am of opinion that the leaſe in queſtion is not a valid one. There are, indeed, other grounds upon which ſtreſs might be laid, to ſhew that this was the intention of the deviſor, if it were neceſſary to have recourſe to them. In the enumeration of the property to be leaſed, every particular mentioned is a corporeal hereditament; the word "hereditament" is, indeed, ſufficiently comprehenſive, in its general ſignification, to include tithes; but the other words, which accompany it, ſhew the ſenſe in which it is to be taken here. Another circumſtance is, that the leaſes are not to be diſpuniſhable of waſte; a proviſion which could not apply to tithes. But I do not wiſh to rely on theſe ſmall circumſtances, my opinion being founded on the general intention of the party, which is fairly to be collected from the other part of the caſe. For it is inconceivable that the deviſor intended, under the power of leaſing, to give authority to reduce the value of the tithes from 30l. to 19s. a-year. And, indeed, according to the defendant's arguments, the leaſe would have been equally good if no rent at all had been reſerved. As the leaſe in queſtion, therefore, is not warranted by the power, it is void. ASHHURST, J.—The inference from all the deciſions is, that the intention of the parties is to govern the conſtruction of the power. Now here the manifeſt intention of the deviſor was, that nothing ſhould be demiſed but that which had been letten before; theſe tithes, therefore, could not be leaſed, becauſe the uſual rent could not be reſerved, they never having been let before.

(1) It appears, from a note in 8 *Mod.* 381. that this judgment was affirmed in the Houſe of Lords.

Perhaps the deviſor had this reaſon for impoſing ſuch a reſtriction on the tenant in poſſeſſion, that, if no rent had been before reſerved for ſome part of the premiſes, there could be no guide for the future rent; and, therefore, the tenant, for the ſake of an immediate advantage to himſelf, might otherwiſe have made a beneficial leaſe, reſerving only a nominal rent. BULLER, J.—The part of Lord *Mansfield*'s judgment, in the caſe of *Goodtitle* v. *Funucan*, which has juſt been read by my Lord, ſeems to be a judgment formed for this very caſe. For it is a reaſoning on the caſe where part of the eſtate is enjoyed in poſſeſſion, and part on leaſe; which Ld *Mansfield* conſidered ſo clear as not to admit of a doubt. In all the caſes which Ld *Mansfield* examined, the intention of the parties was the only point to be conſidered. The misfortune in *Comberford*'s caſe was, that the Court relied on two words, *ita quod*, of little or no ſignification in themſelves, but which were thought to have a technical conſtruction. In *Walker* v. *Wakeman* thoſe words received a ſimilar conſtruction, though manifeſtly againſt Lord *Hale*'s opinion. In the caſe of *Baggot* v. *Oughton* the Court got rid of the words *ita quod*; for though the reſtriction in that caſe was to let *at ſuch yearly rents, or more, as the ſame were then let at*, yet they were the ſame in ſubſtance. And in *Goodtitle* v. *Funucan*, which was twice argued, it was ſaid by one of the counſel at the bar, that there was no difference whether the power were to leaſe, reſerving the ancient rent, or *ita quod* the ancient rent be reſerved: and the Court were of the ſame opinion. And the determination of that caſe proceeded on the intention of the parties. There Lord *Mansfield* ſaid the intent was apparent from the words of the power, and the nature of the property. Now from what was the intention collected? Firſt, from the expreſs power to demiſe the manor and fiſhery, which diſtinguiſhes that caſe from the preſent: that ſhewed that it never could have been intended to annex the reſtriction, of reſerving the uſual rent, to the demiſe of the manor, becauſe it had never been let before; next, from the value of the manor, which was merely nominal; and, 3dly, from the ſmallneſs of the fiſhery, which was worth only 15s. *per annum*, and had been let once before, though it was not in leaſe at the time of the ſettlement; from whence the intent was concluded to be, that the party might let all the premiſes, reſerving as much rent in the whole as had been reſerved before. That was a harſh attempt by a young nobleman to ſet aſide the whole leaſe on account of the trivial article of the fiſhery, which none of the parties to the ſettlement ever underſtood was meant to be excepted out of the power of leaſing. In that caſe too, the Court relied on the words at the end of the power "or proportionably for any part thereof," though no notice is taken of it in the printed report. For thoſe words

ſhewed

ſhewed that it was the intention of the parties that the quantum of the rent, and not any particular part of the premiſes included in the ſettlement, was to guide the perſon in executing the power. But in this caſe the deviſor did not intend that any part of the eſtate ſhould be let but that which had been uſually demiſed before. GROSE, J. alſo agreed.—Poſtea to the plaintiff (1).

And under a power of leaſing for one, two, or three lives, or for any term of years determinable on one, two, or three lives, the three lives muſt be certain and co-exiſting.—On the trial of an ejectment a ſpecial verdict was found, ſtating, *inter alia*, the following facts. Sir *Wadham Wyndham*, Kt. one of the judges of the Court of B.R. being ſeiſed in fee of certain eſtates in the counties of Wilts, Dorſet, and Somerſet (whereof the premiſes in queſtion were part), and having ſix ſons, *John*, *Hugh*, *William*, *Wadham*, *Thomas*, and *George*, on the 20th of December, 1767, demiſed the premiſes in queſtion, by indenture, between himſelf, on the one part, and his two ſons, *Wadham*, then about five years old, and *George*, then about one year old, on the other part, their executors, &c. in conſideration of natural love and affection, and for their better advancement; to hold the ſame unto the ſaid *Wadham*, his executors, &c. from the deceaſe of Sir *W. W. for the term of ninety-nine years, if the ſaid* Wadham, *and any woman whom he ſhould marry, and who ſhould be his wife at the time of his deceaſe, and any ſon of his body lawfully begotten or to be begotten, which ſhould be his eldeſt ſon living, or in* ventre ſa mère *at the time of his deceaſe, or if at that time he had no ſon born, nor in* ventre ſa mère, *then if any his eldeſt daughter ſhould be then living, or in* ventre ſa mère, *or any or either of thoſe three, viz. of the ſaid* Wadham *and ſuch his wife and ſon, if any, or daughter, if no ſon, at the time of his deceaſe ſhould ſo long live*, remainder to the ſaid *George*, for the term of 99 years (in the like manner as was before limited with reſpect to *Wadham)*, yielding and paying, during the ſaid term, the yearly rent of twenty ſhillings; with a proviſo that Sir *Wadham* might revoke the ſaid term during his life. On the 13th of December, 1668, Sir *Wadham* made his will, whereby he deviſed all his lands, &c. (including the premiſes in queſtion), in the manner therein mentioned; and died ſeiſed the 25th of December, 1668, not having revoked the leaſes; and, in 1745, the fee ſimple being veſted in *John Wyndham*, by the means ſtated in the caſe, he, by indentures of leaſe

Doe *ex dim.* William Wyndham *v.* Halcombe, Tr. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 713.

(1) The Court ſaid, that unleſs the counſel agreed upon the ſum to be taken as damages, they muſt neceſſarily ſend the caſe back to a jury, to have the quantum of damages aſſeſſed; but, as far as they could hint any opinion on the ſubject, they thought that the plaintiff ought only to take the ſmaller ſum; on which it was agreed, that the verdict ſhould be entered for 125l. 17s. 2d.

and releaſe of the 6th and 7th of February, 1745, conveyed the ſame eſtates to truſtees to the uſe of himſelf for life, remainder to truſtees to preſerve, &c. remainder to his firſt and other ſons ſucceſſively in tail male; remainder to his daughter *Ann W.* for life; remainder to *William*, ſon of *William W.* brother of the ſaid *John W.* deceaſed, father of the ſaid *John W.* deceaſed, in tail male; remainder to *Wadham W.* another ſon of *William W.* deceaſed, in tail male; with divers remainders to other male branches of the *Wyndhams* in tail male, with remainder to his own right heirs: in which was contained the following power (on which the queſtion aroſe), *that it ſhould be lawful for the ſaid* John W. *party thereto, and the ſaid* Ann W. *the daughter, as they ſhould reſpectively be in poſſeſſion of the ſaid manors, lands, &c. limited to him and them reſpectively for life, as aforeſaid, by any deed in writing under his, her, or their hands and ſeals, for ſuch fine or other conſiderations as to him, her, or them, might ſeem meet, to make any leaſe, and grant, by copy of court-roll, to any perſon or perſons, for one, two, or three lives, or for any term of years determinable upon one, two, or three lives, in poſſeſſion, reverſion, or remainder of ſuch part and parts, and ſo much only of the ſaid manors, lands, &c. as were then demiſed or granted* FOR ANY SUCH TIME; *ſo as upon ſuch leaſe or grant there be reſerved, payable yearly, during the term, ſo much rent as was then reſerved or paid for the ſame, or more, or a proportionable part, &c. any thing contained to the contrary thereof in anywiſe notwithſtanding*; alſo to let any other part of the ſaid premiſes on rack-rent leaſes for twenty-one years or under. Before and at and after the deed of 1745, divers parts of the premiſes ſettled were on leaſes for ninety-nine years, determinable on three lives at the moſt, all the perſons for whoſe lives ſuch leaſes were made being alive at the time of granting the ſame. The premiſes in queſtion were held under the leaſe of 1667, till the death of *Wadham Wyndham* on the 22d of September, 1783. *John Wyndham*, the ſettler of 1745, died on the 27th of December, 1750, leaving *Ann W.* his only child, and *Ann* became ſeiſed for life, remainder to *William W.* in tail male. The ſaid *William W.* died the 29th of December, 1762, ſeiſed of ſuch remainder, which deſcended to *William W.* his ſon and heir; he died the 12th of September, 1786, and *the remainder of which he was ſo ſeiſed deſcended to* William W. *the leſſor of the plaintiff, his eldeſt ſon in tail male.* Ann W. on the 1ſt of May, 1751, married *J. E. Arundel*, whereby he became ſeiſed of the premiſes in right of his wife for her life; and being ſo ſeiſed on the 6th of February, 1773, *leaſed the premiſes in queſtion to* C. P. *by indenture executed by him and* Ann *his wife, to hold the ſame for ninety-nine years, if* J. E. Arundel, *and* J. E. A. *his ſon, ſhould ſo long live, to commence on the death of* Wadham W. *eldeſt*

eldeſt ſon of George, *one of the ſons of Sir* Wadham, reddendum *to* J. E. Arundel *and* Ann *his wife, and the perſon to whom the reverſion ſhould belong*, 20*s. at Lady-day and Michaelmas-day, with a proviſo for re-entry if the rent were not paid and there were no ſufficient diſtreſs.* On the death of *Wadham*, the ſon of *George*, *C. P.* entered, and was poſſeſſed of the premiſes in queſtion. *And on the* 27*th of September*, 1783, J. E. A. *and* Ann *his wife, leaſed the ſame premiſes to the ſaid* C. P. *for ninety-nine years, if* Thomas Raymond Arundel, *their ſon, ſhould ſo long live, to commence from the deaths of the ſaid* J. E. A. *the father, and* J. E. A. *the ſon, with the ſame* reddendum *as laſt mentioned. J. E. A.* the father, and *J. E. A.* and *T. R. A.* the ſons, are living. *Ann Arundel* died the 6th of April, 1796; on whoſe death the leſſor of the plaintiff, as heir male of the body of *William W.* (his father and grandfather being dead), became ſeiſed of the premiſes, and demiſed the ſame to the plaintiff, who entered and was ouſted, &c. THE QUESTION was, Whether that part of the eſtate comprized in the leaſe granted by Sir *Wadham W.* in 1667, to his younger children, is within the leaſing power of the deed of 1745.—PER CURIAM: The defendant's counſel is driven to ſupport, by argument, that Mrs. *Arundel* had power to make the ſame kind of leaſe that Sir *W. Wyndham* granted for the benefit of his children, otherwiſe judgment muſt be given for the plaintiff. In family ſettlements, ſuch as that made in 1745, it is uſual to give a power of leaſing upon lives ſuch parts of the eſtate as are held on lives, and to grant leaſes at rack-rent of ſuch parts as are let at rack-rent. Perhaps the power of leaſing inſerted in the deed of 1745 was ſuggeſted by the conveyancer, who, in all probability, did not know that Sir *W. Wyndham* had, in the laſt century, demiſed part of this eſtate in the manner ſtated in the ſpecial verdict. The execution of the power by Mrs. *Arundel* muſt depend altogether on the power given in the deed of 1745; the intention of the parties in that deed cannot be collected from the contents of the deed made in 1714. By the deed of 1745 ſhe had the power to leaſe "*for one, two, or three lives, or for any term of years* "*determinable upon one, two, or three lives, ſuch parts of the* "*eſtate as were then demiſed* FOR ANY SUCH TIME," that is, for one, two, or three lives, or for any term of years determinable on one, two, or three lives. The leaſe to the defendant having been granted by Mrs. *Arundel* of ſuch parts of the eſtate as were comprized in the proviſion made by Sir *W. Wyndham* for his children, the queſtion comes to this, Whether the leaſe granted by Sir *W. Wyndham* were for one, two, or three lives, or for any term depending on one, two, or three lives? Now what is meant by a leaſe determinable on one, two, or three lives? *The lives muſt be concurrent*; the candles muſt be all burning at the ſame time.

But that was not the caſe with reſpect to the leaſe granted by Sir *W. Wyndham*; for that was determinable on the lives of his ſon *Wadham*, any widow left by that ſon, his eldeſt ſon or eldeſt daughter, and alſo on the lives of his own ſon *George*, and of his widow, and eldeſt ſon or daughter. That certainly was not a leaſe determinable on one, two, or three lives; for, when one died, another was to ſpring up in his room; ſo that there might have been twelve lives on which the leaſe was to determine. If this were a leaſe depending on one, two, or three lives, they would be capable of deſignation: but they were not then known, or in *eſſe*. We are, therefore, clearly of opinion, that the power of leaſing given to Mrs. *Arundel* in the deed of 1745, was a power adapted to the ordinary courſe of ſettlements, and did not enable her to demiſe the lands leaſed by Sir *W. Wyndham* in 1677 to his children, which were not leaſed for one, two, or three lives, or for any number of years determinable on one, two, or three lives, but for a longer duration, for ſeveral lives.—Judgment for the plaintiff.

Jenkins *ex dim.* Yate *v.* Church, Mic. Ter. 17 Geo. 3. B.R. *Cowp.* 482.

A leaſe void againſt a remainder-man cannot be ſet up by his acceptance of rent.—A tenant for life made a leaſe for twenty-one years, and, before the expiration of the term, died: the remainder-man in tail ſuffered the defendant to remain in poſſeſſion four or five years, received rent regularly during that time, and then gave notice to quit, and brought this ejectment. THE QUESTION was, Whether this acceptance of rent by the remainder-man amounted to a confirmation of the leaſe; or whether, the leaſe being void, it was incapable of confirmation? PER CURIAM: This is a *void* leaſe, and not voidable only; but if it were merely voidable, the acceptance of rent alone, unaccompanied with any other circumſtances, is not a ſufficient confirmation; it cannot be a confirmation, unleſs done with a knowledge of the title at the time, or unleſs the remainder-man lies by, and ſuffers the tenant to lay out his money in improvements, in confidence of continuing tenant: but here it is a void leaſe; and, in general, a void leaſe is incapable of confirmation (1).

Doe, Leſſee of Simpſon *v.* Butcher, Mich Ter 19 Geo. 3 B.R. 2 *Doug.* 50.

So in this caſe it was alſo held that a leaſe void againſt a remainder-man cannot be ſet up by his acceptance of rent, and ſuffering the tenant to make improvements, after his intereſt veſts in poſſeſſion—*Jervaiſe Newton*, being ſeiſed in fee of the lands in queſtion, deviſed them to Sir *Michael Newton*, for life, remainder to truſtees to preſerve contingent remainders, remainder to the firſt and other ſons of Sir *Michael Newton* in tail male, *remainder to the leſſor of the plaintiff for life*, remainder to his firſt and other ſons in tail male, with divers remainders over. *Jervaiſe Newton* died

(1) See *Goodright* v. *Straphan*, vol. II. p. 310. and p. 126, *ſupra*.

in

in 1728. *Sir* Michael Newton *being ſeiſed of the lands in queſtion by virtue of the deviſe aforeſaid, by indenture of leaſe, dated the 2d of September*, 1731, *in conſideration of* 192l. *demiſed them to the defendant for the term of ninety-nine years, if the defendant*, John Shirburne, *and* William Laſbury, *or either of them, ſhould ſo long live.* Sir *Michael Newton* died in 1743 without iſſue male; and, on his death, the leſſor of the plaintiff entered on the premiſes, and was ſeiſed thereof for his life. *John Shirburne* died in 1767; and afterwards the leſſor of the plaintiff, by indenture of leaſe, dated the 30th of June, 1767, for the conſideration of 30l. demiſed the lands in queſtion to the defendant, from and after the deaths of the defendant, and *William Laſbury*, for the term of ninety-nine years, if *John Griffin* ſhould ſo long live. Some time afterwards, *William Laſbury* died, and, thereupon, the leſſor of the plaintiff, by indenture of leaſe, dated the 29th of November, 1769, in conſideration of the ſum of 30l. demiſed the lands in queſtion to the defendant for another term of ninety-nine years, from and after the deaths of the defendant and *John Griffin*, if *William Wright* ſhould ſo long live. The defendant paid his rent to Sir *Michael Newton* during his life, and after his death to the leſſor of the plaintiff, until ſeveral years after the granting of the laſtmentioned leaſe, and alſo paid a heriot to the leſſor of the plaintiff, on the death of *John Shirburne*, and another heriot on the death of *William Laſbury*. The leſſor of the plaintiff, from time to time, ſummoned the defendant, as his tenant, to do ſuit and ſervice at his manor court. The defendant, after the death of Sir *Michael Newton*, laid out conſiderable ſums of money in improving the lands. The leſſor of the plaintiff never queſtioned the validity of the leaſe granted by Sir *Michael Newton*, and the defendant had no notice of the defect of title of Sir *Michael Newton* to grant the leaſe, not being apprized of any defect till about four years before bringing the preſent ejectment, when an objection being made by the remainderman to the power of Sir *Michael Newton*, and of the leſſor of the plaintiff, of granting leaſes for a longer time than their own lives reſpectively, the leſſor of the plaintiff offered the defendant to pay him back the conſideration-money of the reſpective leaſes granted by him, provided the defendant would account with him for the rents and profits received by the defendant from the time of the death of Sir *Michael Newton*, deducting what he had laid out on improvements; but the defendant refuſing to accede to this propoſal, the leſſor of the plaintiff gave him proper notice to quit the premiſes before bringing the ejectment. Reverſionary leaſes, of the ſame nature as thoſe above ſtated, are uſually made in the weſtern counties of England, to commence not only from the deaths of the perſons named in the leaſe in poſ-

ſeſſion, but alſo from the end, or other ſooner determination, of the leaſe in poſſeſſion. THE QUESTION was, Whether the original leaſe to the defendant was affirmed by any of the acts of the leſſor of the plaintiff, after the death of the tenant for life? For the plaintiff it was contended, that the leaſe having become abſolutely void on the death of Sir *Michael Newton*, none of the acts done by the leſſor of the plaintiff could re-eſtabliſh it. That this could not have been done, even by the moſt formal deed of confirmation, which could only operate on a voidable leaſe, not on one abſolutely void. And for this *Goodright* v. *Humphrys*, in the Exchequer, was relied on, as directly in point (1). Lord MANSFIELD, Ch. J. ſaid, there could be no confirmation of a thing abſolutely void (2), but that the acts of the leſſor of the plaintiff might operate as a new grant (3); however, he deſired it might ſtand over, and now, juſt before the riſing of the Court, his lordſhip delivered the opinion of the Court, very ſhortly, in favour of the leſſor of the plaintiff. He ſaid, there did not appear to have been any intention, either to confirm the old leaſe, or to grant a new one. Both the leſſor of the plaintiff and the defendant had proceeded under a miſtake, and had ſuppoſed the original leaſe to be good.—Poſtea to be delivered to the plaintiff.

Doe *ex dim.* T. Martin and Jones v. Watts, H. T. 37 Geo. 3. B.R. 7 *Ter. Rep.* 83.

But though a leaſe, granted under a leaſing power, be void, if the remainder-man accept rent, as rent, after the death of the tenant for life, it is an admiſſion that the defendant *is his tenant*, and then he is entitled to notice to quit.—This was an ejectment to recover ſome premiſes in Bermondſey, in the county of Surrey. On the trial it appeared that *J. Martin*, deceaſed, who was tenant for life under a ſettlement, with remainder in tail to *T. Martin*, one of the leſſors of the plaintiff, *had a power of leaſing the premiſes in queſtion for twenty-one years in poſſeſſion, without fine, and at the beſt*

(1) *Goodright*, leſſee of *Wynne*, v. *Humphrys*. *Jane*, Lady *Bulkeley*, having been tenant for life, with remainders over in tail to her firſt and other ſons and daughters, ſucceſſively, and with power to her to leaſe for twenty-one years in poſſeſſion, and not in reverſion, intermarried with *Edward Williams*, who, *without her concurrence, demiſed to the defendant*, to hold from the feaſt of the Annunciation then next to come, for ninety-nine years, determinable on three lives. The leſſor died, and afterwards Lady *Bulkeley* died, leaving *Jane*, her eldeſt daughter, tenant in tail, who ſuffered a recovery, and afterwards married the leſſor of the plaintiff.—*Edward Williams* received the rent reſerved during his life; after his death, his widow, in like manner, received the rent, and granted receipts: *the daughter alſo received the rent till her marriage, and her huſband for ſome time after the marriage*; and a counterpart of the leaſe was found in his poſſeſſion. The Court were of opinion that the leaſe was void, and gave judgment for the plaintiff.

(2) *Co. Litt.* 295. b.

(3) See *Goodright*, leſſee of *Carter*, v. *Straphan*, *ante*, vol. II. p. 310.

rent;

rent; and that, in 1779, *he granted a leaſe to* Stubbs, *under whom the defendant claimed for twenty-one years, at the annual rent of* 36l. *the premiſes being then worth* 60l. *per annum.* That *J. Martin* received the rent during his life-time; that, after his death, which happened June the 4th, 1794, *Lane*, who was authorized by *T. Martin* to receive rent for him, received rent of the defendant for him, and paid part of it to the executors of *J. Martin*, and the reſt to *T. Martin*. It was objected, on the part of the defendant, that, admitting the leaſe in 1779 to be void, the receipt of rent from the defendant by *T. Martin* created a tenancy from year to year, and that the plaintiff could not recover, not having given the defendant notice to quit. Baron *Hotham*, who tried the cauſe, was of that opinion, and nonſuited the plaintiff. PER CURIAM (after a motion had been made to ſet aſide the nonſuit): All the caſes prove, that a leaſe, made by a tenant for life, which is void in its creation, cannot be confirmed by the reverſioner, *but they do not ſhew that when ſuch a leaſe is abandoned, another relation may not ſubſiſt between landlord and tenant, by the one paying and the other receiving rent.* Here one of the leſſors of the plaintiff received rent by his ſteward, *eo nomine*, as rent; if the defendant had been a treſpaſſer, no rent could have become due; it could only be paid as rent under the idea that the defendant was a tenant; and if he were a tenant the plaintiff cannot recover, not having given him notice to quit. It would be extremely unjuſt that a tenant, who occupies land, ſhould, after he has ſown it, be turned out of poſſeſſion by an ejectment without any notice. And it was in order to avoid ſo unjuſt a meaſure that, ſo long ago as the time of the year-books, it was held, that a general occupation was an occupation from year to year, and that the tenant could not be turned out of poſſeſſion without reaſonable notice to quit, 13 *Hen.* 8. 15. b. That rule has always prevailed ſince; and in times certainly as enlightened as theſe we ought not to depart from a rule which was ſo wiſely and juſtly ſettled; therefore this rule muſt be diſcharged.

Baxter *ex dim.* Abrahall, eſq. *v.* Browne, Hil. Ter. 15 Geo. 3. C.B. 2 *Black. Reſ.* 973.

Of leaſes in general.]—An agreement to grant a leaſe, whereby the leſſor did let and ſet for twenty-one years from a future day, ſhall be a leaſe *in præſenti*, if the circumſtances ſhew the party's intent ſo to be.—On the 28th of November, 1760, *John Abrahall, being ſeiſed as tenant for life only* of one undivided moiety of the premiſes in queſtion, with remainder in fee to his ſon, the leſſor of the plaintiff, and the other moiety being veſted in *Percival Lloyd*, they, the ſaid *John Abrahall* and *Percival Lloyd*, entered into an agreement (ſtamped with a 2s. 6d. ſtamp), with regard to their reſpective moieties, with the defendant *Browne*, whereby they agreed (*inter alia*)

" with

" with all convenient ſpeed, to grant a leaſe to the ſaid " *Browne* of, and *they did thereby ſet and let* to him, all that, " &c." to hold for twenty-one years, from Candlemas then next, at the rent of 290l. *per annum*, payable half-yearly to the leſſors; provided that the ſaid leaſe ſhall be void on non-payment of rent, alienation, &c. and that ſuch leaſe ſhall contain uſual covenants on the part of the leſſors and leſſee, and certain ſpecial ones therein mentioned; in one of which the words *this demiſe* occur. The ſame concludes thus, " as witneſs the hands of *J. A. P. L.* and *J. B.*"— The defendant entered in purſuance of this agreement; and, on the 25th and 26th of May, 1768, *John Abrahall* being dead, the ſaid *Percival Lloyd* conveyed his moiety of the premiſes to *James Abrahall*, the leſſor of the plaintiff in fee. On the 29th of March, 1773, the leſſor of the plaintiff gave notice, in writing, to the defendant, to quit at Candlemas then next.—On the 2d of October, 1773, and the 1ſt of March, 1774, the defendant paid the leſſor of the plaintiff two half-years' rent of 145l. each. THE QUESTION was, If the plaintiff is entitled to recover the moiety which lately belonged to *Percival Lloyd?* PER CURIAM: This was clearly a good leaſe in *præſenti*, with an agreement to execute a more formal and perfect leaſe in *futuro* (1). The operative words, *let* and *ſet*, are in the preſent tenſe. A reference is made to *this demiſe*. There have been fourteen years uninterrupted occupation under this inſtrument, and five or ſix of them ſince the leſſor of the plaintiff's title accrued. He has accepted rent, and thereby given the defendant every reaſonable hope of his acquieſcence. Under ſuch circumſtances, if the words of the leaſe can import an immediate legal demiſe, the Court will ſupport it as ſuch; and that it will is evident, from the caſe of *Harrington* and Wife, *Cro. Eliz.* 486. 1 *Roll. Abr.* 847. *Moor*, 459. *Noy*. 57. which we have looked into and compared; therefore, let there be— Judgment for the plaintiff as to one moiety, for the defendant as to the other.

Goodright *ex dim.* Hall *v.* Richardſon, Mic. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 462.

On the trial of this ejectment, a verdict was found for the leſſor of the plaintiff, ſubject to the opinion of this Court on the following caſe: *William Child*, being ſeiſed in fee of the premiſes in queſtion, on the 28th of October, 1785, demiſed the ſame to one *James Moſs*, from whom the defendant derived title, " at the yearly rent of 10l. payable half-yearly, *for and* " *during the full end and term* of three, ſix, or nine years " from the feaſt-day of St. *Thomas* the Apoſtle, next enſuing " from the date thereof, and to be fully complete and ended " on the ſaid feaſt-day of St. *Thomas* the Apoſtle, *which ſhall be*

(1) Vide vol. I. p. 528. for caſes on agreements reſpecting leaſes.

" *determinable*

" *determinable in the years* 1788, 1791, 1794," in which was a covenant by the tenant, to repair during the *term or terms* thereby granted. On the 13th of June, 1786, *William Child* ſurrendered the premiſes in queſtion to the leſſor of the plaintiff, who, on the 28th of May, 1787, was admitted thereto. On the 13th of December, 1788, the leſſor of the plaintiff ſerved the defendant with notice to quit, on or before the feaſt-day of St. *Thomas* the Apoſtle enſuing. PER CURIAM: In theſe caſes the intention of the parties ought to prevail, if it be not contrary to law. It is true, that there muſt be a certainty in the leaſe, as to the commencement and duration of the term; but that certainty need not be aſcertained at the time; for, if in the fluxion of time a day will arrive, which will make it certain, that is ſufficient: as if a leaſe be granted for twenty-one years after three lives in being, though it is uncertain at firſt when that term will commence, becauſe thoſe lives are in being, yet when they die it is reduced to a certainty, and *id certum eſt quod certum reddi poteſt*; and ſuch terms are frequently created for raiſing portions for younger children. Now in this caſe it is impoſſible to form any doubt reſpecting the intention of theſe parties. It was intended that this leaſe ſhould take effect for three years at all events, and that it ſhould be in the election of either of the parties to put an end to it at that time, or at the end of ſix years, giving reaſonable notice to the other. It is like a leaſe for a year, and ſo from year to year; where, if the leſſee wiſh to determine it at the end of the year, he muſt give reaſonable notice to the other party. And though here either of the parties might have determined the leaſe at the expiration of the firſt three years, yet when the time elapſed, at which notice ought to have been given for that purpoſe, the leaſe could not be determined till the end of the next three years; conſequently, the leſſor of the plaintiff is not entitled to recover. It is a leaſe for nine years, determinable by either of the parties at the end of the firſt three or ſix years (1).—Poſtea to the defendant.

A demiſe of premiſes in Weſtminſter, late in the occupation of *A.* particularly deſcribing them, part of which was a yard, does not paſs a cellar ſituate under that yard, which was then in the occupation of *B.* another tenant of the leſſor. And the leſſor, in an ejectment brought to recover the cellar, is not eſtopped by his deed from going into evidence, to ſhew

Doe *ex dim.* Freeland *v.* Burt, Ea. Ter. 27 Geo. 3. B.R. 1 *Ter. Rep.* 701.

(1) In *Ferguſon* v. *Corniſh*, 2 *Burr.* 1034. and 3 *Ter. Rep.* 436. n. *a.* on a leaſe for ſeven, fourteen, or twenty-one years, Lord *Mansfield* ſaid, " it was at leaſt a leaſe for ſeven years; *then, if he continues, it is for* " *fourteen years*, and if, at the end of that time, he ſtill continues, it is " for twenty-one years."

that

that the cellar was not intended to be demiſed.—In an ejectment for a cellar and wine-vaults in Weſtminſter, the defendant claimed under a leaſe, from the leſſor of the plaintiff, of certain parts of a meſſuage, ſituated on the weſt ſide of Swallow-ſtreet, deſcribed to be one room on the ground floor, and a cellar thereunder, and a vault contiguous and adjoining thereto, and three rooms, together with the ground whereon the ſame now ſtand, and together with a piece of ground on the north ſide, particularly deſcribing it, with an exception of a right of way; and the whole were deſcribed to have been late in the occupation of *A.* It was admitted, that the vault in queſtion was under this piece of ground, which was a yard.—The defendant reſted his title on the maxim, that *cujus eſt ſolum, ejus eſt uſque ad cœlum & ad inferos.* The leſſor of the plaintiff offered evidence to ſhew, that, at the time of the leaſe, the cellar in queſtion was in the occupation of *B.* another tenant, and, therefore, that it could not have been the intention of the parties that it ſhould paſs by the leaſe to the defendant, and that the defendant had not claimed it till after the expiration of that leaſe. The defendant's counſel objected to this evidence, becauſe the leſſor of the plaintiff was eſtopped, by his deed, from ſaying it was not meant to paſs. But Buller, J. was of opinion that the evidence was admiſſible; and the plaintiff obtained a verdict, with liberty to the defendant to enter a nonſuit, if the objection were well-founded. Cauſe was ſhewn againſt a rule for entering a nonſuit. Per Curiam: It appears plainly from the evidence, that this objection is againſt the juſtice of the caſe; for it was not in the contemplation of the parties, at the time of the leaſe, to paſs the cellar; and it appears that, for three or four years after the defendant's leaſe, the leſſor of the plaintiff received rent from the former tenant of the cellar. The only queſtion is, Whether the Court are abſolutely bound, by the terms of this leaſe, to put the conſtruction on it for which the defendant contends. Now it ſeems, that the conſtruction of all deeds muſt be made with a reference to their ſubject-matter. And it may be neceſſary to put a different conſtruction on leaſes made in populous cities, from that on thoſe made in the country. We know that in London different perſons have ſeveral freeholds over the ſame ſpot; different parts of the ſame houſe are let out to different people. That is the caſe in the inns of court. Now it would be very extraordinary to contend, that if a perſon purchaſed a ſet of chambers, then leaſed them, and afterwards purchaſed another ſet under them, the after-purchaſed chambers would paſs under the leaſe. In the preſent caſe, conſidering the nature of this property, it was proper to let in evidence, to ſhew the ſtate and condition of it at the time when the leaſe was granted. *Prima facie,* indeed,

indeed, the property in the cellar would paſs by the demiſe; but that might be regulated and explained by circumſtances; therefore, conſidering all the circumſtances of this caſe, it was proper to receive the evidence offered at the trial, which, when received, proved that the cellar was not intended to be paſſed by the demiſe to the defendant.—Where there is a conveyance, in general terms, of all that acre called Black-acre, every thing which belongs to Black-acre paſſes with it; and there the rule which has been mentioned, *primâ facie*, obtains: but whether parcel or not of the thing demiſed is always matter of evidence. Suppoſe the premiſes in queſtion had been the inheritance of another perſon at the time of this demiſe, inſtead of their being in leaſe, they clearly would not have been parcel of this demiſe. Then their being in leaſe to another perſon under this plaintiff cannot vary the queſtion, whether parcel or not. In the next place it is very clear, on inſpecting the leaſe itſelf, theſe words cannot receive the general conſtruction of the law. This is a leaſe of a part of a meſſuage, conſiſting of one room on the ground floor, *with a cellar thereunder:* now, if the argument for the plaintiff would hold, the cellar would have paſſed with the room on the ground floor, without particularly ſpecifying it. Then a deſcription of another part of the premiſes is, "of ground, together with three rooms which ſtand on it," which ſhews, that the parties have particularly deſcribed every thing which was intended to paſs. Then follows a demiſe of the yard deſcribed with the ſame particularities, ſpecifying the abuttals and the dimenſions. It might as well be contended, that a leaſe of a houſe in the Adelphi would paſs the warehouſes underneath; but it would be the greateſt injuſtice to put the general conſtruction of law on grants of the houſes in that building; for we all know that thoſe houſes are held under titles entirely diſtinct from the cellars and warehouſes underneath.—Rule diſcharged.

A leaſe for lives, to begin from the day of the date thereof, and ſeiſin delivered afterwards, is good, and ſhall not be ſaid to convey a freehold to commence in *futuro*.—On the trial of this ejectment, it appeared in evidence, that the dean and chapter of Worceſter were ſeiſed, in right of their church, of one of the manors of Charlton, in the ſaid pariſh of Cropthorne; and being ſo ſeiſed, by indenture, bearing date the 26th day of November, 1750, between the dean and chapter of the one part, and the plaintiff's leſſor on the other part, the dean and chapter, for a valuable conſideration, granted the ſaid manor of Charlton (of which the premiſes in queſtion are part) to the plaintiff's leſſor, to hold to him and his heirs FROM THE DAY OF THE DATE THEREOF, for the lives of three perſons who are ſtill living, under the yearly rents therein reſerved; and in the leaſe power is given by the

Freeman *ex dem.* Vernon alias Bund *v.* Weſt, Tr. Ter. 3 Geo. 3. C.B. 2 *Wils.* 165.

the dean and chapter to *William Bund*, as their attorney, to take poſſeſſion of the premiſes, and to deliver ſeiſin thereof to the plaintiff's leſſor, according to the tenor, effect, and true meaning of the ſaid leaſe; in purſuance of which power ſeiſin was delivered of the premiſes, by the ſaid *William Bund*, to the plaintiff's leſſor, on the 28th day of May, 1751. It was objected, on behalf of the defendant, that this is a leaſe of a freehold, and, being made to commence in *futuro*, is therefore void. AND THE QUESTION for the opinion of the Court is, Whether this leaſe, as it is made to commence from the day of the date thereof, and ſeiſin being afterwards delivered on the 28th day of May following, is good or not? PER CURIAM: We muſt not overthrow eſtabliſhed principles of law. That a *freehold* cannot be conveyed to paſs in *futuro* is a certain principle, and was grounded on the feudal law; for, if a *freehold* could paſs to commence in *futuro*, there would be an abeyance; and want of a tenant againſt whom to bring a *præcipe*; and the law will not ſuffer the land to be in abeyance a ſingle day, if poſſible to prevent it; for, if it might be without a tenant of the freehold for one day, why not for a year, or fifty years? indeed, at this day, there is not ſuch abſolute neceſſity that there ſhould be an actual tenant of the freehold as formerly, when real actions were the only way of trying titles to land, and which *real writs* can only be brought againſt the *tenant* of the *freehold*, becauſe at this time, and for 200 years paſt, the fictitious action of ejectment againſt the tenant in poſſeſſion is, and has been, the univerſal practice of trying titles to lands and tenements; and, therefore, if ever there was a caſe where the *aſtutia* of judges (to overlook niceties in the law, and to get over difficulties of firſt principles which ſtood in their way), was commendable, this is *that* caſe. The old principle of law, that a *freehold* cannot paſs to commence in *futuro*, has no good reaſon or ground to ſtand upon at this day; but, without ſaying any thing againſt that old law, we may in this particular caſe, with the authority of our forefathers, determine this to be a good leaſe. The objection to it is not much to be favoured; it is to overturn a deed made upon good conſideration; it would make void a great number of church leaſes, which are penned in the ſame way, and occaſion much inconvenience; *ut res magis valeat quam pereat* is a good ground for us to ſtand upon, and, therefore, we are of opinion with the caſe in *Moor*, 637, 759, that the *freehold* remained in the dean and chapter after the date and making of the leaſe, and until ſeiſin was delivered by the attorney to the plaintiff's leſſor, according to the tenor, effect, and true meaning of the ſaid leaſe, and *then*, and not *before*, the *freehold* paſſed out of the dean and chapter to the plaintiff's leſſor. The *livery of ſeiſin* is the only powerful operative tranſaction;

tranſaction; for if, in this caſe, nothing had been ſaid of livery, either *in* or *dehors* the deed, nothing would have paſſed by the leaſe till the day of judgment. Courts have determined, that if livery be made by the leſſor himſelf after the date in the deed, it ſhall control the expreſs-day in the deed, and make ſuch a leaſe as this *(habendum a die datûs)* good; what difference, therefore, can there be between this, and when it is done by the leſſor's attorney, according to the tenor, effect, and true meaning of the leaſe, ſix months after the date, as is ſtated? No difference at all. Vide *Palm.* 30, *Dean and Chapter of Worceſter*'s caſe, there cited, was a leaſe for life, to commence *a die datûs*, and a letter of attorney to make livery the next day, which was made accordingly, and adjudged a good leaſe. By the warrant of attorney to deliver ſeiſin in the preſent caſe, the intention of the parties was, that the deed ſhould be ſubſtantiated by the livery, and in the mean time the freehold was in the grantor; ſo that without ſaying any thing againſt the old law, *that a freehold* cannot paſs to commence in *futuro*, we give judgment for the plaintiff, and order the poſtea to be delivered to him. NOTE; Mr. Juſtice *Wilmot*, at a trial of an ejectment, formerly upon this ſame leaſe, was of opinion, that *from the date*, and *from the day of the date*, was the very ſame, and both included the day (1).

On a proviſo in a duchy-leaſe, that it ſhall be inrolled with the auditor, the certificate of the auditor on the margin is ſufficient evidence of the inrolment; alſo under-leaſes are not within proviſoes concerning aſſignment.—In an action of treſpaſs, for fiſhing in the plaintiff's fiſhery, it appeared, that the plaintiff derived his title under a leaſe, dated in 1753, from the duchy of Lancaſter, in which there was a proviſo, "that the leaſe, *and all aſſignments thereof*, ſhould be "inrolled within three months from the date, with the "auditor of the duchy, or otherwiſe ſhould become void." The original leſſee made a leaſe in 1777 to the plaintiff, for a term ſomewhat leſs than what remained unexpired of the original term. To prove the inrolment of the leaſe of 1753, a memorandum, or certificate, on the margin of the leaſe was read, ſigned "*Peregrine Fury*, auditor." No evidence of the inrolment of the ſecond leaſe of 1777 was offered. On an application for a new trial, it was objected, 1ſt, That the verdict was againſt the weight of evidence produced at the trial; 2d, That the defendants had been ſurprized by evidence, which they now offered affidavits to contradict; 3dly, *That there was not legal evidence of the inrolment of the firſt leaſe, for that an office-copy of the inrolment ought to have been produced*; 4thly, *That the ſecond leaſe was an aſſignment, and, not having been inrolled, was void.* THE COURT im-

Kinnerſley *v.* Orpe, *et al.* Hil. Ter. 19 Geo. 3. B.R. 1 *Dougl.* 56.

(1) See *Pugh* v. *Duke of Leeds*, *ante*, p. 48.

mediately

mediately diſpoſed of the two firſt grounds. They ſaid it did not appear from the report, that the verdict was againſt the weight of evidence. No ſurprize was ſtated by the judge, and the evidence offered to be laid before *the Court* by affidavit, might have been produced at the trial, on the third and fourth points. PER CURIAM: The memorandum on the margin is the certificate of the proper officer, not of a private perſon. This caſe cannot be diſtinguiſhed from that of a bargain and ſale, where the indorſement on the back of the deed, by the proper officer, is always received as evidence of the inrolment. This caſe, too, is fortified by the circumſtance of long poſſeſſion under the leaſe. At any rate, third perſons cannot avail themſelves of a forfeiture of this ſort; but the inrolment is ſufficiently proved, if it were againſt the grantor; beſides the leaſe is admitted, for it is ſtated in the pleadings, and not traverſed. The caſe of *Gruſoe*, leſſee of *Blencoe*, v. *Bugby*, *T. C. B.* 11 *Geo.* 3. 3 *Wilſ.* 234. 2 *Black.* 766 *(infra*, p. 92), is concluſive, to prove that the ſecond leaſe being for a ſhorter time than what remained of the firſt term, is not an aſſignment, but an under-leaſe.

Daviſon *ex dim.* Bromley, Eſq. *v.* Stanley, Ea. Ter. 8 Geo. 3. B.R. 4 *Burr.* 2210.

The acceptance of a new good leaſe, implies a ſurrender of a former.—This was a caſe reſerved, upon an ejectment, and was as follows: *William Bromley*, Eſq. being ſeiſed in fee, in the year 1686, demiſed for ninety-nine years, to hold from the day of the date. Afterwards, *William Bromley*, upon the marriage of *Francis Bromley* with *Ann Walſh*, joined in a ſettlement with his uncle *Francis Bromley*, and reduced his former eſtate in fee, to an eſtate for life. This was a voluntary ſettlement, and had a power in it: but it was not pretended that the ſecond leaſe was made according to that power. After this, *William* (being then only tenant for life), in 1693, makes a new leaſe for ninety-nine years, to the ſame tenant, of the ſame premiſes, without communicating to the tenant the alteration which he had made of his eſtate, by reducing his fee to a life-eſtate: and this was acquieſced in, and the rent paid and received, for ſixty years. In the mean time, and before any objection was made with regard to theſe leaſes, *William Bromley* died, and his effects came into the hands of Lord *Montfort*. The leſſor of the plaintiff was tenant in tail under the ſettlement; and claimed a right to diſpoſſeſs the tenant. THE ONLY QUESTION upon which the Court gave their opinion, was—"Whether the *acceptance* "of the *ſecond* leaſe operated as a SURRENDER of the *former* "*leaſe.*"—PER CURIAM: *The acceptance of a ſecond* GOOD *leaſe* will operate as a ſurrender of a former. But the reaſon does not hold in the caſe of accepting A NEW VOID leaſe, or one that the leſſee *can't enjoy*. In the preſent caſe, Mr. *William Bromley* had, probably, forgotten that he had altered his eſtate in fee to an eſtate for life; at leaſt, he did not tell the leſſee that he had ſo done. The firſt leaſe was for ninety-

nine

nine years from the day of the date: the ſecond leaſe is for ninety-nine years, to commence immediately; and there is not a word ſaid of the ſettlement or power. The tenant made a fair contract, *bonâ fide*, for a valuable conſideration. The ſecond leaſe was a deceit upon him: for the leſſor had no title to grant this new leaſe. But the preſent leſſor of the plaintiff ſays he ſhall loſe the former leaſe too; becauſe the latter is inconſiſtent with the former; and he could not hold under both.—Where the firſt could be of no uſe, if he had the ſecond; and both parties ſo intended; there is no inconſiſtency in the acceptance of a new *good* leaſe being a ſurrender of the former. But the accepting a new *void* leaſe, which the leſſee is *not* to enjoy, could not ſhew an intention to ſurrender the other. Therefore, the reaſon why this ſhould be an *implied* ſurrender totally fails. A void contract for a thing that a man can not enjoy, cannot, in common ſenſe and reaſon, imply an agreement to give up a former contract. And it has been ſhewn, that the law is ſo (1), and that caſes of this nature appear to have been grounded upon ſolid reaſon, when they are well conſidered.—It is clear, that the acceptance of this new leaſe, which did not paſs an intereſt according to the contract, cannot operate as a ſurrender of the former. And this is ſufficient. The plaintiff has no right to recover.—Poſtea to the defendant.

Clements, eſq. *et al.* executors of Dr. Baldwin, *v.* Waller, eſq. Hil. Ter. 8 Geo. 3. B.R. 2 *Burr.* 2154.

Leaſes by governors of colleges in Ireland, muſt reſerve more than a moiety of the true value, at the peril of the leſſee.—This was upon a writ of error from B. R. in Ireland; where judgment had been given for the plaintiff, *Waller*, leſſee of Dr. *Baldwin*, late provoſt of the college of Dublin, in an action of covenant brought there by Mr. *Waller*, againſt the executors of Dr. *Baldwin*; and the plaintiff had taken his judgment againſt the executors *de bonis propriis*. The ſhort of the fact was, that Dr. *Baldwin*, the late provoſt, had made a leaſe to Mr. *Waller*, his executors, adminiſtrators, and aſſigns; reſerving the rent to Dr. *Baldwin* and his then ſucceſſors: and *Waller* had covenanted to pay the rent to Dr. *Baldwin* and his ſucceſſors. Dr. *Baldwin*, on the other hand, had covenanted for himſelf and his ſucceſſors, with *Waller*, his executors, adminiſtrators, and aſſigns, to warrant and defend the premiſes againſt himſelf and his ſucceſſors. The rent reſerved was *leſs* than the moiety of the *true yearly value* of the eſtate demiſed by the

(1) *Litt. Rep.* 268. 279 *Hutton*, 104, 105. 2 *Rol. Abr.* 495. Sir *William Jones*, 405. *Wilſon* v. Sir *Thomas Sewell (ante*, p. 35), 1 *Co.* 134. a. 8 *Co.* 71. *Carter*, 20. 1 Ld *Raym.* 166. *Co. Litt.* 113. *Shep. Touch.* 269. Sir *J. Jones*, 110. *Eq. Ca. Abr.* 344. *Co.* 352. *Litt.* 667. *Co. Litt.* 47. 5. a. 6 *Co.* 14.

leaſe. Dr. *Baldwin* died. Dr. *Andrews* ſucceeded him as provoſt; and brought his ejectment againſt *Waller*, the leſſee, and evicted him. Whereupon he brought this action againſt the executors of Dr. *Baldwin*, upon Dr. *Baldwin*'s covenant. They craved *oyer* of the leaſe, and pleaded the act of the Iriſh parliament of 10 and 11 *Char.* I. c. 3. § 2. which gives power to governors of colleges, &c. to demiſe for 21 years, reſerving "ſo much yearly rent or profits, or "more, *at the peril of the* LESSEES *who ſhall take the ſame*, "as the moiety of the true value of the ſaid lands, &c. "*(communibus annis)*, at or immediately before the time of "the making of ſuch leaſe ſhall amount unto." To this plea, the plaintiff, *Waller*, demurred: and the court of King's Bench in Ireland gave judgment for him. Upon which the executors of Dr. *Baldwin* brought the preſent writ of error. The queſtion now litigated was, "Whether the action could be "maintained againſt the *executors* of the late provoſt, upon "his covenant for himſelf and his *ſucceſſors*, to warrant and "defend, &c. in which covenant his *executors* were *not* "*named?*"—PER CURIAM: This caſe will not turn upon the *form*; for it is clear upon the *merits*. The words of the act of parliament are, "that it ſhall be at the *peril of the* "*leſſee*." The leſſee *knew* the value; becauſe, to obtain *this* leaſe, he ſurrendered an *old* one. The leſſor might not know the value. The act impoſes the riſque upon the leſſee; and ſays, his leaſe ſhall be void, unleſs made purſuant to that act, which requires a moiety of the true yearly value to be reſerved, and which was *not* here reſerved. Beſides, this judgment is erroneous, as being againſt the executors *de bonis propriis*.—JUDGMENT reverſed.

Doe *ex dim.* Criſp *v.* Barber, Mic. Ter. 29 Geo. 3. B R. 2 *Ter. Rep.* 749.

A leaſe of a rectory-houſe, &c. by a rector, becomes void by 13 *Eliz.* c. 20. by his non-reſidence for 80 days; and a ſtranger may take advantage thereof.—The leſſor claimed a rectory-houſe, &c. by leaſe from the rector for 21 years, dated the 27th of March, 1786. In the July following the former tenant, the rector, and the leſſor of the plaintiff, had come to an agreement, on iſſuing a writ of poſſeſſion, under an ejectment, brought by the leſſor and the rector, that the leſſor of the plaintiff ſhould have the poſſeſſion. At Lady-day, 1787, the leſſor received poſſeſſion from that tenant; and, in Auguſt, 1787, he paid the rent up to Lady-day, 1788. On the 17th of March, 1788, the defendant entered without any colour of title. There were two demiſes in the declaration; the one on the 6th of April, 1787, and the other on the 17th of March, 1788. On the trial the defendant relied on the 13 *Eliz.* c. 20. which enacts, "that "*no leaſe of any benefice, &c. or any part thereof, ſhall endure* "*any longer than while the leſſor ſhall be ordinarily reſident* "*without abſence above fourſcore days in one year*; *but that every* "*ſuch*

"*ſuch leaſe, immediately upon ſuch abſence, ſhall ceaſe and be* "*void.*" The rector, in the preſent caſe, was wholly reſident in another place. A verdict was found for the defendant, with liberty to move the Court to ſet it aſide, and to enter a nonſuit. And a rule to ſhew cauſe having been obtained, and cauſe ſhewn, THE COURT declared they were ſorry that ſuch a poſſeſſion as that of the defendant ſhould find a ſhield from an act of parliament, the policy of which, whatever it was at the time when it was paſſed, might now, at leaſt, be much doubted. That according to the maxim, *expreſſum facit ceſſare tacitum*, the leſſor's title, under the leaſe, excluded the ſuggeſtion of a ſubſequent demiſe. And even that would be equally void; ſince the act of parliament would affect a parol-demiſe as much as a demiſe by deed. And, therefore, though the defendant was a ſtranger, and a wrong-doer, the plaintiff could not recover in this action.—Rule abſolute for entering a nonſuit.

Enys, executor of Enys, v. Donnithorne, executor of Donnithorne, Tr. Ter. 1 Geo. 3. B. R. 2 *Burr.* 1190.

A covenant, by two joint leſſees, if it be joint and ſeveral, ſhall bind the executors of the deceaſed leſſee.—By a leaſe, dated the 10th of October, 1735, *S. Enys*, in conſideration of 20 guineas, and of the yearly rent and covenants therein mentioned, demiſed certain premiſes to *N. Donnithorne* and *J. Donnithorne*, their executors, adminiſtrators, and aſſigns, from the 1ſt day of March then laſt paſt, for 50 years, if the ſaid *S. Enys* and one *R. P.* or either of them, ſhould ſo long happen to live: and the then preſent term and eſtate of the ſaid *S. Enys*, in the premiſes, ſhould ſo long continue; the ſaid term to commence and begin from, and immediately after, the ſurrender, forfeiture, or other determination, of a leaſe or demiſe of the ſaid premiſes, made and granted by the ſaid *S. Enys* to the ſaid *N. Donnithorne* and *J. Donnithorne*, bearing date the 27th day of February, 1728; they, the ſaid *N. Donnithorne* and *J. Donnithorne*, their executors, adminiſtrators, and aſſigns, paying yearly, and every year, during the term thereby granted, unto the ſaid *S. Enys*, his executors, adminiſtrators, and aſſigns, the yearly rent, &c. And the leſſees covenanted to pay the rent, and all taxes, and to keep the premiſes in good and ſufficient repair. *S. Enys*, the leſſor, died; and *N. Donnithorne*, one of the joint leſſees, alſo died; and there being three years reſerved rent in arrear, and the premiſes greatly out of repair, the executor of *S. Enys* brought his action of covenant againſt *J. Donnithorne*, not as the ſurviving joint leſſee, but as the executor of *N. Donnithorne*: and, upon a general demurrer to the declaration, two objections were taken: 1ſt, That the leaſe of the 10th of October, 1735, was void, for uncertainty in the commencement of the term. 2dly, That by the death of *N. Donnithorne*, one of the two joint leſſees, the whole benefit of the term, and the term itſelf, and the whole charge, ſur-

vived to *J. Donnithorne*, the other joint leſſee. Upon the firſt point, THE COURT HELD, that it was either a ſurrender of the former leaſe, or if a new one, that in point of intereſt, it was to take its commencement from the determination of the former one only, which, as the plaintiff had averred in his declaration, expired on the 1ſt of March, 1738. And, as to the ſecond point, that the action was brought on a joint and ſeveral covenant, by which the two leſſees became ſecurities for each other; therefore, the Court unanimouſly gave judgment for the plaintiff.

Johns v. Whitley, *et al.* Mic. Ter. 11 Geo. 3. C.B. 3 *Wilſ.* 127.

A proviſo in a leaſe to enter for a condition broken can only operate during the term.—This was treſpaſs, with a *continuando quare clauſa fregerunt, ceperunt & aſportaverunt, &c.* DECLARATION, 1ſt count for breaking and entering cloſes, ſpoiling the graſs and corn, and with cattle, &c. and for mowing, and cutting, and carrying away the ſame, and with carts, &c. ſpoiling the ſoil of plaintiff: 2d count for mowing and cutting graſs and corn of plaintiff, and carrying it away: 3d count for taking and carrying away other graſs and corn of the plaintiff. PLEAS—1ſt plea, not guilty to the whole declaration: 2d plea, as to breaking and entering the cloſes in the declaration, treading, &c. the graſs, and eating, &c. the other graſs with cattle, and with carts, &c. ſpoiling, &c. the ſoil; defendants plead in BAR. That before any of the times when, &c. one *C. H.* was ſeiſed in fee of the cloſes, in which, &c. and by indenture demiſed the ſame to *J. K.* for 99 years, if *P. K.* and *M. K.* or either of them, ſhould ſo long live; to begin immediately after the death of *E. M.* &c. whereby *J. K.* became entitled to the ſaid cloſes, expectant on the death of *E. M.* &c. That afterwards, and before any of the times when, &c. the ſaid *E. M.* died, &c.; and *J. K.* afterwards entered upon the ſaid cloſes, and was poſſeſſed; and, being ſo poſſeſſed, the ſaid *M. K.* afterwards died. AND the defendants further ſay, that *J. K.* afterwards, and before any of the times when, &c. made his will, and the ſaid *P. K.* executor, and died poſſeſſed of the ſaid cloſes; by which *P. K.* entered and was poſſeſſed; and before any of the times when, demiſed the ſame to defendant *Whitley* for one year; and ſo from year to year at will, and ſo long as the eſtate of *P. K.* ſhould continue. By virtue whereof *Whitley* entered and was poſſeſſed; and during the life of *P. K.* ploughed and ſowed the cloſes with corn, &c.; and before the ſame was ripe, and fit for reaping, *P. K.* died; whereupon his ſaid demiſe to defendant ceaſed, and he delivered up poſſeſſion to the ſaid plaintiff, to whom the ſame belonged. And when the corn was ripe, *the defendants entered and reaped*, &c.; and ſo excuſe the treſpaſs, by taking the emblements; which is the ſame breaking, &c. REPLICATION to the plea ſecondly in bar,

bar, as to part of the treſpaſs, viz. Wall-park and the Three Pieces. Confeſſes that *C. H.* was ſeiſed in fee, and all the reſt of the plea, to the time of delivering up poſſeſſion to the plaintiff of the cloſes, in which, &c. But plaintiff further ſays, that *in the ſaid leaſe from* C. H. *to* J. K. *it is provided, that if the ſaid* J. K. *ſhould let the premiſes otherwiſe than from year to year, and that only to paſture, and not to tillage, it ſhould be lawful for* C. H. *and his heirs, &c. to re-enter.* And the plaintiff further ſays, that the ſaid *C. H.* after making the ſaid leaſe, and before any of the times when, &c. being ſeiſed in fee of the reverſion, made his will, and deviſed the ſame to one *W. H.* in fee; and afterwards died ſo ſeiſed; whereby *W. H.* became ſeiſed, and before the ſaid firſt time when, &c. bargained and ſold to the plaintiff, to hold for one year; by virtue whereof, and the ſtatute of uſes, the plaintiff was poſſeſſed of the reverſion for that term; and being ſo poſſeſſed, the ſaid *W. H.* releaſed the premiſes to the plaintiff in fee; by virtue whereof, and the ſtatute of uſes, plaintiff was ſeiſed in fee; and was ſo ſeiſed at the time of the ending of the leaſe to the ſaid *J. K.*; *and that* P. K. *had no licence from* C. H. *to let the cloſes to defendant* Whitley *to tillage; ſo that* Whitley *wrongfully ploughed*, &c.; and that the defendants, of their own wrong, did part of the treſpaſs in the declaration. *Et hoc*, &c. And as to the ſame plea ſecondly in bar. Replication as to breaking, &c. the reſidue of the ſaid cloſes. Plaintiff confeſſes that *C. H.* was ſeiſed in fee, and the reſt of the plea to the delivering up poſſeſſion of the reſidue of the cloſes to the plaintiff; but that the plaintiff, before and at the end of the ſaid leaſe of 99 years, and before, and at the time of defendant *Whitley*'s quitting poſſeſſion, was, and ſtill is, ſeiſed in fee; and that defendants, *de injuria ſua propria*, did the treſpaſs. Traverſe, that *P. K.* was living at the time when *Whitley* ploughed, &c.—REJOINDER. Confeſſes the proviſo in the leaſe for 99 years; and that *C. H.* deviſed the reverſion to *W. H.*; and that *W. H.* bargained, ſold, and leaſed the ſame to the plaintiff: and confeſſes the reſt of the firſt part of the replication. *But defendants ſay, that the plaintiff did not re-enter during the term ſubſiſting. Et hoc*, &c. As to the other part of the replication, defendants ſay, that at the time of ploughing and ſowing, *Peter Knight* was living; and conclude to the country. And iſſue is joined upon the traverſe.—Then was a GENERAL DEMURRER to the rejoinder, as to the cloſes called Wall-park, and the Three Pieces: and joinder in demurrer.—THE QUESTION upon the pleadings, for the conſideration of the Court, was, Whether the defendant, *Whitley*, had a right to enter, after the determination of the term of 99 years, by the death of *Peter Knight*, and take the *emblements* of thoſe cloſes which he *(Whitley)* had ploughed

and ſowed, while his intereſt at *will* ſubſiſted, and in the life-time of *Peter Knight*, notwithſtanding the *proviſo* that it ſhould be lawful for *Chriſtopher Harris* (the leſſor of the 99 years' term), his heirs and aſſigns, to *re-enter* into the cloſes in which, &c. if the ſame ſhould be *let to tillage*, without *licence*, in writing, from the ſaid *Chriſtopher Harris*, his heirs or aſſigns, firſt had and obtained; as neither the ſaid *Chriſtopher Harris*, his heirs or aſſigns (or the plaintiff), entered before the determination of the ſaid term of 99 years, for the breach of the ſaid *proviſo* or *condition* therein, by plowing and ſowing the cloſes in queſtion.—PER CURIAM: The *proviſo* could only operate during the continuance of the leaſe; when *that* was determined, the *proviſo* was vaniſhed and gone; and the plaintiff having never been in poſſeſſion by *right of re-entry* for the condition broken, can have no advantage thereof; and the defendant who ploughed and ſowed the land, has, in law and juſtice, a right to reap and take the *emblements*.—Judgment for the defendant.

Gerrard *v.* Clifton, in error, Tr. Ter. 38 Geo. 3 B.R. 7 *Ter. Rep.* 676.

The leſſee of a coal-mine covenanted to pay a moiety of all ſuch ſums of money as the coals there raiſed *ſhould ſell for at the pit's mouth*: and the Court held that he was not liable to pay any part of the money produced by the ſale of the coals elſewhere.—This was an action of covenant brought in the court of Common Pleas. The declaration ſtated an indenture, dated the 30th of September, 1781, by which *T. Clifton*, under whom the plaintiff below claims, demiſed to *Gerrard* and *E. Walmeſly certain quarries of cannel, for* 21 *years*, at the yearly rent of 150l.; and, alſo, the further ſum of 1s. 9d. for every ſcore baſkets of cannel over and above 41,150 baſkets, each baſket not exceeding 132lb. weight, "and, alſo, one-half part or ſhare of "all ſuch ſums of money all, or any part, of the cannel to "be got by the ſaid indenture *ſhould ſell for, at the pit mouth*, "over and above 4d. the baſket; and, alſo, the further ſum "of 4l. *per* acre for land uſed for roads, &c. payable half-"yearly." The breach aſſigned was, that the leſſees had, between the 1ſt of January, 1792, and the 29th of September, 1794, gotten, raiſed, and drawn out of the pit mouth, upon the ſaid premiſes, 100,000 baſkets of cannel, and *ſold the ſame at other places than at the pit mouth for divers ſums of money, and which might and would have ſold at the pit mouth for more than 4d. the baſket*, to wit, for 1s. the baſket: one-half part or ſhare of which ſaid ſeveral ſums of money that the ſaid cannel might and would have ſold for at the pit mouth, over and above 4d. the baſket, amounted to 1333l. 6s. 8d.; but that the leſſees had not paid the ſaid ſum, &c. To this declaration there was a general demurrer. Before judgment was given in the Common Pleas, one of the defendants (*Walmeſly*) died; her death was ſuggeſted on the

the record; and then judgment was given for the plaintiff (1), to reverſe which judgment a writ of error was brought. THE ONLY QUESTION was, Whether it was the intention of the parties to this leaſe that the leſſees ſhould only pay the additional rent of one-half part of ſuch ſums above 4d. the baſket as the cannel *gotten and ſold at the pit mouth*, or as all the cannel *raiſed there, but carried and ſold elſewhere*, ſhould ſell for (2)?—PER CURIAM: In the courſe of the argument ſome caſes have been alluded to: but decided caſes are never brought forward with effect unleſs they eſtabliſh certain principles. Thoſe caſes were cited to eſtabliſh a point that wants no authority to ſupport it; namely, that when a court of law is called upon to conſtrue the agreement of the parties, and it is their duty to diſcover the intention of the parties, to give effect to it if by law they can. It is not pretended that the leſſee has not paid the half part of the money that the coals ſold for at the pit's mouth; but the breach aſſigned is the non-payment by the leſſee of the half part of the money produced by the ſale of coals elſewhere, but which might have been ſold at the pit's mouth; and the queſtion is, Whether, under this reddendum, the leſſee is liable for coals not ſold at the pit's mouth? When this queſtion came before us on a former occaſion, it appeared to us, that as the leſſee had ſtipulated to pay for the coals ſold at the pit's mouth, in contradiſtinction to thoſe not ſold there, he was not to pay for the latter: and we ſtill continue of the ſame opinion. There is no doubt about the words of this leaſe; and it is better to adhere to the words of the covenant than to indulge ourſelves in conjectures as to the ſuppoſed intention of the parties; and it is ſufficient to ſay, that the leſſee has not entered into the covenant inſiſted upon by the plaintiff below: the parties have met here on the conſtruction of a ſolemn inſtrument, in which their reſpective rights and duties are clearly preſcribed, and we cannot ſubſtitute any other contract in lieu of that into which they have entered.—Judgment reverſed.

A ſubſequent agreement may, by relation, operate to make a reſervation of rent from the beginning.—This was replevin, and on a caſe reſerved at the trial, it appeared, that the plaintiff, and *Samuel Meeke*, at Midſummer, 1775, got poſſeſſion of the chalk-pit in queſtion, under an agreement with Mr. *Shrubb*, attorney or agent for the defendant, at the rate of 20l. a-year; *and at Michaelmas*, 1775, *by agreement*

M'Leiſh *v.* Tate, Ea. Ter. 18 Geo. 3. B.R. *Comp.* 781.

(1) But there was a difference of opinion on the bench in that court.

(2) *Vide*, vol. I. p. 406, a caſe on this ſame leaſe, where the ſame queſtion was agitated, except that in that caſe the leſſees pleaded that they had not broken the covenant.

with William Horſenell, *tenant to the defendant: they alſo came into poſſeſſion of three other fields upon certain terms*, both which agreements were ſubject to the approbation, or otherwiſe, of the defendant and his wife, who were then abroad. On their return to England, after many tranſactions, *it was agreed, on the 26th of November*, 1776, *between the ſaid* Samuel Meeke *and* David James, *agent for the defendant, that a leaſe ſhould be drawn of the whole premiſes, for ten years from Michaelmas*, 1775, *at* 100*l. a-year rent*, with the uſual covenants; and that the ſaid plaintiff and *Samuel Meeke* ſhould pay 15*l.* for the chalk-pit, from Midſummer to Michaelmas, 1775; and *Meeke* then paid 57*l.* 10*s.* and a receipt or memorandum was given by the ſaid *David James*, and ſigned by him and the ſaid *Samuel Meeke*, in the words and figures following: "Received 26th Nov. 1776, of *Samuel Meeke*, Eſq. "the ſum of 57*l.* 10*s.* in part and on account of 115*l.* for ſo "much rent agreed to be due from him and Mr. *M'Leiſh* at "Michaelmas laſt, for a chalk-pit and lands, ſituate, &c." no leaſe was ever executed, although a draft of the leaſe for nine years, from Michaelmas, 1776, was made, and left with the ſaid *Samuel Meeke*, by the defendant's agent.—A verdict was found for the plaintiff, with 1*s.* damages and 40*s.* coſts, ſubject to the opinion of the Court upon the following queſtions; *firſt*, Whether the ſum of 15*l.* for the quarter ending at Michaelmas, 1775, was to be conſidered as a rent under the demiſe mentioned in the avowry? which avowry was, becauſe the plaintiff, and *Samuel Meeke*, his partner, enjoyed the ſaid chalk-pit from Midſummer, 1775, to Michaelmas, 1775, at the rent of 15*l.* for that quarter; and the ſaid chalk-pit, and other the premiſes, from Michaelmas, 1775, to Michaelmas, 1777, at the rent of 100*l.* *per annum: ſecondly*, Whether the agreement for the ten years' leaſe, under the circumſtances aforeſaid, was good under the ſtatute of frauds?—Lord MANSFIELD, Ch. J. It is very plain what the juſtice of the caſe is: it is that the leaſe ſhould be executed: the only material fact is, whether the defendant is ready to execute it; and the plaintiff diſſents: it is clear the plaintiff has held at a rent: it is as clear that he has agreed to let that rent be 15*l.* from Midſummer to Michaelmas. At the ſame time, there were other ſtipulations to be performed on the part of the defendant; and, therefore, he ſays, he ought not to be bound by what he has agreed to, unleſs the defendant will perform his part: but the anſwer given to that is, that the defendant is ready to perform the whole of it:—the firſt agreement is out of the queſtion: the real juſtice of the caſe is, that the leaſe ſhould be executed: therefore, let it be added to the caſe, which party is backward to execute it.—ADJORNATUR.—An affidavit was afterwards made, ſtating, that the defendant was ready to execute the leaſe in queſtion

queſtion, a draft of which was in the plaintiff's poſſeſſion; but that the plaintiff, without objecting to the terms of it, refuſed to accept it.—THE COURT, upon the firſt point, held this a demiſe at a rent certain, for that the ſubſequent agreement ſhould, by relation, operate to make it a reſervation of the rent from the beginning.—Judgment for the defendant.

Covenant to renew.] The act of the leſſor and his anceſtors, by *repeatedly* inſerting, in different renewals of a leaſe for lives, a covenant to renew, under the ſame rent and covenants, may be held to conſtrue ſuch covenant, though doubtfully worded, a covenant for a perpetual renewal—this was a caſe out of chancery, for the opinion of this Court, ſtating, in ſubſtance, as follows: "*Robert Booth*, by indenture, demiſed certain "premiſes to one *Otho Cooke*, for the lives of the ſaid *Otho* "*Cooke*, *Elizabeth Cooke*, and *Robert Cooke*; and the ſaid "*Robert Booth* thereby covenanted as follows: *that if the* "*ſaid* Otho Cooke, *his heirs and aſſigns*, ſhall be minded, at "the deceaſe of the ſaid *O. C. E. C.* and *R. C.* or any of "them, to ſurrender this preſent indenture, and take a new "leaſe of the ſaid premiſes, and thereby add *one new life* to the "then *two* in being, *in lieu of the life ſo dying*; that then the "ſaid *R. R.* his heirs, &c. upon requeſt on ſuch ſur-"render of the leaſe then in being, and upon payment of one "broad piece of gold of 22s. value, or 22s. in ſilver, to the "ſaid *R. B.* his heirs, &c. *for every life* ſo to be added in "lieu of the life of *every of them* ſo dying; and at the proper "coſts of the ſaid *Otho*, without demanding any further fine "for the ſame, ſhall and will grant and *execute*, unto the "ſaid *Otho Cooke*, his heirs, &c. *a new leaſe* for the lives of "the *two perſons named in the former leaſe*, as ſhall be then "living, and of *ſuch other perſon* as the ſaid *Otho Cooke*, his "heirs or aſſigns, ſhall nominate and appoint in lieu of the "perſon named in the preceding leaſe, as the ſame ſhall re-"ſpectively happen to die, under the beforementioned annual "rent, *and the ſame covenants therein contained.*" This leaſe bore date the 22d of December, 1749; *and there had been ſucceſſive renewals, containing the* ſame clauſe of renewal, from the time of a former leaſe, granted by the anceſtor of the ſaid *Robert Booth*, bearing date the 3d of Auguſt, 1688, down to the date of the leaſe in queſtion, viz. a renewal by the ſaid *Robert Booth*, in the year 1725, another on the 9th of Nov. 1746, another on the 1ſt of February, 1748; which was granted to the ſaid *Otho*, upon the ſame lives as the leaſe in queſtion; and then the preſent leaſe was granted.—In Jan. 1773, the ſaid *Otho Cooke* died; whereupon the plaintiff, his widow, and *Robert Cooke*, his eldeſt ſon, ſince deceaſed, became entitled, as deviſees, under the will of the ſaid *Otho*, to the ſaid leaſehold premiſes, for their joint lives. Shortly after

Cooke *v.* Booth, Ea. Ter. 18 Geo. 3. B. R. *Cowp.* 819.

after a new leaſe, in preciſely the ſame terms as the leaſe of the 22d of December, 1749, was tendered to the defendant to execute, for the lives of the ſaid *Elizabeth* and *Robert Cooke*; and alſo for the life of *James Cooke*; but the defendant refuſed to execute it. Soon after *Robert Cooke*, another life named in the leaſe of 1749, died, whereupon another indenture, in the like words, except that the name of *Mary Cooke* was inſerted, inſtead of *Robert Cooke*, was tendered to the defendant, who refuſed to execute it, becauſe it contained a covenant of renewal on the death of *James* and *Mary Cooke*, who were not any of the lives named in the original leaſe of 1749; but he was willing to renew on the death of *Elizabeth Cooke*, for the lives of the ſaid *James* and *Mary*; and for ſuch other perſon as the repreſentatives of *Otho* ſhould nominate in lieu of the ſaid *Elizabeth*; and for the life of the longeſt liver of them, the ſaid *James* and *Mary*, and ſuch other perſon ſo nominated, on payment of 22s. and ſubject to the rents and covenants in the original leaſe; but not to renew any farther.—THE QUESTION was, Whether the defendant, as deviſee of *Robert Booth*, the leſſor, was bound to add any covenant for renewal after the death of *Mary Cooke?* or, in other words, Whether this were a covenant for a perpetual renewal?—Lord MANSFIELD, Ch. J. The queſtion in all theſe caſes is, Whether, *under the ſame rents and covenants*, ſhall be conſtrued *incluſive*, or *excluſive*, of the clauſe of renewal? now here the parties themſelves have put the conſtruction upon it; for there have been frequent renewals: and, in all of them, the covenant of renewal has been uniformly repeated. How then ſhall the Court ſay the contrary?—WILLES, J. The act of the parties ſeems to be different in this caſe from all the caſes cited (1): here there have been four or five renewals, all in the ſame terms.—ASHHURST, J. I think this a very hard caſe on the part of the leſſor, and there does not ſeem any mutuality, as in the caſes of improvement of lands: but as there have been four ſucceſſive renewals, the leſſor himſelf has put his own conſtruction upon the covenant; and, therefore, is bound by

(1) The caſes cited on behalf of the plaintiff were *Bridges* v. *Hitchcock*, *Dom.* Proc. 15 June, 1715; and *Furnival* v. *Crewe*, 3 Atk. 83.——On behalf of the defendant were cited, *Hyde* v. *Skynner*, 2 Pere *Wms.* 196. to ſhew that the Court in general would lean againſt perpetual leaſes: and RUSSEL v. DARWIN, 1ſt July, 1767, where the demiſe was for 99 years, or three lives, if they ſhould ſo long live: the leſſor covenanted that he would, upon the death of *either* of the parties, add a new life, upon the payment of 150l. if one only ſhould die; 500l. if two; and 1100l. if all three died; *and under the like rent and covenants*: and Lord CAMDEN held, that the leſſor was under no obligation to renew for more than three lives; and that the covenant of renewal need not be inſerted.

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it.—BULLER, J. I think the case of *Bridges* v. *Hitchcock*, dom. proc. 15 June, 1715, decides this: in that case, both the House of Lords and the Exchequer determined, that the words "*under the same rents and covenants in the new lease contained a perpetual covenant to renew*: so here, I think, they must be construed to mean a like covenant to renew.—PER CURIAM: We are of opinion that a like covenant for renewal ought to be inserted in the new lease; consequently, that the lease offered to be executed by the defendant, *John Gore Booth*, is not an execution of the covenant in the lease, dated the 22d day of December, 1749.

A covenant in a lease for 61 years, to renew at the end of every 20 years, *for the further term of* 20 *years, to commence at and from the expiration of the term then last before granted*, &c. does not authorize the lessee to claim a further term of 20 years, at the expiration of the last term of 20 years in the lease, if he has omitted to claim a further term at the end of the first and second 20 years in the lease.—This was an action of covenant; and the declaration stated, that on the 3d of March, 1725, by a certain indenture *tripartite*, *Walter Baynes* and *Robert Warner* did demise certain premises unto *William Wilton*, his executors, administrators, and assigns, from the Feast of St. *John* the Baptist, then last past, for sixty-one years; at and under a certain rent. And the said *Walter Baynes* and *Robert Warner* covenanted with the said *William Wilton*, his executors, administrators, and assigns, *that, at any time, within one year after the expiration of* 20 *years of the said term of* 61 *years thereby granted, at and upon the request, proper costs and charges of him the said* William Wilton, *his executors, administrators, and assigns, and his or their paying unto the said* Walter Baynes *and* Robert Warner, *their heirs or assigns* (as tenants in common), *the sum of* 6*l. of lawful money of Great Britain, they the said* Walter Baynes *and* Robert Warner, *their or either of their heirs and assigns* (*as tenants in common*), *would, upon such request and payment made, execute another lease of the said premises unto the said* William Wilton, *his executors, administrators, and assigns, for and during the further term of* 20 *years, to commence from and after the expiration of the said term of* 61 *years thereby granted*, at and under the said yearly rent of 2*l.* 7*s.* 6*d.* and the usual and general covenants; AND SO IN LIKE MANNER, *at the end and expiration of every* 20 *years during the said term of* 61 *years thereby granted, for the like consideration, and upon the like request, would grant and execute another lease of the said premises unto* William Wilton, *his executors, administrators, or assigns, for the further term of* 20 *years, to commence at and from the expiration of the term then last before granted*, at and under the like rent, &c. The declaration then stated, that on the 11th of May, 1785, the lease was assigned unto the

Rubery *v.* Jervoise *et al.* Ea. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 229.

the plaintiff, &c.; and that the reverſion of the demiſed premiſes was veſted in the defendants. Then it ſtated, that the plaintiff, at the end and *expiration of the third twenty years* of the ſaid term, requeſted the defendants to execute another leaſe, &c. and aſſigned, as a breach of covenant, "that the "defendants did not, nor would, *grant or execute another* "*leaſe*," &c. &c. To this there was a general demurrer, and joinder in demurrer (1).—PER CURIAM: This queſtion has been argued upon the words of the covenant, and the intention of the parties. If there be a doubt upon the words, it is true that they are to be taken moſt ſtrongly againſt the covenantor; but, in this caſe, they are very plain. This is an agreement, on the part of the leſſor, to grant a further leaſe on a precedent condition to be performed by the leſſee, which he has not done. The leſſor, at any time within one year after the expiration of the firſt 20 years in the ſaid term, upon the application of the leſſee, covenanted to grant a further term of 20 years; then the covenant ſtates, that he is, "*in like manner*," to grant a ſecond term of 20 years after the expiration of 40 years of the original leaſe, upon a ſimilar application: that is, the leſſee is to apply at the end of every 20 years, ſo that there may always be 40 years intervening between the grant and the commencement of the additional terms. The words "*and ſo in like manner*," after the term laſt before granted, neceſſarily mean, that the leſſee muſt have applied for the term of 20 years preceding; and it made a very material difference to the leſſor, whether this renewal was made at the end of 20 or 60 years. It was optional in the leſſee, whether he would apply for a renewal of the leaſe, or not; but if he had intended to claim the benefit of ſuch renewal, he ought to have applied for it at the end of the firſt 20 years.—Judgment for the defendant.

Cruſoe *ex dim.* Blencowe *v.* Bugby, Tr. Ter. 11 Geo. 3. C.B. 2 *Black.* 766. 3 *Wiſ.* 234.

Covenants not to aſſign.] A covenant not to *aſſign, transfer, ſet over, or otherwiſe do or put away the leaſe or premiſes*, does not extend to an under-leaſe granted for part of the term.—This was an ejectment for a meſſuage and mill, which was demiſed, by *Henry Blencowe*, and *Mary* his wife, to *William Alder*, his executors and adminiſtrators, for 21 years, from Chriſtmas, 1762, at 20l. rent; with a proviſo for re-entry on non-payment of rent, or breach of any of the covenants. Among the covenants, one was, "that the leſſee, his execu- "tors or adminiſtrators, ſhall not, nor will, at any time or

(1) The Court obſerved, that this was a *joint action* on a *ſeveral covenant*: but as it was the wiſh of the parties to take the opinion of the Court on the conſtruction of the covenant, this was argued as if the declaration had been amended.

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" times during this demiſe, *aſſign, transfer, or ſet over, or* " *otherwiſe do, or put away, this preſent indenture of demiſe,* " *or the premiſes hereby demiſed, or any part thereof,* to any " perſon or perſons whomſoever; without the licence and " conſent of the ſaid *Henry Blencowe*, and *Mary* his wife, " their heirs or aſſigns, in writing, under his, her, or their " hands and ſeals, firſt had and obtained." *Henry Blencowe* died in May, 1765; *Mary* his wife, 20th of October, 1770; and the leſſor of the plaintiff is their ſon and heir. *William Alder*, 25th of Auguſt, 1769, *without any previous licence, demiſed the premiſes to the defendant* Bugby, for fourteen years from Michaelmas, 1769, being three months ſhort of his own term; by virtue of which ſubdemiſe, the defendants claimed the poſſeſſion.—THE QUESTION was, Whether the leſſor of the plaintiff was entitled to re-enter, by virtue of the covenant and proviſo aforeſaid?—PER CURIAM: The Courts have always held a ſtrict hand over theſe conditions for defeating leaſes. Very eaſy modes have always been countenanced, for putting an end to them. The leſſor, if he pleaſed, might certainly have provided againſt the change of occupancy, as well as againſt an aſſignment, but he has not done ſo, by words which admit of no other meaning. *Aſſign, transfer*, and *ſet over*, are mere words of aſſignment—*Otherwiſe, do*, or *put away*, ſignifies any other mode of getting rid of the premiſes entirely; and cannot be extended to the making an under leaſe. The deviſing a term *is a doing, or putting it away*; the leſſee becoming a bankrupt *is a putting, or doing it away*; a dying inteſtate *is a putting it away*; ſo, being in debt by confeſſing a judgment and having the term taken in execution, *is the like*; but none of theſe amount to an aſſignment, or to a breach of the covenant or condition. —Judgment for the defendant, *per totam Curiam* (1).

But if a leaſe contain a proviſo, that the leſſee and his adminiſtrators ſhall not *ſet, let*, or *aſſign over*, the adminiſtratrix of the leſſee cannot underlet without incurring a forfeiture.—On the trial of an ejectment the jury found a verdict for the plaintiff, ſubject to the opinion of the Court on a caſe ſtated. *William Gregſon*, by indenture, in 1774, demiſed the premiſes in queſtion to *Samuel Harriſon*, his executors, &c. from the 25th of December then next enſuing, for 21 years, at the yearly rent of 26l. payable quarterly; in which indenture is contained a proviſo in the words following, to wit: " In caſe the ſaid *Samuel Harriſon*, his exe- " cutors or adminiſtrators, ſhall, at any time during the ſaid " term, SET, LET, OR ASSIGN OVER, the ſaid hereby de- " miſed meſſuage or dwelling-houſe, or any part thereof,

Roe *ex dim.* Gregſon, widow, *v.* Harriſon, E. 1. Ter. 28 Geo. 3. B.R. 3 *Ter. Rep.* 425.

(1) See *Bally* v. *Wells*, *ante*, vol. I. p. 685.

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" without the licence and conſent of the ſaid *William Gregſon*, " his executors, adminiſtrators, or aſſigns, for that purpoſe " firſt had and obtained *in writing*, theſe preſents, and every " clauſe, matter, and thing herein contained, ſhall be abſo- " lutely null and void to all intents and purpoſes whatſoever; " and then and from thenceforth it ſhall and may be lawful " to and for the ſaid *William Gregſon*, his executors, ad- " miniſtrators, and aſſigns, to enter," &c. The leſſee entered, and died, and the defendant took out adminiſtration to him, and became poſſeſſed of the demiſed premiſes. By indenture dated the 13th of November, 1786, *the defendant, as adminiſtratrix of her huſband, demiſed the premiſes in queſtion, to hold*, from the 24th day of December then next, for the term of nine years, at the yearly rent of 34l.; on which indenture was an indorſement in the words following: " Be it " remembered, that before the execution of the above-written " indenture, it was mutually agreed between the parties " thereto, that the ſaid *Sarah Harriſon*, her executors or " adminiſtrators, ſhall pay the original rent reſerved to *Wil- " liam Gregſon*, his heirs or aſſigns, within ſeventeen days " next after the ſame ſhall become due quarterly; but in " caſe ſhe ſhall neglect or refuſe ſo to do, then it ſhall and " may be lawful for the ſaid *Thomas Pilling*, his executors, " &c. to pay the ſame unto the ſaid *William Gregſon*, by " and out of the rent above reſerved, if he will accept thereof; " and that his receipts ſhall be good and effectual diſcharges " for ſo much of the rents for which ſuch receipts ſhall be " given. And it is further agreed that ſhe, the ſaid *Sarah Har- " riſon*, ſhall and will ſave, keep harmleſs, and indemnify the " ſaid *Thomas Pilling*, his executors, &c. from all coſts, " charges, and expences, which he or they ſhall or may pay, " ſuſtain, or be put unto, for or by reaſon of any ejectment " to be brought upon the demiſe of the ſaid *William Gregſon*, " for the recovery of the poſſeſſion of the ſaid premiſes, or " any part thereof." *Pilling* entered according to the leaſe, and is now in poſſeſſion. *Gregſon* died, having, on the 20th day of October, 1787, made his will, whereby he deviſed the premiſes to the leſſor of the plaintiff, who brought this ejectment to recover the demiſed premiſes, as being forfeited by the demiſe to *Pilling*. The defendant proved, that previous to the 10th day of October, 1786, *William Gregſon*, under whom the leſſor claims, gave liberty, *by parol*, to *Samuel Harriſon*, the tenant, to let the ſtable, part of the premiſes demiſed, but refuſed to give the like liberty to demiſe any other part of the premiſes. On the 2d of January, 1787, *William Gregſon* received of *Sarah Harriſon*, 6l. 16s. for a quarter's rent, due the 25th of December then laſt paſt, and gave a receipt in the following words, and with the following memorandum under it; " 2d January, 1787, received of Mrs. *Harriſon*, ſix pounds " ten

"ten ſhillings, for rent due the 25th of December laſt, *per* "me, *William Gregſon*. No new tenants accepted without "conſent." The ſtable is at the diſtance of ſix yards from the dwelling-houſe. Formerly *Gregſon*, the owner of the houſe, occupied the ſtables with the houſe.—PER CURIAM: Notwithſtanding ſeveral objections have been taken againſt the plaintiff's recovering in this ejectment, there is no ſufficient anſwer to the plaintiff's claim. Firſt, it is objected, that the covenant only extends to an aſſignment of the whole term; and that no forfeiture could be incurred by letting for a ſhorter period than the whole term: but that is not to be collected from the words of the proviſo, which are "that "the tenant ſhall not SET, LET, *or aſſign* OVER, the ſaid "premiſes, or any part thereof, without licence of the leſſor "in writing." Now as the word "over" is annexed to the word "aſſign," the covenant neceſſarily means, that if the leſſee part with the premiſes, even for a part of the term, his leaſe ſhould be vacated. Then the aſſignment, which is ſtated in this caſe, muſt be conſidered to be a breach of the condition; and no authority has been cited to warrant the Court in ſtriking out the words, "let and ſet." The caſe in 3 *Wilſon*, though a pretty ſtrong one, does not come up to this, for there the word "let" is not uſed; for that is a material word here, and we cannot reject it. It was then objected, that this proviſo, not to aſſign, does not extend to perſons who come into poſſeſſion by operation of law, but only to prevent an aſſignment in fact by the party; and the caſe of Lord *Stanhope* v. *Skeggs*, Ea. Ter. 21 *Geo.* III. B.R. was cited. But there the term was taken in execution, and it does not apply to this caſe. There the only ground on which the Court entertained any doubt was, that the aſſignment was the act and operation of law, and not the act of the party. We none of us doubted but that if the party himſelf had broken the proviſo by aſſigning, that would have been a forfeiture. If a creditor of the leſſee, in this caſe, had obtained judgment againſt him, and taken this leaſe in execution, the ſame queſtion would have ariſen as in that caſe: but this aſſignment is by the act of the party himſelf; and the executors and adminiſtrators are expreſsly named in the covenant. It is impoſſible to argue againſt the expreſs ſtipulation of the parties; there is no doubt but that it was competent to the parties to bind their repreſentatives; and the covenant is, that neither the leſſee, *nor his executors, nor adminiſtrators*, ſhall let, &c. Therefore, for the purpoſe of this aſſignment, this term never could be conſidered as legal aſſets in their hands. If, indeed, the word "executors" had not been inſerted in the proviſo, but it had been confined to an aſſignment by the leſſee himſelf, it might have been doubted whether the reſtriction would have extended to the preſent caſe. Another objection taken was,

was, that the leſſor gave licence to the tenant to let *part of the premiſes*, namely, the ſtables, and that that licence deſtroyed the whole condition. But this is not ſuch a licence to alien as falls within the terms of the proviſo: the expreſs words are "licence or conſent in *writing*;" whereas this was only a licence *by parol*: therefore, this was not a legal licence according to the terms of the covenant. This objection then does not hold. It was, laſtly, contended, that the forfeiture was waived by the acceptance of rent: there is no doubt but that ſuch a forfeiture as the preſent may be waived by a ſubſequent acceptance of rent; but that only holds in caſes where the party, at the time of receiving the rent, is cognizant of the fact of the forfeiture. The giving of the receipt by the landlord for rent, ſubſequent to the time of the forfeiture, is, indeed, an acknowledgment of the tenancy; but that is only where he knows the act of forfeiture at the time. That principle has been frequently recognized in this Court, and the words at the bottom of the receipt import no notice of any actual aſſignment.—Poſtea for the plaintiff.

Goodright *ex dem.* Walter *v.* Davids, Ea. Ter. 18 Geo. 3. B.R. *Cowp.* 803.

If a leſſee covenant not *to underlet* without conſent of the leſſor, under *hand and ſeal*, with a power of re-entry in caſe of a breach, acceptance by the leſſor, of rent due after the condition broken, with full notice, is a waiver of the forfeiture.—A leaſe, executed by the leſſor of the plaintiff, contained, among other things, a covenant, that "the de-" fendant ſhould not *underlet*, aſſign, or transfer the premiſes, " or any part thereof, without the conſent of the ſaid leſſor, " in writing, *under his hand and ſeal*, firſt had and obtained, " with a power of re-entry, in caſe the defendant ſhould not " obſerve the covenants in the ſaid leaſe." It further appeared, by receipts produced, and parol evidence, that the defendant had underlet various parts of the premiſes in queſtion to ſeveral tenants, for ſome years, but that the leſſor of the plaintiff knew of ſuch underlettings; all which were previous to Michaelmas, 1775. The laſt receipt for rent, paid by the defendant, was dated March 25, 1777, for rent due to the leſſor of the plaintiff at Michaelmas preceding: the underletting was before Michaelmas, 1775, and continued at the time of the ejectment brought.—A verdict was found for the plaintiff, ſubject to the opinion of the Court on the following queſtions: 1ſt, Whether a forfeiture was incurred by the underletting? And if it were, Whether the ſame were waived by the acceptance of rent after notice of the condition broken? PER CURIAM: This caſe is extremely clear. To conſtrue this acceptance of rent, *due ſince the condition broken*, a waiver of the forfeiture is to conſtrue it according to the intention of the parties. Upon the breach of the condition, the landlord had a right to enter: he had full notice of the breach, and does not take advantage

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of it, but accepts rent ſubſequently accrued; that ſhews he meant the leaſe ſhould continue. Caſes of forfeiture are not favoured in law; and, when the forfeiture is once waived, the Court will not aſſiſt it.

And if a leſſee, who has covenanted not "*to let, ſet, aſſign, transfer, make over, barter, exchange, or otherwiſe part with the indenture*, &c." with a proviſo that the landlord may, in ſuch caſe, re-enter, gives a warrant of attorney to confeſs judgment; on which the leaſe is taken in execution, and ſold; it is no forfeiture of the leaſe.—On the trial of this ejectment, a verdict was found for the leſſor of the plaintiff, ſubject to the opinion of the Court, on the following caſe: The leſſor of the plaintiff demiſed the ſame by leaſe, dated the 28th of September, 1784, to *J. Braban*, in which leaſe there is the following covenant and proviſo: that *Braban*, his executors, adminiſtrators, or aſſigns, *ſhould not let, ſet, aſſign, transfer, make over, barter, exchange, or otherwiſe part with, this indenture, or the ſaid meſſuage, lands*, &c. *hereby demiſed, or any part thereof, to any perſon or perſons whomſoever, for all or any part of the ſaid term, without the ſpecial licence, conſent, and approbation of* Mitchinſon, *his heirs, or aſſigns, in writing*; provided always, that if *Braban*, his executors, adminiſtrators, or aſſigns, or any of them, ſhould let, ſet, aſſign, transfer, or make over, this indenture, or the ſaid premiſes hereby demiſed, or any part thereof, to any perſon or perſons whomſoever, without the licence or conſent of *Mitchinſon*, his heirs, or aſſigns, in writing, or if all or any of the covenants, &c. on the part of *Braban*, his executors, &c. ſhould not be by him or them paid, obſerved, &c. according to the true intent, &c.; in either of thoſe caſes it ſhould be lawful for *Mitchinſon*, his heirs, and aſſigns, into and upon the ſaid meſſuage or tenement, farm, lands, &c. wholly to re-enter, &c.—*Braban* entered into poſſeſſion of the premiſes under this leaſe, and continued poſſeſſed of them until the entry of the defendant hereafter mentioned. *A creditor of* Braban, *for a juſt debt, took from him a warrant of attorney to confeſs judgment, upon which a judgment was accordingly entered up as of Michaelmas term*, 1797. *Execution iſſued in the ſame term; and the leaſe was, on the 11th of December*, 1797, *ſold under ſuch execution by the ſheriff to the defendant, who was put into poſſeſſion on the 1ſt of January*, 1798, *and now continues ſo poſſeſſed.* The defendant, at the time of his purchaſe, knew that the leaſe contained the ſaid covenant and proviſo. Lord KENYON, Ch. J.—Generally ſpeaking, the grant of an eſtate carries with it all legal incidents, and, therefore, the grantee has a right to ſell and convey it, unleſs he be controlled by the terms of his grant. In the caſe of Lord *Stanhope* v. *Skeggs*, Lord *Mansfield* ſeems to have doubted on this ground, whether or not the covenant that the executors

Doe *ex dim.* Mitchinſon *v.* Carter, Mic. Ter. 39 Geo. 3. B.R. 3 *Ter. Rep.* 51.

of the tenant ſhould not aſſign were void, as being inconſiſtent with the thing granted: but in ſo doubting, his lordſhip probably overlooked the maxim, *modus et conventio vincunt legem*, though, indeed, that maxim is to be taken with ſome qualification; for a grantor, when he conveys an eſtate in fee, cannot annex a condition to his grant not to alien, nor when he conveys an eſtate tail, a condition not to bar the entail. Such reſtrictions are impoſed to prevent perpetuities; but, ſhort of that reſtriction, both parties to a contract may model it in what manner they pleaſe; though, therefore, the grant of an eſtate, *primâ facie*, carries with it all legal incidents, that grant may be modified according to the wiſh of the parties; and, when we are conſidering the rights of the grantee, it is neceſſary to ſee what reſtraints have been impoſed on him. That covenants may be introduced into a leaſe, to prevent the term paſſing under a commiſſion of bankrupt (*ante*, vol. II. p. 97), or being taken in execution againſt the tenant, ſeems to be admitted; and ſuch covenants are now become very uſual. In the caſe of *Cruſoe* v. *Bugby*, Lord Chief Juſtice *De Grey* ſaid, that the courts of Weſtminſter have always watched with a great deal of care, to ſee if the particular caſe fell within the reſtraint impoſed upon the tenant; if not, the party has thoſe legal incidents belonging to the eſtate, and may diſpoſe of it. Now, what are the words uſed in this leaſe; that the leſſee ſhall not *let*, *ſet*, *aſſign*, *transfer*, *make over*, *barter*, *exchange*, *or otherwiſe part with*, the indenture or the premiſes demiſed; but theſe are all acts to be done by the tenant himſelf: and there is a diſtinction between thoſe acts, that the party does voluntarily, and thoſe that paſs *in invitum*; judgments in contemplation of law always paſs *in invitum*, and there is no difference between a judgment that is obtained in conſequence of an action reſiſted, and a judgment that is ſigned under a warrant of attorney, ſince the latter is merely to ſhorten the proceſs, and to leſſen the expence of the proceedings. If the warrant of attorney itſelf had been a ſpecific lien on the eſtate, that perhaps would have come within the words of this covenant; but it only gave the creditor power to enter up judgment againſt the tenant, and, *non conſtat*, that it would be followed up by the term being taken in execution under that judgment. Unleſs we were to carry this farther than the words, I do not think that this is an alienation within the meaning of the covenant. In the courſe of the argument it was ſaid, that the granting of a leaſe was a ſtipulation of confidence; as between the parties themſelves it is ſo, ſo much that the tenant's liability, on his covenant to pay rent, ſubſiſts during the continuance of the leaſe, notwithſtanding he may become a bankrupt, and be deprived of all his property; but there is no perſonal confi-

dence

dence in the aſſignee of the leſſee, and when he parts with the leaſe he alſo gets rid of his liability. On the whole, therefore, I think that this is not a breach of the condition or proviſo for re-entry, the term having been taken in execution againſt the tenant *in invitum*. If I entertained any doubts, I ſhould wiſh to hear the caſe argued again; but I confeſs I have, for ſome time, conſidered this point as being at reſt. ASHHURST, J.—The preſent inclination of my opinion is, that this is not a breach of the condition, but I deſire time to conſider of the caſe. GROSE, J.—The caſes upon this ſubject do not quite agree in deciding what is a breach of a condition of this kind. The words in this covenant rather point to ſome act to be done by the tenant himſelf; but the giving of a warrant of attorney did not ſpecifically operate on this property. If it had been given for this purpoſe, perhaps in equity it would have been conſidered as a fraud on the covenant in the leaſe. But the material conſideration here is, that there is no proviſo that the leaſe ſhall be void, in caſe of the inſolvency or bankruptcy of the leſſee; and as ſuch a proviſo is frequently inſerted in modern leaſes, the omiſſion of it in this caſe is ſtrong, to ſhew that the parties did not intend that this ſhould be a forfeiture of the leaſe. In *Cruſoe* v. *Bugby*, the Court ſaid, that "the leſſee becoming a bankrupt, was the doing or putting it (the term) away," ſo "being in debt by confeſſing a judgment, and having the term taken in execution, was the like;" but ſaid, that "none of theſe amounted to an aſſignment." Now, if the words in this proviſo were only inſerted to guard againſt an aſſignment by the party himſelf (and it ſeems to me that they were), then, according to the above caſe, there has been no aſſignment in this caſe, and, conſequently, no breach of the condition. LAWRENCE, J.—If the Court ſhould ultimately be of opinion that this is not a forfeiture of the leaſe, and I think that is the better opinion, this will be the firſt caſe in which the point is ſo decided. This queſtion has been agitated at various times. So far back as in *Dyer* 6. a. there is this note in the margin: "A man leaſed for years, upon condition that the leſſee ſhould not aſſign it over: the leſſee acknowledged a ſtatute; the term is extended: *Walters* cited this, reſolved to be a breach of the condition, although they come in the poſt, and by act of law." In the caſe in 1 *And.* 124. there was a difference of opinion among the judges; it was ſaid by one of them, that if land be leaſed on condition not to aſſign, and the leaſe be taken in execution by reaſon of a judgment or recognizance, it is not a forfeiture; but this was denied by another of the judges, who ſaid, that the execution was itſelf a forfeiture; to which the reporter adds, "which is hard, as it ſeems." The ſame caſe is alſo reported in 1 *Leon.* 3. according to

which *Periam*, J. and *Meade*, J. held, that it was not an alienation againſt the condition. In 2 *Leon.* 83. where a man deviſed lands to his wife, until his ſon, *William*, attained the age of twenty-two, and then the remainder of part of the lands to his two ſons, *A.* and *John*, upon condition that if any of his ſons ſhould ſell any part before *William* attained the age of twenty-two, he ſhould loſe the lands, &c. it was ſaid, "If the deviſee had entered into a ſtatute to the value of the land leaſed, by the intent of the will, the ſame had been a ſale; and ſuch was the opinion of the whole Court." Theſe are the earlier caſes on this ſubject; the later caſes have been mentioned in the argument. That of *Goring* v. *Warner*, which was cited from 2 *Eq. Caſ. Abr.* 100. is alſo in 7 *Vin. Abr.* 85. pl. 9. where Lord *Macclesfield* ſaid, "I do not think this is a breach of the proviſo or condition at law, but, whether it be ſo or not, I think this is a proper caſe for relief in a court of equity." The caſe of *Dommett* v. *Bedford* (*ante*, vol. II. p. 100) is very diſtinguiſhable from the preſent; for there it was the teſtator's intention that the annuity ſhould be paid to the annuitant ſo long only as the latter ſhould be able to receive it; and when the bankrupt could no longer receive it, there was an end of the term for which the annuity was given. With regard to the caſe of *Roe* v. *Galliers* (*ante*, vol. II. p. 97), it was directly contrary to the opinion given by Lord *Macclesfield* in *Goring* v. *Warner*, becauſe it was there holden that a covenant that the leaſe ſhould be void in caſe the leſſee became a bankrupt was good. Now, looking through all theſe caſes, it does not appear that this preciſe point has been decided. According to what was ſaid in *Cruſoe* v. *Bugby*, this would be a putting away or parting with the eſtate, and then it would be a forfeiture: but if the Courts rather lean againſt ſuch reſtraining covenants and conditions, then I think there is no forfeiture in this caſe, becauſe all the words uſed in this leaſe point at ſome act to be done by the tenant himſelf. If it had been ſtated, that the warrant of attorney was given for the expreſs purpoſe of having the term taken from the tenant, it would have been a forfeiture of the leaſe: but the mere giving of a warrant of attorney does not imply that ſuch was the tenant's object; it might as well be argued that the giving of a bond, which might lead to a judgment and execution, on which the term may be taken, was a forfeiture.—On the whole, therefore, I think that the ſafeſt way of deciding this queſtion is to look to the terms of the leaſe, and, according to thoſe, it does not appear that the tenant has done any act to create a forfeiture. This determination will not be productive of any miſchievous conſequences, becauſe the parties may always ſtipulate (if they pleaſe), that the leaſe ſhall ceaſe and be determined, in caſe of the bankruptcy or inſolvency of the leſſee.

leſſee. And though, at firſt, I had ſome doubts on this caſe, I have now no heſitation in agreeing, that there muſt be judgment in favour of the defendant. ASHHURST, J. then expreſſed himſelf ſatisfied with the reaſons given by the Bench, and added, that he concurred in opinion with the reſt of the Court. *Per Curiam*:—Poſtea to the defendant.

Leather.

THIS was an action of debt on 1 *J.* 1. c. 22. ſ. 14. for ſelling leather which had not been ſearched and ſealed.—On the trial it was objected, that, as under the 50th ſection of this ſtatute, the plaintiff might have proceeded in a different form againſt the defendant before the juſtices of aſſize, or juſtices of the peace at their ſeſſions, &c. for this offence, the juriſdiction of the ſuperior courts was taken away by the 21 *J.* 1. c. 4. ſ. 1. which enacts, "That all offences hereafter to be "committed againſt any penal ſtatute, for which any com- "mon informer or promoter may lawfully ground any "popular action, bill, plaint, ſuit, or information, before "juſtices of aſſize, juſtices of *Niſi Prius*, or gaol-delivery, "juſtices of oyer and terminer, or juſtices of peace in their "general or quarter-ſeſſions, ſhall be commenced, ſued, "proſecuted, tried, recovered, and determined, by way of "action, plaint, bill, information, or indictment, before the "juſtices of aſſize, juſtices of *Niſi Prius*, juſtices of oyer "and terminer, and juſtices of gaol-delivery, or before the "juſtices of peace of every county, &c. having power to "enquire of, hear, and determine the ſame, &c.; and that "all, and all manner of informations, actions, bills, plaints, "and ſuits, whatſoever, hereafter to be commenced, ſued, "proſecuted, or awarded, either by the attorney-general, "&c. or by any common informer, or other perſon what- "ever, in any of his majeſty's courts at Weſtminſter, for or "concerning any of the offences, penalties, or forfeitures "aforeſaid, ſhall be void and of none effect." But the objection was over-ruled, and a verdict was taken for the plaintiff for one penalty of 6s. and 8d. with liberty to move the Court. Afterwards a rule was obtained to ſhew cauſe, either why a nonſuit ſhould not be entered on the conſtruction of the fourth clauſe of the 21 *J.* 1. which enables defendants, ſued on penal ſtatutes, to plead the general iſſue, and give ſuch ſpecial matter in evidence as, if pleaded, would have been a good bar to the action, or why the judgment ſhould not be arreſted on the firſt clauſe of the ſame ſtatute. PER CURIAM: This action is brought on the 1 *J.* 1. c. 22. which

Shipman, *qui tam*. v. Henbeſt, Mic. Ter. 31 Geo. 3. B R. 4 *Ter. Rep.* 109.

which impoſes certain penalties, and enacts (by the 46th ſection) that the penalties ſhall be recovered *by action of debt, bill, plaint, information, or otherwiſe, in any of his majeſty's courts of record*, in which ſuit no wager of law, or eſſoin, ſhall be admitted. Therefore this action may undoubtedly be ſupported, unleſs the juriſdiction of this Court be taken away by the ſubſequent ſtatute of the 21 *J.* 1. c. 4. Then the general queſtion muſt depend on the conſtruction of this act of parliament: but ſome preliminary queſtions having being made, they may be firſt diſpoſed of. It has been argued, that the 21 *J.* 1. does not extend to acts paſſed ſubſequent to it, and that this may be conſidered as an action brought on a ſubſequent ſtatute, the 1 *J.* 1. c. 22. having expired before the 21 *J.* 1. and having been only re-enacted ſince that time. But on this point we are all moſt clearly of opinion, that this muſt be conſidered as an action on the 1 *J.* 1. c. 22. and that the ſubſequent laws, which have continued it from time to time, all give effect to it, as an act made in the reign of the 1 *J.* 1; therefore all the caſes, which decide that this ſtatute of the 21 *J.* 1. prohibit this mode of proceeding, will apply to this caſe, as far as reſpects the date of the act of parliament, provided it applies to it in other reſpects. Another objection made at the bar was, that the 9 *Ann*, c. 11. has inflicted other penalties for this offence; and that, becauſe a ſummary mode of proceeding is given by the 36 & 37 ſect. of that act, before two juſtices, with a power of mitigating the penalties, the juriſdiction of this Court is taken away; for which the caſe of *Cates* q. t. v. *Knight* (*ante*, vol. I. p. 423) was cited. But that argument is totally unfounded; the penalties in the latter ſtatute are accumulative, and impoſed with a different view; and this ſtatute does not affect to repeal the proviſions of the 1 *J.* 1. c. 22. It was not pretended in the caſe cited, that a later ſtatute neceſſarily repealed the penalties given by a former law: the ſole queſtion there depended on the conſtruction of two different ſections in the ſame act of parliament. Then, as to the principal queſtion in the caſe, an attentive conſideration of the words of 21 *J.* 1. c. 4. ſ. 1. will remove all doubts concerning it; it enacts, "That all offences againſt "any penal ſtatute, for which any common informer may "lawfully ground any popular action, bill, plaint, ſuit, or "information, *before juſtices of aſſize, juſtices of* Niſi Prius, "*or gaol-delivery, juſtices of oyer and terminer, or juſtices of* "*peace in their ſeſſions*, ſhall be commenced, ſued, proſecuted, "tried, recovered, and determined, by way of action, plaint, "bill, information, or indictment, before the juſtices of aſſize, "&c. or before the juſtices of peace of every county, city, "&c. wherein ſuch offences ſhall be committed, &c. and "not elſewhere, &c." Then this act of parliament does not

not extend to *all* proceedings on penal ſtatutes; it only prohibits the proceedings in the courts of Weſtminſter, in all thoſe caſes where popular actions, bills, plaints, ſuits, or informations, might have been brought in the inferior courts. But neither of thoſe modes of proceeding, to recover the penalty inflicted by the 1 *J.* 1. c. 22. is given by the 50th ſection of that act; and that clauſe only enables juſtices of aſſize, juſtices of peace, &c. within their ſeveral juriſdictions, to *enquire* of all the premiſes in their ſeſſions, leet or law days, *and to hear or determine the ſame.* Now, *when a power is given to a juriſdiction, which does not ordinarily entertain actions, bills, or plaints, and that power is only generally to enquire of, hear, and determine the offence, it muſt be underſtood to mean by the common law mode of proceeding, namely, by indictment, or preſentment.* There is no pretence to ſay that an action, bill, or plaint, can, by the common law, be brought at the aſſizes, the ſeſſions, or at courts leet; therefore, it appears moſt clearly, that the ſtatute 21 *J.* 1. c. 4. has only excluded the juriſdiction of the ſuperior courts in certain enumerated caſes; and, as this is not one of thoſe caſes, the ſtatute 21 *J.* 1. does not apply to it. It was argued, that the 21 *J.* 1. c. 4. is a beneficial law, and ought to be extended as far as poſſible: but if the legiſlature had thought ſo, they would have extended the benefit of it to all penal ſtatutes paſſed ſubſequent to it, which are infinitely more numerous than thoſe made before that time; and it is more beneficial to the ſubject that his cauſe ſhould be heard and determined by the ſuperior courts of record. Then ſeveral caſes were cited at the bar, to ſhew that this ſtatute reſtrained the proceedings on all prior penal ſtatutes to the courts below: but all thoſe caſes are founded on the ſtatute 5 *Eliz.* the 39th ſection of which expreſsly gives power to juſtices of oyer and terminer, and juſtices of the peace, &c. to hear and determine the offences contrary to that ſtatute, as well by indictment, *as by information, action of debt, or bill of complaint.* This act, having given an action in inferior juriſdictions, however diſſimilar it is to the common law remedy, preciſely ſhews the meaning of the 21 *J.* 1. c. 4. and to what caſes that latter ſtatute applies; on the whole, therefore, conſidering the authorities which have been cited, the ſtatute of the 5 *Eliz.* c. 4. and that of the 21 *J.* 1. c. 4. We are clearly of opinion, that the latter act only applies to thoſe caſes where proceedings by way of action, bill, plaint, ſuit, or information, may be commenced in the inferior courts; and, conſequently, that it does not extend to the preſent, where no ſuch proceeding can be inſtituted.

Searchers of leather, appointed under ſtat. 2 *Jac.* 1. c. 22. are authorized to ſeize leather *inſufficiently dried*, in order to carry it before other officers, called triers; but they cannot ſeize

Warne *v.* Varley, and two others, Mic. Ter. 36 Geo. 3. B. R. 6 *Ter. Rep.* 443.

ſeize any leather which is ſufficiently dried, though *in their judgment it be not ſo*; and if they do, they are liable to an action of treſpaſs.—To an action of treſpaſs for taking the plaintiff's goods (leather), and detaining them eighteen days, the defendants pleaded a juſtification under the ſtat. 2 *Jac.* 1. c. 22. in which, after alleging that they were duly appointed, according to the act, to view and ſearch all tanned hides, ſkins, or leather, that ſhould be brought to Leadenhall market, and ſworn to execute their office truly, and that *Varley* was alſo appointed a ſealer under the act. They ſtated that the plaintiff, a tanner, on the 25th of November, 1795, offered for ſale, in Leadenhall market, the goods in queſtion, which "had not, after the tanning thereof, been well and thoroughly dried, *in the judgment of the defendants*, according to the true intent and meaning of the ſaid act of parliament; wherefore the defendants, by virtue of their office, ſeized and carried away the ſaid goods, and detained them in their cuſtody, until they might be duly tried, in manner and form as is directed by the ſaid ſtatute, &c.; and that within a reaſonable and convenient time after the ſaid ſeizure, to wit, on the 28th of November, the defendants gave notice of the ſeizure to the lord mayor of London, in order that triers might be appointed for trying the ſame, according to the directions of the ſaid act," &c.—The plaintiff replied, that the ſaid ſkins, after the tanning thereof, and before they were put up to ſale, *had been well and thoroughly dried*, according to the true intent and meaning of the ſaid act, and that, after the ſeizure, they were duly tried by ſix perſons (naming them) duly appointed by the lord mayor to be triers, who, upon their oaths, determined that the leather had been well and thoroughly dried after the tanning, according to the true intent and meaning of the act; and that the leather was afterwards reſtored to him. To this replication there was a general demurrer. THE QUESTION was, Whether the ſearchers and ſealer of leather, appointed and ſworn under 2 *Jac.* 1. c. 22. (1), acting in that capacity, *according to*

(1) By ſect. 9. all perſons may buy leather at Leadenhall market every Monday, the ſame being firſt duly ſearched, ſealed, and regiſtered. By ſect. 15. tanners offering to ſale leather, found inſufficiently dried by the triers in the act thereafter appointed, forfeit ſuch leather. Sect. 31. directs the lord mayor and aldermen to appoint ſearchers and a ſealer, annually, from the companies of cordwainers, curriers, ſadlers, or girdlers, who are to ſearch all hides offered to ſale. Sect. 32. authorizes the ſearchers, if they find any leather offered to ſale, or brought to be ſearched, which is inſufficiently dried, &c. contrary to the intent and meaning of the ſtatute, to ſeize it and retain it till it ſhall be tried. Sect. 33. empowers the lord mayor, in ſix days after notice, to appoint triers of the better ſort of cordwainers, curriers, and tanners, who are ſworn

to the beſt of their judgment, are treſpaſſers in ſeizing leather to put it in the courſe of trial preſcribed by that act, if the opinions of the triers ſhould be different from their own? PER CURIAM: We ſhould have been glad to have found ſome ground on which the defendants' juſtification could have been ſupported, becauſe they appear to have acted fairly and *bonâ fide*; but, after comparing the pleadings with the act of parliament, it is impoſſible to decide in their favour. This act was made early in the time of *James* the Firſt, when the trade of this country was in its infancy, and in a reign during which more wholeſome acts of parliament were made, for the benefit of the trade of the country, than in any ſubſequent period of the ſame duration. But this furniſhes one of many examples, that the wiſeſt legiſlature, in making a law, do not foreſee every poſſible caſe that may happen. There is no doubt but that, if the caſe in queſtion had occurred to their minds when they framed this law, they would have provided for it. But, ſitting in a court of law, we are bound to decide on the act of parliament as we find it, and are not at liberty to introduce into it any regulations, however wiſe and proper they may appear to us. *This ſtatute, after directing that ſearchers ſhall be appointed, authorizes them to ſeize leather of a certain deſcription, and to ſubmit it to the future enquiry of the triers. It ſeems reaſonable that, if theſe ſearchers exerciſe their authority* bonâ fide, *and only ſeize ſuch leather for the examination of the triers as, in their judgment, ought to be examined, they ſhould be protected*; in ſuch a caſe they do not tranſgreſs any moral duty, and we ſhould have been glad to find that they had not tranſgreſſed any legal duty: but the act of parliament affords them no ſuch protection; *it only empowers them to ſeize leather which is not dried*, &c. according to the true intent and meaning of the act. Here the plea does not allege that the leather was inſufficiently dried; and the replication does ſtate expreſsly, that it was inſufficiently dried, &c. according to the true intent and meaning of the act; therefore, it appears on the record, that the defendants ſeized leather which the ſtatute did not authorize them to ſeize. *This caſe does not differ in principle from thoſe of cuſtom-houſe and exciſe officers:* in thoſe caſes, which more frequently occur, the legiſlature have gradually introduced new laws, as the occaſion called for them. *Cuſtom-houſe officers were, until a late act of parliament*, 19 Geo. 2. c. 34. ſ. 16.

ſworn to try whether the leather ſeized be good or not, on the ſecond or third market-day after the ſeizure. Sect. 37. impoſes a penalty on the ſearchers and ſealer refuſing to ſeal leather ſufficiently wrought, or allowing inſufficient leather; and alſo impoſes a penalty on perſons elected to the office refuſing to execute it.

was

was paſſed to protect them, liable to an action for ſeizing goods, if it ultimately turned out that the goods were not the ſubject-matter of ſeizure, even though there was a probable cauſe for ſeizing them. Exciſe officers continued in this ſituation to a later time, upon a ſuppoſition that the ſtatute reſpecting cuſtom-houſe officers extended to them; and, when it was diſcovered that they were not protected by the former act, the legiſlature made a ſimilar law, 23 *Geo.* 3. c. 70. ſ. 29. for their protection. So in the caſes of juſtices of the peace (1) and conſtables, the legiſlature have made laws in their favour, when acting in the execution of their office. All theſe inſtances ſhew the propriety of protecting perſons, acting under this act of parliament, when they act *bonâ fide*. But the legiſlature not having given them any protection, except when they ſeize leather of a certain deſcription, the only queſtion is, Whether the leather in queſtion was, or was not, the ſubject of ſeizure? and that queſtion is againſt the defendants by their own admiſſion. On the other point made at the bar, the injury done to the plaintiff is by the immediate act of the defendants, and not a conſequence ariſing from ſome other act; for this treſpaſs is the proper remedy. We are, therefore, bound to give judgment againſt the defendants.

Leet.

Sir George Colebrooke, bart. *v.* Elliott, Hil. Ter. 6 Geo. 3. B.R 3 *Burr.* 1859.

THE offence of ſelling a loaf of bread ſhort of weight, is not within the juriſdiction of the court leet.—This was an action of debt for amercements ſet and affeered in the *court* LEET belonging to the manor of Stepney. The fact charged in the declaration and preſentment (which was ſet forth in the declaration) was the defendant's having in his cuſtody, and expoſing to ſale, a loaf of bread, pretended to be and *as and for a quartern loaf* of the weight of 4lb. $5\frac{1}{2}$oz. whereas it *wanted* 4oz. and $\frac{1}{2}$. "*Nil debet*" was pleaded, and iſſue joined; the cauſe was tried, and a verdict given for the plaintiff. Upon the trial it was objected, "that the preſentment given in evidence was neither *ſealed nor indented*, "as it ought to have been, by the ſtatutes of Weſtm. 2. c. 13. "13 *E.* 1. and 1 *Edw.* 3. ſtat. 2. c. 17." And leave was then given to the defendant to move for a new trial, *without* payment of coſts. Afterwards, another objection was taken, "that the *court leet* had *no juriſdiction*." PER CURIAM:

(1) Vid. 7 *Jac.* 1. c. 5.; 21 *Jac.* 1. c. 12.; and 24 *Geo.* 2. c. 44.

It

It is not neceſſary that a preſentment of this kind ſhould be either *ſealed* or *indented*. The *turn*, and the *leet* (derived out of it), were anciently the principal courts of criminal juriſdiction, coeval with the eſtabliſhment of the Saxons here. There were no traces of them, either amongſt the Romans or Britons; but the activity of thoſe courts is marked very viſibly, both amongſt the Saxons and the Danes. By *Magna Charta*, cap. 17. their juriſdiction is abridged, their power "to *hear and determine*" is taken away; but *not* their power "to *take indictments*, and *apprehend* the parties indicted." *That* power was abuſed: they took people up to extort money from them, upon pretence of their having been indicted in their turns, *de furtis et aliis malefactis*, when, in fact, they had not been lawfully indicted. The ſtatute of Weſtm. 2. c. 13. recites that grievance, and directs that ſheriffs, in their turns, ſhall enquire by twelve lawful men, at the leaſt, *de hujuſmodi malefactoribus; qui hujuſmodi inquiſitionibus ſigilla ſua apponant: et ſicut dictum eſt de vicecomitibus, obſervetur de quolibet ballivo libertatis*. And 2 *Inſt.* 388. ſays, "this act "*extends to leets*;" and it certainly does: but it reſpects only ſuch inquiſitions as are a foundation for impriſonment That was the grievance intended to be obviated, to prevent fictitious impriſonment upon pretence of inquiſitions *de furtis et aliis malefactis*. The act does not relate to inquiſitions for offences where the party *cannot be apprehended*; but the proceeding againſt him is *only by amercement*, where the delinquent can either be taken up in the firſt inſtance, or even puniſhed for the offence by impriſonment.—The *univerſal* PRACTICE IS NOT *to ſeal* theſe inquiſitions.—And as to the *indenting*; it is not neceſſary that ſuch an inquiſition ſhould be *indented*. The act of 1 *Edw.* 3. ſtat. 2. cap. 17. extends to courts leet; but the reaſon of the law fixes the true conſtruction of it. It was made to prevent the altering or embezzling ſuch indictments as were to be delivered over to the juſtices; it does not relate, therefore, to *preſentments*, which were to be proceeded upon in the turn or leet, and not to be delivered over to the juſtices. But it is not neceſſary to determine theſe points, becauſe we are all of opinion, "that the *offence* preſented is not within the juriſdiction of "the court leet, becauſe it is a *new* offence, created by act of "parliament, and can be proſecuted *only* in the manner "directed by the act." THE ASSIZE OF BREAD is an ordinance, aſcertaining the *weight* and the *price* of it, which is to be regulated by the price of corn. The intention was, to preſerve a due proportion between them, making the baker a reaſonable allowance (a very wiſe proviſion, to derive the effects of plenty upon the poor). If that aſſize was broken (whether ſet by the court leet or not), the breach of it was always preſentable and puniſhable in the court *leet*. But the

aſſize

aſſize muſt fix both *price* and *weight*; and it would be very incomplete and imperfect, if it were to fix *only the weight*, and leave the *price* with a ſeller.—The 51 *H.* 3. *(aſſiſa panis et ceruiſiæ)* fixes *both*; and the variations in that aſſize, occaſioned by the different prices of corn, always took in *both*. The 8 *Ann.* c. 18. repeals the 51 *H.* 3. but directs how the aſſize ſhall be ſet, and exhibits a plan for that purpoſe: but it takes in *both the price and weight*, according to the true principle of the law.—The 31 *G.* 2. c. 29. repeals *all* former laws, but ſtill proceeds upon the ſame principle of fixing both the *price and weight*; and the plan of an aſſize exhibited in it, ſhews that both are fixed by it. This act ſaves the juriſdiction of courts leet; and, therefore, whenever and wherever an aſſize is made according to the directions of 31 *G.* 2. c. 29. the court leet may enquire and puniſh for the breach of it.—But the 3 *G.* 3. c. 11. upon which this preſentment is grafted, does not fix the price, but was made to meet with ſome inconveniences, in caſes where no aſſize was ſet; whereas the ſetting the aſſize is the *baſis* of the juriſdiction of the court leet. If we ſhould ſupport this preſentment, it would be giving them a juriſdiction where no aſſize is ſet, though their juriſdiction ariſes only, and can only attach, where it is ſet.—The offence, cognizable there, is *fractio aſſizæ*.—The counſel for the plaintiff were aware of the objection, and, therefore, inſiſted "that this act of 3 *G.* 3. is "an aſſize, becauſe it fixes the *weight*." But it wants one of the eſſential characteriſtics of an aſſize, *price*; price regulated by the price of corn in the market: and it would be a ſtrange conſtruction of this act, to give it the effect and operation of an aſſize, when it was intended only to ſupply the *defect* of an aſſize, and to operate *where* and *becauſe* there was none.—The act directs, ſect. 6. that a quartern loaf ſhall be four pounds five ounces and a half, under the penalty of not more than five ſhillings, nor leſs than one ſhilling, for every ounce of every loaf which ſhall be deficient, and not more than two ſhillings and ſixpence, nor leſs than ſixpence, for any defect under an ounce; but in cities, towns corporate, &c. or within the weekly bills of mortality, the complaint muſt be made, and the bread weighed, within twenty-four hours, and in other places, within three days; and a ſummary juriſdiction is given to juſtices, to convict and levy the penalty. It is unneceſſary to ſpeculate upon the utility of the regulation: ſo far it goes, that when a perſon buys a quartern loaf, it muſt weigh 4lb. 5 oz. and 1-half; but, as it does not fix the *price* of that quartern loaf, it reaches only one half of the evil.—But, whatever benefit may ariſe from this proviſion, it is *not* a proviſion made by the *common* law, but introduced by this ſtatute; and the preſentment deſcribes the offence in the very words of the ſtatute, and was plainly meant to enforce the execution of the ſtatute, and to apply

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the right of puniſhment for the breach of the aſſize, to the puniſhment of a violation of an act of parliament.—The bread muſt be weighed in twenty-four hours, or *three days*, whereas this preſentment may puniſh at *three months* diſtance. The act ſays, "he ſhall be ſummoned, ſect. 14. and "have an opportunity of making his defence." The preſentment cannot be controverted in the court leet, but accuſes and puniſhes at the ſame inſtant.—There is a ſaving of the juriſdiction of the *leet* in the 31 *G.* 2. ſect. 43. becauſe that act keeps an aſſize in its view, from one end to the other, and the ſettling that aſſize is the great object of it: but in *this* act there is *no* ſuch exception, becauſe it was providing for caſes where the court leet had no juriſdiction.—Theſe courts were very properly adapted to the cuſtoms, manners, genius, and policy, of a people upon their firſt ſettlement, but, like all other human juriſdictions, vary in the courſe and progreſs of time, as the government and manners of a people take a different turn, and fall under different circumſtances. From *Magna Charta* to this time, they have been always gradually abridged; never enlarged. Experience ſhews the wiſdom of widening (inſtead of contracting) the circle of both civil and criminal juriſdiction.—But the point is not now upon abridging the juriſdiction of the leet; the preſent queſtion is, "Whether we ſhall *increaſe* it, and *give* them power to hold "plea of an offence againſt an act of parliament, which is "formed upon a plan that has been uniformly and univerſally "purſued from the Conqueſt to this day?"—Upon the *firſt* and other objections (which were waived), leave was given to move for a new trial, *without* coſts. The ſecond objection was not then made. As it now comes out, the defendant ſhould have had a verdict, which would have carried coſts.—The plaintiff could not have maintained his action of debt for this amercement, becauſe it appears, upon the whole of the caſe, that there is no debt due to him. The plea of *nil debet* puts the *whole* matter in iſſue; and upon the *whole* matter nothing is due to the plaintiff.—But the defendant cannot have any coſts under the *preſent form* of proceedings: here is no demurrer, but a verdict againſt him; nor did he inſiſt, at the trial, upon a caſe to be ſtated for the opinion of the Court; ſo that there can be no poſſibility of entering a verdict for him, nor can the Court give judgment for him: all we can do is to ſet aſide the verdict againſt him, and grant him a new trial.—Therefore, let this verdict be ſet aſide, and a new trial had, without coſts.

Lord MANSFIELD, Ch. J. then addreſſing himſelf to the defendant's counſel, ſaid, In the ſhape it *now* ſtands, you cannot have coſts: you may take it either of theſe two ways; either as I have juſt now pronounced the rule, or by having judgment arreſted, but you cannot have coſts. The truth of the

the matter is, the defendant ſuffers by a ſlip, by not ſeeing the objection ſooner: if he had ſeen it ſooner, he might have demurred, inſtead of pleading "*nil debet*," and then he would have been entitled t his coſts: but this he has not done.—It was very properly l boured by the counſel for the plaintiff, as upon an aſſize ſet by 3 *G.* 3. for it is certainly neceſſary that an aſſize ſhould be ſet, in order to ſupport this action.—Verdict ſet aſide, and a new trial, but without coſts.

Libel.

Villers *v.* Monſley, Ea. Ter. 9 Geo. 3. C.B. 2 *Wils.* 403.

AN action will lie for publiſhing any thing in writing, which tends to render another ridiculous.—This was an action upon the caſe againſt the defendant, for maliciouſly writing and publiſhing a libel upon the plaintiff, in the words following, viz.

"Old *Villers*, ſo ſtrong of brimſtone you ſmell,
"As if not long ſince you had got out of hell,
"But this damnable ſmell I no longer can bear,
"Therefore I deſire you would come no more here;
"You old ſtinking, old naſty, old *itchy old toad*,
"If you come any more you ſhall pay for your board,
"You'll therefore take this as a warning from me,
"And never more enter the doors, while they belong
"to *J. P.*

"*Wilncoat, December* 4, 1767."

The defendant pleaded, Not guilty; and a verdict being found for the plaintiff, and ſixpence damages, it was moved in arreſt of judgment, that this was not ſuch a libel for which an action would lie. SED PER CURIAM: This is ſuch a libel for which an action well lies. We muſt take it to have been proved at the trial, that it was publiſhed by the defendant *maliciouſly*; and if any man *deliberately or maliciouſly* publiſhes any thing in writing concerning another, which renders him *ridiculous*, or tends to hinder mankind from aſſociating or having intercourſe with him, an action well lies againſt ſuch publiſher. There is no difference between this and the caſes of the *leproſy* and *plague*; and it is admitted that an action lies in thoſe caſes. The writ *de leproſo amovendo* is not taken away, although the diſtemper is almoſt driven away by cleanlineſs, or new-invented remedies: the party muſt have the diſtemper to ſuch a degree before the writ ſhall be granted, which commands the ſheriff to remove him without delay, *ad locum ſolitarium ad habitandum ibidem prout moris eſt, ne per communem converſationem ſuam hominibus dampnum*

dampnum vel periculum eveniat quoviſmodo.—*Regiſtrum Brevium*, 267. b. The degree of *leproſy* is not material, if you ſay he has the leproſy it is ſufficient, and the action lies. The reaſon of that caſe applies to this; the *itch* may be communicated by the air without contact: it is ſaid to be occaſioned by *animalcula* in the ſkin, and muſt be cured by outward application; no body will eat, drink, or have any intercourſe with a perſon who has the *itch*, and ſtinks of brimſtone, therefore this libel is actionable, and judgment muſt be for the plaintiff. Though for ſaying a man has the *itch*, without more, perhaps an action would not lie without other malevolent circumſtances; for there is a diſtinction between libels and words: a libel is puniſhable, both criminally and by action, when ſpeaking the words would not be puniſhable in either way. For ſpeaking the words *rogue* and *raſcal* of any one an action will not lie; but if thoſe words were written and publiſhed of any one, an action will lie. If one man ſhould ſay of another that he has the itch, without more, an action would not lie; but, if he ſhould write thoſe words of another, and publiſh them *maliciouſly*, as in the preſent caſe, no doubt but the action well lies. — JUDGMENT FOR THE PLAINTIFF *per tot Cur.* without granting any rule to ſhew cauſe.

A letter, written to a third perſon, calling the plaintiff "a "villain," was held actionable, without proof of ſpecial damage.—On the trial of an action on the caſe for defamation, it appeared, that the defendant had wrote the following letter of and concerning the plaintiff: "After the communi- "cation I had with your ſon in your abſence, I but little "thought you would have been made the dupe of one of the "moſt infernal villains that ever diſgraced human nature; "but I ſuppoſe you were deceived by thoſe whom you thought "well of, and whom he will deceive if they will give him "an opportunity: I am told they are reſpectable, and how "they can be connected with him is the moſt aſtoniſhing "thing to me. Mr. *H.* writes me you called upon him "(meaning the plaintiff) on the ſubject of your account, for "which the villain gave you his note at five months." The declaration ſtated, that the plaintiff had ſuſtained ſpecial damages: and the plaintiff having failed in proving the ſpecial damage laid, *Macdonald*, Ch. B. was of opinion, that the letter, unſupported by proof of ſpecial damage, was not actionable, and directed a verdict for the defendant. The counſel for the plaintiff, however, contending that the letter itſelf was actionable, the Chief Baron aſked the jury what damages they would give, ſuppoſing the plaintiff entitled to a verdict in point of law.—The jury anſwered 1s. Afterwards, on a motion to ſet aſide the verdict for the defendant, and to enter a verdict for the plaintiff for 1s.—THE COURT were

Bell *v.* Stone, Mich. Ter. 39 Geo. 3. C.B. 1 *Pul. & Boſ.* 331.

were clearly of opinion, that any words written and publiſhed, throwing contumely on the party, 5 *Co.* 125. b. were actionable; and made the rule abſolute.

The King *v.* Kinnerſley, Tr. Ter. 1 Geo. 3 B R. 1 *Black. Rep.* 294.

An information being moved for againſt the printer of "*Lloyd*'s Evening Poſt," for a ludicrous paragraph, giving an account of the Earl of *Clanrickard*'s marriage with an actreſs at Dublin, and appearing with her in the boxes with jewels, &c. Cauſe was ſhewn againſt making the rule abſolute. 1ſt. That Lord *Clanrickard* was not a peer of Great Britain. *Sed non allocatur.* For *per Cur.* As he is ſworn to be a married man, it is a high offence, even againſt a commoner.—2dly. That this paragraph was taken from another paper, againſt whoſe printers informations were alſo moved. 3dly. That in his next paper *Kinnerſley* had voluntarily made a public recantation. *Sed non allocantur.* For *per Cur.* It is high time to put a ſtop to this intermeddling in private families.—Rule abſolute.

The King *v.* Hart, Mic. Ter. 3 Geo. 3. B R. 1 *Black. Rep* 386.

But expulſion from a quaker's meeting, and reaſons aſſigned in the books, is not a libel.—On a motion for a new trial, it appeared, that *Mary Jerom*, the proſecutrix, was a quaker; but being leſs rigid than the reſt of her ſect, the brethren, according to their uſual diſcipline, firſt admoniſhed her, for frequenting balls and concerts; then ſent deputies to her; and, laſtly, expelled her; and entered, as a reaſon, in their books, "For not practiſing the duties of ſelf-denial." This was ſigned by the defendant, their clerk. The proſecutrix ſent her maid for a copy of the entry, which was delivered to her by the defendant, and was the only act of publication proved. On the trial of the indictment—CLIVE, J. left it to the jury, and they brought in the defendant guilty. It was argued to be irregular, to leave it at all to the jury, upon ſuch an evidence only of publication. 5 *Mod.* 167. But as the judge was diſſatisfied with the verdict, the whole tranſaction being merely a piece of diſcipline (in which the Court ſtrongly concurred), they, for that reaſon, granted the new trial, in the firſt inſtance, without any rule to ſhew cauſe.

The King *v.* E. Topham, H l. Ter. 31 Geo. 3. B R. 4 *Ter. Rep* 127.

An indictment for publiſhing libellous matter, reflecting on the memory of a dead perſon, not alleging that it was done *with a deſign to bring contempt* on the family of the deceaſed; and to ſtir up the hatred of the king's ſubjects againſt them; and to excite his relations to a breach of the peace; cannot be ſupported. But proof that the defendant gave a a bond to the ſtamp-office, for the duties on the advertiſement in a newſpaper, and had occaſionally applied at the ſtamp-office reſpecting the duties, is evidence that he is the publiſher.—This was an indictment reflecting on the memory of the late Earl *Cowper*, publiſhed in a newſpaper called "THE WORLD:" the indictment charged "that he, de-

"fendant

" fendant, being a perſon of a wicked and malicious diſpoſi-
" tion, and wickedly and maliciouſly contriving and intend-
" ing to injure, defame, diſgrace, and vilify the memory,
" reputation, and character of *George Naſſau Clavering* Earl
" *Cowper*, then deceaſed: and to cauſe it to be believed, that
" the ſaid Earl, in his life-time, was a perſon of a vicious
" and depraved mind, &c. &c. did print and publiſh," &c.
[ſetting forth the libel]; and it concluded, " *to the great diſ-*
" *grace and ſcandal of the memory, reputation, and character of*
" *the ſaid Earl* Cowper. In contempt," &c. &c. At the trial, *Buller*, J. left to the conſideration of the jury the two queſtions, namely, Whether the defendant were or were not the publiſher? and whether the inuendos were made out? And the jury found the defendant guilty. An application was made for a new trial, or to arreſt the judgment. The grounds for the former were, that another queſtion ſhould have been left to the jury, namely, Whether this paper were publiſhed in the ſpirit of a biographer, or with a malicious intention to defame and vilify the character of Lord *Cowper*?—PER CURIAM: Of the firſt queſtion which the jury determined, whether the defendant were or were not the publiſher, there can be no doubt whatever; the evidence was perfectly ſatiſfactory. It was proved that the paper was ſold at the office; that the defendant, as proprietor of the paper, had given a bond to the ſtamp-office, purſuant to the 29th *Geo.* III. c. 50. ſ. 10. for ſecuring the duties on the advertiſements; and that he had, from time to time, applied to the ſtamp-office reſpecting the duties on the paper. It is impoſſible, therefore, to ſay that this was not ſtrong evidence to be left to the jury to ſhew that he was the publiſher. Then it was aſked at the bar, Shall every perſon, who is a proprietor of a paper, as a *feme covert*, an infant, or a truſtee, be anſwerable *criminally* for the acts of the agent, in inſerting libellous matter in the paper? To that queſtion it is ſufficient to anſwer, that this is not one of thoſe caſes. This was the caſe of an adult. And this, unqueſtionably, was proper evidence to the jury, who have drawn the only concluſion which, in the diſcharge of their duty to themſelves and the public, they could draw. Then it was argued, that even ſuppoſing there was ſufficient evidence of publication, there was no evidence of a criminal intent in the defendant. To this the words of Lord *Mansfield*, in *R.* v. *Woodfall*, 5 *Burr.* 2667. are an anſwer, that " where the act is in itſelf
" unlawful (as in this caſe), the proof of juſtification or
" excuſe lies on the defendant; and, in failure thereof, the
" law implies a criminal intent." There may, indeed, be caſes; and ſo it was admitted in *R.* v. *Nutt. Fitz.* 47; of a publication, in point of law, where no criminal intention can be imputed to the party, as where a perſon delivers a

letter, without knowing its contents, or delivers one paper inſtead of another. But here no evidence was offered to the jury to diſprove the publication: the caſe was nakedly left to them to make that inference, which neceſſarily ariſes from the publication of a paper, ſuppoſed to reflect on the memory of the nobleman mentioned in the indictment. Therefore, we are of opinion, that the queſtions put to the jury were the only queſtions which it was the duty of the judge to leave to them; and that they have drawn the only inference which could fairly be drawn from that evidence; and, conſequently, that there is no ground for a new trial.—THE NEXT QUESTION is, Whether or not the judgment ought to be arreſted? and that queſtion is ſuppoſed to have ſome novelty in it. The only judicial deciſion on this ſubject, which was cited at the bar, was that in 5 *Co.* 125; the caſe *de libellis famoſis*: where it is ſaid, that *publications, defamatory of dead perſons, are libellous*; and the reaſon given is, *becauſe it tends to ſtir up others of the ſame family, blood, or ſociety, to revenge, and to break the peace, by provoking them to vindicate the memory of the deceaſed, and to wipe off that ſtain which the reflections on the anceſtor may caſt upon them.* But it is to be obſerved, that that was not the point in judgment; for it was a libel on the living archbiſhop as well as on his predeceſſor; and, therefore, the judgment for the former might well have been ſuſtained, without going into the other point incidentally mentioned by the Court. In 1 *Hawk. P. C.* c. 73. ſ. 3. it is ſaid, "the chief cauſe, for which the law "ſo ſeverely puniſhes all offences of this nature (libels), is "the direct tendency of them to a breach of the public "peace, by provoking the parties, and their friends, and fa-"milies, to acts of revenge, which it would be impoſſible to re-"ſtrain by the ſevereſt laws, were there no redreſs from "public juſtice for injuries of this kind, which, of all others, "are moſt ſenſibly felt." Now is it fit to compare the manner in which this indictment is drawn with others of a ſimilar nature. *This profeſſes to be a libel, merely reflecting on the memory of the late Earl* Cowper; *and it does not ſtate that it tended to excite his relations to revenge, and a breach of the peace.* In other caſes, particularly in thoſe reflecting on King *William*, the indictments charged that they were publiſhed to ſlander the government, *Carth.* 405, with a view to counteract the revolution. We have ſeen the indictment in *R.* v. *Crichley*, Hil. 7 *Geo.* II. (1); in which it was alleged, that

(1) This libel was as follows: "On Saturday evening died of the "ſmall-pox, at his houſe in Groſvenor-ſquare, Sir *Charles Gaunter* "*Nicoll*, Knight of the moſt honourable order of the Bath, and repreſen-"tative in parliament for the town of Peterborough. He was bleſſed "with

that the defendant, "intending to vilify and ſcandalize the "memory of Sir *C. Gaunter Nicoll*, &c.; and to induce a belief "that the ſaid Sir *C. Gaunter Nicoll* had obtained the order "of knighthood of the Bath by vile and ſcandalous means;" thereby reflecting on the *government* which has the diſtribution of honours; "that he had acted as an enemy to this kingdom, "and had voted, as a member of parliament, corruptly and "perniciouſly, contrary to his duty, &c. and maliciouſly to "fix a mark of infamy, contempt, and diſhonour, on the "name and *family* of the ſaid Sir *C. G. Nicoll*, &c. and to "ſtir up the hatred and evil will of the ſubjects of the king "*againſt the family and poſterity* of the ſaid Sir *C. G. Nicoll*." Now to ſay, in general, that the conduct of a dead perſon can at no time be canvaſſed; to hold that, even after ages are paſſed, the conduct of bad men cannot be contraſted with the good; would be to exclude the moſt uſeful part of hiſtory. And, therefore, it muſt be allowed, that ſuch publications may be made fairly and honeſtly. But, let this be done whenever it may, whether ſoon or late after the death of the party, if it be done with a malevolent purpoſe, to vilify the memory of the deceaſed, and with a view to injure his poſterity, as in *R.* v. *Crichley*, then it comes within the rule ſtated by *Hawkins:* then it is done with a deſign to break the peace; and then it becomes illegal. But, on that queſtion, the jury ought to have had the power to deliberate; ſomething like that which was ſtated in *Crichley*'s caſe, and in *R.* v. *Horne*, *infra*, ſhould have been ſtated. We are, therefore, of opinion, that as nothing of that ſort is ſtated in the prefatory part of this indictment, as that it was publiſhed with an intent to create any ill-blood, or to throw any ſcandal on the family and poſterity of Lord *Cowper*, or to induce them to break the peace in vindicating the honour of the family, this judgment ſhould be arreſted.—Rule abſolute to arreſt the judgment.

Upon an information againſt the defendant for a libel, for that *he*, &c. wickedly, maliciouſly, and ſeditiouſly, did write and publiſh, &c. a certain falſe, ſcandalous, and ſeditious libel "OF AND CONCERNING *his Majeſty's government and the* "*employment of his troops*," according to the tenor and effect following; (ſetting forth the libel *verbatim*)—The Court held that the words "*of and concerning*" were a *ſufficient introduction* of the *matter* contained in the libel, and a ſufficient *averment* that it

Rex v. Horne, Mic. Ter. 17 Geo. 3. B. R. Cowp. 672.

"with an ample fortune, which he enjoyed in a manner that rendered "him, in early years of life, a truly valuable huſband and a friend. He "could not be called a friend to his country, for he changed his princi- "ples for a red ribband, and voted for that pernicious project, the ex- "ciſe."

was written "*of and concerning the King's government and the* "*employment of his troops.*"—This was an information filed againſt the defendant by the Attorney-general, for writing, printing, and publiſhing, two libels. The firſt count in the information ſtated, "That the ſaid *John Horne*, being a "wicked, malicious, ſeditious, and ill-diſpoſed perſon, and "being greatly diſaffected to our ſaid preſent Sovereign Lord "the King, and to his adminiſtration of the government of "this kingdom, and the dominions thereunto belonging, and "wickedly, maliciouſly, and ſeditiouſly intending, deviſing, "and contriving to ſtir up and excite diſcontents and ſedi- "tions among his Majeſty's ſubjects, and to alienate and "withdraw the affection, fidelity, and allegiance of his ſaid "Majeſty's ſubjects from his ſaid Majeſty, and to inſinuate, "and cauſe it to be believed, that divers of his Majeſty's "innocent and deſerving ſubjects had been inhumanly mur- "dered by his ſaid Majeſty's troops in the province, colony, "or plantation of the Maſſachuſet's Bay, in New England, "in America, belonging to the crown of Great Britain, "and unlawfully and wickedly to ſeduce and encourage his "ſaid Majeſty's ſubjects in the ſaid province, colony, or "plantation, to reſiſt and oppoſe his Majeſty's government, "on the 8th day of June, in the 15th year of the reign, &c. "with force and arms, at London aforeſaid, in the pariſh "of St. Mary le Bow, in the ward of Cheap, wickedly, "maliciouſly, and ſeditiouſly, did write and publiſh, and "cauſe and procure to be written and publiſhed, a certain "falſe, wicked, malicious, ſcandalous, and ſeditious libel, "*of and concerning his Majeſty's government, and the employ-* "*ment of his troops*, according to the tenor and effect follow- "ing:"—[ſetting forth the advertiſement which was charged to be a libel (1)]. There were other counts in the information, charging the ſaid *John Horne* with cauſing the ſame libel to be printed in "The London Packet, or New Lloyd's "Evening Poſt," and "The Morning Chronicle, or Lon- "don Advertiſer." The count on the *ſecond* libel was as follows, viz.: "That the ſaid *John Horne*, being ſuch perſon "as aforeſaid, and again unlawfully, wickedly, maliciouſly, "and ſeditiouſly intending, deviſing, and contriving as afore- "ſaid, afterwards, to wit, on the 14th day of July, in the "15th year aforeſaid, with force and arms at London afore- "ſaid, in the pariſh and ward aforeſaid, wickedly, malici- "ouſly, and ſeditiouſly did write and publiſh, and cauſe "and procure to be written and publiſhed, a certain falſe, "wicked, and malicious, ſcandalous, and ſeditious libel, *of* "*and concerning his ſaid Majeſty's government, and the employ-*

(1) *Vide*, p. 121, *infra*, for the words of this advertiſement.

"*ment*

" *ment of his troops*, according to the tenor and effect fol-
" lowing:"—[ſetting forth another advertiſement charged as a libel]. Other counts were added, for cauſing this laſt libel to be printed in the public newſpapers. The defendant pleaded not guilty; and, on the trial of the information, by a ſpecial jury, the defendant was found guilty of all the offences charged in the information.—*Mr. Horne, in perſon*, moved the Court in *arreſt of judgment*; and took many objections, to ſhew, that the charge, as it ſtands upon this record, is inſufficient, in law, to ſupport any judgment.—
" That there was no averment as to the ſtate of the Maſſa-
" chuſet's colony at that time; either that there were riots,
" inſurrections, or a rebellion: no averment that the king
" had ſent any troops; no averment that there was any
" ſkirmiſh or engagement; or the nature of it; how it be-
" gan, or how it went on, or ended; and, laſtly, that it
" was not averred, *that the employment of the troops was by*
" *the king's authority*."—PER CURIAM: The only objection which has colour in it, is the laſt; and we have duly weighed every thing: precedents have been looked into; we have fully conſidered the information, all the objections that were mentioned, and all the objections we ourſelves could think of; and we are all clearly of opinion, *without any doubt*, that the information is ſufficient. An indictment, or information, muſt charge what, in law, conſtitutes the crime, with ſuch certainty as muſt be proved: but that certainty may ariſe from a neceſſary inference; in the manner ſettled in the caſe of the *King* v. *Lawley*, in 2 *Str.* 904. Plain words in a libel ſpeak for themſelves; if they are doubtful, their meaning muſt be aſcertained by an *inuendo*. Here the words are plain; and want no *inuendo*: they are averred to be written " of and concerning the King's government and the
" employment of his troops." The obvious meaning is, that the *employment* of the king's troops muſt be under his authority; and neceſſarily ſo when the words preceding are " of and concerning the king's government." This muſt now be taken to be true; becauſe the verdict finds it. Had the queſtion ariſen upon a demurrer, it muſt equally have been taken to be true.—The *giſt of every charge of every libel conſiſts in the perſon or matter of and concerning whom* or *which* the words are averred to be ſaid or written. In the *King* v. *Alderton*, *Paſch.* 29 *Geo.* II. B.R. the information was held bad; becauſe it was *not* laid in the information, that the libel was " of and concerning the juſtices of *Suffolk*." Where the words are averred to be " of *and*
" *concerning the king's government*," or " *of the government*
" *of the kingdom*, or *of the government of the navy*," as to any thing further of which they are alſo written, or *any particular circumſtances* mentioned in the libel, through the me-

dium of which it calumniates the king's government, *that* need not be particularly noticed in the *introductory* part of the information; nor is any technical form of expreſſion neceſſary. It cannot be; becauſe there may be caſes where the king's government might be calumniated through an imputation upon the groſs licentiouſneſs of his troops. The only queſtion to be tried is, "Whether the words laid, are written "of the king's government?" It may vary the *degree* of miſchief, malice, or guilt; but it is totally immaterial as to the *conſtitution* of the crime upon the record, Whether the words refer to ſomething that has exiſted, and miſrepreſent ſuch exiſtent facts, or are an entire *fiction*. Had Lexington been left out; or had any other place, where there had been no ſkirmiſh or engagement, been mentioned as the ſcene, inſtead of Lexington; it would, without any *inuendo*, have been equally a libel, if meant to impute the ſame kind of miſconduct to the king's troops acting under his authority. It is the duty of the jury to conſtrue plain words and clear alluſions to matters of univerſal notoriety according to their obvious meaning, and as every body elſe who reads muſt underſtand them. But the defendant may give evidence to ſhew they were uſed upon the occaſion in queſtion, in a different or in a qualified ſenſe. If no ſuch evidence is given, the natural interpretation of the words, and the obvious meaning to every man's underſtanding, muſt prevail. Before this trial, *five* different juries had found theſe words, from their *neceſſary meaning*, to be "*of* "*and concerning the king's government.*" In this caſe the defendant gave evidence: but the evidence he gave plainly *demonſtrated* that the words related to troops *acting under the king's authority*; and, conſequently, that the libel was "concerning the *king's government*;" for the military department is one branch of government.—*Aſton*, Juſtice, then pronounced the judgment of the Court, viz.—That he ſhould pay a fine to the king of 200l. be impriſoned for the ſpace of twelve months, and until that fine be paid; and that upon the determination of his impriſonment, he ſhould find ſureties for his good behaviour for three years, himſelf in 400l. and two ſureties in 200l. each.

Afterwards the defendant brought a writ of error in the Houſe of Lords; and, after counſel on both ſides had been fully heard, the following queſtion was put to the judges: "Whether the writing contained in the information was, "in point of law, ſufficiently charged to be a libel upon his "Majeſty's government?" and Lord Chief Juſtice De Grey, May 11, 1778, delivered the unanimous opinion of all the judges in the affirmative, as follows:

By the words "*ſufficiently charged*" I underſtand to be meant, "Whether it is charged with ſufficient certainty? But, though the law requires certainty, we have no

preciſe

preciſe idea of the ſignification of the word; which is as indefinite in itſelf, as any word that can be uſed. Lord *Coke*, ſpeaking of it, repreſents it thus (1): "There are *three* kinds "of certainties: certainty to a certain intent in general; "certainty to a common intent; and certainty to a certain "intent in every particular." This *laſt* is rejected in all caſes, as partaking of two much ſubtlety. The *ſecond* is ſufficient in *defence*; the *firſt* is required in a *charge* or accuſation. Perhaps this account of it does not convey a much clearer idea; but, I apprehend, it will become intelligible, by conſidering the grounds of the diſtinctions taken in the preſent caſe, upon the certainty required in a charge. The charge muſt contain ſuch a deſcription of the crime, that the defendant may know what crime it is which he is called upon to anſwer; that the jury may appear to be warranted in their concluſion of "guilty," or "not guilty," upon the premiſes delivered to them; and that the Court may ſee ſuch a definite crime, that they may apply the puniſhment which the law preſcribes. This, I take to be what is meant by the different degrees of certainty mentioned in the books: and it conſiſts of two parts; the *matter* to be charged, and the *manner* of charging it. As to the *matter* to be charged, whatever circumſtances are neceſſary to conſtitute the crime imputed, muſt be ſet out; and all beyond are ſurpluſage. And, therefore, in the inſtance of the proſecution for perjury, which has been cited, it was neceſſary to ſet out the oath, as an oath taken in a judicial proceeding and before proper perſons, in order to ſee whether it was an oath which the Court had juriſdiction to adminiſter. In the proſecution of a conſtable for not ſerving the office, 5 *Mod.* 96, it is neceſſary to ſet out the mode of his election; becauſe, if he is not legally elected, he cannot be guilty of a crime in not ſerving the office. Where the circumſtances go to conſtitute a crime they muſt be ſet out:—Where the crime is a crime independently of ſuch circumſtances, they may aggravate, but do not contribute to make the offence. To apply theſe principles to the caſe of a libel: It may happen, that a writing may be ſo expreſſed, and in ſuch clear and unambiguous words, as that it may amount of itſelf to a libel. In ſuch a caſe, the Court wants no circumſtance to make it clearer than it is of itſelf: and, therefore, all foreign circumſtances introduced upon the record would be only matter of ſupererogation. But, if the terms of the writing are general, or ironical, or ſpoken by way of alluſion or reference; although every man who reads ſuch a writing may put the ſame conſtruction upon it, it is by underſtanding ſomething not expreſſed in direct words; and it being a matter of crime,

(1) *Co. Litt.* 303. a. 5 *Co.* 121. *Dougl.* 158.

and the party liable to be punished for it, there wants something more. It ought to receive a judicial sense, whether the application is just: and the fact, or the nature of the fact, on which that depends, is to be determined by a jury. But a jury cannot take cognizance of it, unless it appear upon the record; which it cannot do without an averment. Thus much is sufficient to be said, in regard to the *matter* that is necessary to be averred. Secondly, as to the *manner* of making the averment: There are cases, where a *direct* and positive averment is necessary to be made in *specific* terms; as where the law has affixed and appropriated technical terms to describe a crime; as in murder, burglary, and others. It is likewise true, that in all cases, those *facts* which are *descriptive of the crime*, must be introduced upon the record by *averments*, in opposition to argument and *inference*. In the case of a libel, which does not in itself contain the crime, without some extrinsic aid; it is necessary that it should be put upon the record, by way of *introduction*, if it is *new* matter; or by way of *inuendo*, if it is only matter of *explanation*. For an inuendo means nothing more than the words, "*id est*," "*scilicet*," or "*meaning*," or "*aforesaid*," as, explanatory of a subject-matter sufficiently expressed before; as, such an one, *meaning* the defendant, or such a subject, *meaning* the subject in question. But as an inuendo is only used as a word of explanation, it cannot extend the sense of the expressions in the libel beyond their own meaning; unless something is put upon the record for it to explain. As in an action upon the case against a man for saying of another, "He has burnt my barn," 4 *Co. Barham's* case, the plaintiff cannnot there, by way of inuendo, say, *meaning* "his barn "*full of corn*;" because, that is *not* an *explanation* of what was said before, but an *addition* to it. But if in the introduction it had been averred, that the defendant had a barn *full of corn*, and that in a discourse about that barn, the defendant had spoken the words charged in the libel of the plaintiff; an inuendo of its being the barn full of corn would have been good: for by coupling the inuendo in the libel with the introductory averment, "his barn full of corn," it would have made it complete. And I conceive, that this kind of *extrinsic* matter may be introduced upon the record, either by *direct averment*, or by *recitals*, or by *general inference*; and that such introductory matters and explanatory inuendos so made to appear upon the record, do all amount to sufficient averments. An inuendo is an averment, that *such an one*, means such a *particular person*; or, that such a thing, means such a particular thing: and, when coupled with the introductory matter, it is an averment of the whole connected proposition, by which the cognizance of the charge will be submitted to the jury, and the crime appear to

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the Court. The libel in the preſent caſe ſays, "That the "ſubſcription propoſed to be entered into, was for the relief "of the widows, orphans, and aged parents of our beloved "American ſubjects; who, faithful to the character of "Engliſhmen, and preferring death to ſlavery, were, for "that reaſon, only, inhumanly murdered by the king's troops "at or near Lexington and Concord in the province of "Maſſachuſets." It is not neceſſary to conſider, whether this libel comes within the deſcription of a libel, which conſtitutes a crime of itſelf, without any aſſiſtance of other circumſtances; or what our opinions upon that queſtion might be; becauſe, we are all of opinion, that there is ſufficient matter, expreſſed with ſufficient certainty, to conſtitute the crime. But, two queſtions have been made upon the introductory part of this information: firſt, Whether the *interior* ſubſequent matter, being introduced by the words, "Of and "concerning his Majeſty's government, and the employment "of his troops," theſe words amount to a ſufficient averment to put it legally upon the record? And, ſecondly, Whether, admitting it to be legally put upon the record, the ſenſe of it muſt be underſtood to be a libel upon his Majeſty's government? And, firſt, "Whether it is legally put upon the re-"cord in point of form?"—It is put upon the record by theſe words:—"That the defendant wrote and publiſhed ſuch a "libel, *of and concerning* his Majeſty's government and the "employment of his troops." This is an averment; for the fact is, that "he wrote and publiſhed the libel;" and the circumſtance connected with that fact, and which, therefore, makes a part of it, is that "he wrote and publiſhed the "paper or libel, *of and concerning* his Majeſty's *government* and "the *employment of his troops.*" If the jury, upon the defence ſet up, had found that the libel was not publiſhed relative to the king's government, or the employment of his troops; the information was not proved: for it contains an *entire* propoſition. And if it had appeared, that the paper related to a *voluntary* act of the troops only, and not to an employment of them by government, the information would have been falſe: becauſe the proſecutor would have failed in the proof of the propoſition, that it was written, "*Of and con-*"*cerning the King's government and the employment of his* "*troops.*" This is no new doctrine: the caſes cited at the bar ſhew it. In *Tuchin*'s caſe, State Trials, vol. V. 590, one part of the libel was this:—"The miſmanagements of "the navy have been a greater tax upon the merchants, than "the duties raiſed by parliament." It might have been ſaid there, *what navy? whoſe navy?* was it the navy of England, or did it mean only the *merchant ſhips?* The information charged, that the defendant had written a ſcandalous and ſeditious libel; in which, the information ſtated in the *introductory*

ductory part, that "*Of and concerning the royal navy* of this "kingdom, and the government of the ſaid navy, it is written "ſo and ſo." When the information came, in ſtating the libel, to the word "*navy*," by an inuendo, it explains it thus: "*meaning* the *royal navy* of this kingdom;" which, being coupled with the averment in the introductory part of it, made the ſenſe and the charge complete.—Again, in another part of the ſame information for another libel, one part of the libel was thus: "There is another plot againſt "you:" and afterwards, "it is a plot preparatory to your "trial." What trial? The introductory part of the information charged, that this libel was written, "*Of and concerning* "*the defendant*, and a proſecution to be had againſt him for "divers ſeditious libels by him, before that time, compoſed "and publiſhed." The information afterwards explains "*you*" thus; meaning "the defendant." *This, connected* with the averment in the introductory part, was a ſufficient explanation of the charge. The defendant was found guilty of the ſeveral libels in the information. He moved in arreſt of judgment; but *not* upon the ground of the *inſufficiency* of the averments: for it was ſufficiently underſtood, that, "Of "and concerning the royal navy, *&c.*" was good without any other additional averments. In the caſe of *Rex* v. *Matthews*, State Trials, vol. IX. p. 682, *et ſeq.* which was an indictment upon ſtat. 6 *Ann.* c. 7. the words of the libel were theſe; "From the ſolemnity of the *Chevalier's birth*, "and if hereditary right be any recommendation, he has that "to plead in his favour." It was there ſaid, *What Chevalier?* Who was he? What recommendation? And to what thing?—In the introductory part, the information charged the libel to have been written, "Of and concerning the "Pretender," and "Of and concerning his right to the "crown of Great Britain." And it was held, that the inuendos in the body of the libel, explaining the words "*Chevalier*," &c. to mean the *Pretender* and his *hereditary right* to the *crown* of Great Britain, when connected with the averments in the introductory part, of its being written "Of and concerning the Pretender and his right to the crown "of Great Britain," were a ſufficient explanation to make good the charge. In the caſe of *Rex* v. *Alderton*, Sayer's Reports, 280. the libel there was an advertiſement, reciting certain orders made for collecting money on account of the diſtemper amongſt the horned cattle, advertiſed by the clerk of the peace for the county of Suffolk; and it charged, that by theſe orders the money collected had been improperly applied.—The information charged this to be a libel on the juſtices of Suffolk. In the *body* of the libel, it was *not* ſaid, "*by order of the juſtices*," nor did the information in the *introductory* part ſay, that it was a libel "*of and concerning*

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" the juſtices of Suffolk." But when the information came to ſtate any of the orders in the advertiſement, it added this inuendo; meaning " an order of the juſtices of peace for the " county of Suffolk." But theſe inuendos could not ſupply the want of an averment in the introductory part, of its being written of and concerning the juſtices; becauſe they were not explanatory of, but in addition to, the former matter; and the Court were of opinion, that the information having omitted the words: " *Of and concerning the juſtices*" in the introductory part, ſuch omiſſion was fatal; and judgment was accordingly arreſted. From theſe caſes it is clear, that the words " *Of and concerning*" are a ſufficient introduction of the *new* matter. And, therefore, in the preſent caſe, it is, in point of form, a ſufficient averment upon the record, that the paper was written " Of and concerning the king's " government." But, *ſecondly*, it has been argued upon the further charge reſpecting the troops, that it does not import that theſe troops were ſo employed by act of government. And, therefore, though it ſhould be held to have been written " *Of and concerning the king's government*," yet it does *not* appear to be ſo, *relative to the act of the troops*. It has been further argued, that in giving their opinion upon this point, " The judges can take no knowledge of any thing " that is ſaid or written, but what they can collect from the " record;" and likewiſe, " That every accuſation taken " from the record muſt be plain and clear; and is not to be " ſtrained by any forced meaning or conſtruction." But, as the crime of a libel conſiſts, in conveying and impreſſing injurious reflections upon the minds of the ſubject; if the writing is ſo underſtood, by all who read it, the *injury is done* by the publication of theſe injurious reflections, *before* the matter comes to the jury and to the court. And if courts of juſtice were bound by law, to ſtudy for any one poſſible or ſuppoſable caſe or ſenſe, in which the words uſed might be innocent, ſuch a ſingularity of underſtanding might ſcreen an offender from puniſhment; but it could not recal the words, or remedy the injury. It would be ſtrange to ſay, and more ſo to give out as the law of the land, that a man may be allowed to defame in one ſenſe, and to defend himſelf by another. Such a doctrine would, indeed, be pregnant with the *nimia ſubtilitas*, which my Lord *Coke* ſo juſtly reprobates. The true rule to go by, is laid down by my Lord *King*, in the caſe of *Rex* v. *Matthews*, State Trials, vol. IX. 710, which is this: " *That the Court and jury muſt under-* " *ſtand the record as the reſt of mankind do.*" This being the rule, and the accuſation ſuch as I have before ſtated, it remains to be ſeen only, what the words in the preſent caſe are. They are theſe: " That the defendant, of and concerning

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" the *king's government and the employment of his troops*," ſaid " that innocent ſubjects had been inhumanly murdered by " the king's troops only for preferring death to ſlavery." Do theſe words import, in their natural and obvious ſenſe, that the king's troops were employed by the act of government, inhumanly to murder the king's innocent ſubjects? — There can be no doubt but that the king's government comprehends all the executive power of the ſtate, both civil and military. That he employs all the national force, and that his troops are the inſtruments with which part of the executive government is to be carried on. The introductory part of this information charges, that the ſubject of the writing in the preſent caſe was, " The troops, and the *king's troops*, and the buſi- " neſs they had done." It has been truly ſaid, that the king's troops may, like other men, act as individuals: but they can be *employed as troops* by the act of *government only*. If the averment, therefore, amounts to this, that, in the diſcourſe which was held, the words were ſaid " *of and con-* " *cerning the king's government*;" the natural import of them, without any forced or ſtrained meaning, appears to us to be this: I am ſpeaking of the king's adminiſtration of his government relative to his troops, and I ſay, " that our " fellow-ſubjects, faithful to the character of Engliſhmen, " and preferring death to ſlavery, were for that reaſon only " inhumanly murdered by the king's order; or the orders of " his officers." The motive imputed tends to aggravate the inhumanity of the act, and, conſequently, of the imputation itſelf: becauſe it arraigns the government of a breach of public truſt, in employing the means of the defence of the ſubject, in the deſtruction of the lives of thoſe who are faithful and innocent. As to any other circumſtances not ſtated in the information; if thoſe which are ſtated do of themſelvs conſtitute an offence, the reſt ſuppoſed by the defendant, whether true or falſe, would have been only matter of aggravation, and not any ingredient eſſential to the conſtitution of the crime; and, therefore, not neceſſary to be averred by the record. Upon the whole of the caſe, therefore, we are unanimouſly of opinion, that the record contains " all facts and circumſtances neceſſary to warrant the " concluſion of the jury; and that it likewiſe contains all " facts and circumſtances neceſſary for the information of " the Court to give their judgment upon the occaſion."— Judgment of B.R. affirmed.

The King *v.* Burks, Mic. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 4.

An information for a libel need not charge the offence to have been committed *vi et armis*, or allege that the libellous matter is *falſe*.—The defendant having been convicted on an information filed againſt him by his majeſty's attorney-general

general for a libel, it was moved to arreſt the judgment for two objections appearing on the information; 1ſt, that the information does not charge the offence to have been committed *vi et armis*; 2dly, that the libellous matter is not ſaid to be *falſe*. THE COURT were perfectly ſatisfied, that there was no weight in either of the objections. As to the firſt objection they ſaid, that the paſſage in 2 *Hale*, pl. 187. is correct, namely, that the ſtatute 37 *H.* 8. did not extend to informations; but that an indictment for a libel before that ſtatute would have been good without the words *vi et armis*; for that a libel was not in itſelf an actual breach of the peace, but only tended to a breach of it. That the diſtinction taken in 2 *Hawk.* c. 25. ſ. 90. between indictments for offences, which amount to an actual diſturbance of the peace, as reſcues, aſſaults, &c. and thoſe for conſpiracies, cheats, ſlanders, eſcapes, &c. was the true diſtinction; and that in the former only the words *vi et armis* were neceſſary. That though ſome of the precedents in *Tremaine* contained the words *vi et armis*, yet that thoſe words were omitted in the greater number of them, as well as in moſt of the precedents in modern times. That in *R.* v. *Eades*, *Trem.* 61. thoſe words were omitted; and, though ſeveral objections were taken in arreſt of judgment, *vide* 2 *Show*, 468. no objection was made on that account. Neither was any objection taken in *R.* v. *Tutchin*, 5 St. Tr. 527. for the omiſſion of thoſe words, though other objections were taken in that caſe. And that in *R.* v. *Franklin*, 9 St. Tr. 255. judgment was given againſt the defendant on an information for a libel, where theſe words were omitted. And that, as to the other objection, the greater number of precedents in late times was without the epithet *falſe*; and that the reaſon of the thing alſo was againſt the inſertion of the word "falſe," becauſe it is not neceſſary to prove the libel to be falſe. See alſo *Sterling*, et al. 1 *Lev.* 125, 6. where an objection to an information for a conſpiracy, made in arreſt of judgment for the omiſſion of the words *vi et armis*, was over-ruled.

Baldwin v. Elphinſton, eſq. in Err. in the Ex. Ch. Tr. Ter. 15 Geo. 3. 2 *Black. Rep.* 1037.

Although the publication of a libel muſt be ſtated in a declaration, yet it may be collected from the whole of it, and needs not any technical form of words.—This was error in the Exchequer Chamber from a judgment in the King's Bench. The declaration was in an action on the caſe, 1ſt, For *printing and publiſhing* in the *St. James's Chronicle*, a libel, groſsly traducing the plaintiff in his capacity of a captain of the navy; 2dly, *For printing and cauſing to be printed* another ſimilar libel. The defendant pleaded the general iſſue; and on the trial, the jury found a general verdict for the plaintiff with damages 500l. on which judgment was entered. The ſpecial error aſſigned was, that in the ſecond count

count the defendant is only charged with the *printing* and not the *publication* of the libel, which, it was alleged, was inſufficient to maintain the action. PER CURIAM: We are all of opinion to affirm the judgment; for, though we agree, 1ſt, that where there are two counts in a declaration, one perfect, and the other not ſo, general damages cannot be regularly given; ſee *Dyer*, 369. b. 5 *Co.* 108. 10 *Co.* 31. *Cro. Car.* 127.; and, 2dly, that in actions for libels, if no publication is ſtated in the declaration, the count is bad; ſee *Hob.* 62. 115.; yet we apprehend there is a publication ſufficiently ſtated in the preſent caſe.—There are various modes of publication, and no technical words are neceſſary to deſcribe it. Words may be publiſhed by preaching, teaching, or adviſed ſpeaking, even where the conſequences are highly penal. A written libel may be publiſhed in a letter to a third perſon. The word *palam* has been held to ſtate a publication ſufficiently; *Cro. Eliz.* 861. There are in *Raſtall's Entr. titl. Action ſur le Caſe*, 13. a. two inſtances of conſtructive publications, by delivering letters to *A.* and *B.* and by fixing them on the door of St. *Paul's* church. See alſo 3 *Cro.* 327. *Penſon* and *Gooday*, and 2 *Lev.* 193. It is therefore ſufficient, if there be ſtated in the declaration ſuch matter as amounts to a publication (without uſing the formal word *publiſhed*), and the jury are upon the evidence, to decide whether a publication be ſufficiently proved or no. *Printing* a libel may be an innocent act; but, unleſs qualified by circumſtances, ſhall, *primâ facie*, be underſtood to be a *publiſhing:* it muſt be delivered to the compoſitor, and the other ſubordinate workmen. Printing in a *newſpaper* (as laid in the declaration) admits of no doubt upon the face of it. It ſhall be intended a publication, unleſs it be ſhewn that the newſpaper ſo printed by the defendant was ſuppreſſed, and never publiſhed. It is ſtated, that he *cauſed to be printed:* this confirms the fact of publication, becauſe it calls in a third perſon, as agent, to whom the libel muſt have been communicated. The introduction to this count ſtates, that it was ſo printed, with a *malicious intent* to injure the plaintiff *as aforeſaid*, which connects it with the introduction to the firſt count, which ſpeaks of *publiſhing* the ſeveral *libels* hereinafter mentioned, in the plural number. This is the legal as well as the grammatical conſtruction of the words. The concluſion to the whole declaration ſtates, that by means of the printing and *publiſhing* of the ſaid *ſeveral libels* the plaintiff is greatly injured. In ſhort, the count does not ſtate generally, as it might have done, that the libel *was publiſhed*, but it expreſſes the particular mode of publication, viz. by printing in a newſpaper. It thereby puts the publication in iſſue, and the jury have found it ſo. By ſuch finding they have excluded the idea of innocent printing, for they have found

found it to be done *maliciouſly*, to the infamy and damage of the plaintiff.—Judgment affirmed.

In an action for a libel written in a foreign language, the plaintiff muſt ſet forth the libel in the original; and, if he only ſet out a tranſlation of it, the Court will arreſt the judgment.—In an action for a libel, judgment having paſſed againſt the defendant by default; the defendant, after the plaintiff had executed a writ of enquiry, moved in arreſt of judgment, becauſe the original paper [an article in the French newſpaper, called *Courier de Londres*], as written in the French language, ſhould have been ſet out in this count. PER CURIAM: That this objection muſt prevail is evident, from the uniform current of precedents; in all of which the original is ſet forth. The plaintiff ſhould have ſet out the original words, and then have tranſlated them, ſhewing their application to him.—But the plaintiff had leave to amend the declaration, on payment of coſts.

Zenobio v. Axtell, Hil. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 162.

On the trial of an indictment for a libel, the only queſtions for the conſideration of the jury are, the fact of publiſhing, and the truth of the *inuendos*. Whether the ſubject-matter be or be not a libel is a queſtion of law for the conſideration of the Court (1). The defendant was indicted for a libel, and tried before Mr. Juſtice *Buller*, at Shrewſbury, on the 6th of Auguſt, 1784, when the judge, in ſumming up, told the jury that there were only two queſtions for their conſideration, namely, the fact of the publication, and the truth of the *inuendos*. And the jury found the defendant guilty of publiſhing, but whether a libel or not they did not find.—A motion was made for a new trial: and after the queſtion had been argued at the bar, the Court took till the next day to conſider, when they unanimouſly agreed to diſcharge the rule, *though Mr. Juſtice* Willes *was of opinion that the jury had the right, as well as the power, to judge of the queſtion, whether libel or no libel.* Lord MANSFIELD delivered the judgment of the Court as follows: This motion to ſet aſide the verdict and grant a new trial, for the miſdirection of the judge, ſuppoſes that, upon the verdict, either as a general, or as minutes of a ſpecial one, to be reduced into form, judgment may be given; for, if the verdict were defective, and omitted finding any thing within the province of the jury to find, no judgment could be given,

The King v. The Dean of St. Aſaph, Mic. Ter. 25 Geo. 3. B.R. 3 *Ter. Rep.* 428. n. *a.*

(1) But now, by ſtat. 32 *Geo.* 3. c. 60. it is declared and enacted, that on the trial of an indictment or information for a libel, the jury may give a general verdict of guilty or not guilty upon the whole matter put in iſſue, and ſhall not be required or directed by the Court, or judge, to find the defendant guilty, merely on the proof of the publication, by the defendant, of the paper charged to be a libel, and of the ſenſe aſcribed to the ſame in the indictment or information.

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and there muſt be a *venire de novo*; conſequently, this motion would be improper.—Four objections have been made to the direction of the judge: the firſt, peculiar to this caſe, and therefore I begin with it, that he did not leave the evidence of a lawful excuſe or juſtification to the jury, as a ground for acquitting the defendant. Circumſtances merely of alleviation or aggravation are irrelevant upon the trial; they are immaterial to the verdict; and they may be made uſe of when judgment is given, to increaſe or leſſen the puniſhment. Circumſtances which amount to a lawful excuſe, or juſtification, are proper upon the trial, and can only be uſed then. Upon every ſuch offence there ariſe two queſtions; one of law, the other of fact; the firſt to be decided by the Court, the ſecond by the jury. Whether the fact alleged, ſuppoſing it true, be a legal excuſe, is a queſtion of law; whether the allegation be true, is a queſtion of fact; and, according to this diſtinction, the judge ought to direct, and the jury ought to follow the direction, though, by means of a general verdict, they are entruſted with the power of confounding the law and the fact, and follow the prejudices of their affections or paſſions.—The ſecond objection is, that the judge did not give his own opinion, whether the writing was a libel, or ſeditious, or criminal.—The third was, that the judge told the jury they ought to leave that queſtion upon the record to the Court, if they had no doubt of the meaning and publication.—And the fourth, that he did not leave the defendant's intent to the jury.—The anſwer to theſe objections is, that by the conſtitution the jury ought not to decide the queſtion of law whether ſuch a writing, of ſuch a meaning, publiſhed without a lawful excuſe, be criminal; and that they cannot decide it againſt the defendant, becauſe after a verdict it remains open upon the record; therefore, it is the duty of the judge to adviſe the jury to ſeparate the queſtion of fact from the queſtion of law; and, as they ought not to decide the law, and the queſtion remains entire for the Court, he is not called upon to tell them his own opinion. It is almoſt peculiar to the form of a proſecution for a libel, that the queſtion of law remains entirely open for the Court upon the record, and that the jury cannot decide it againſt the defendant; ſo that a general verdict, that the defendant is guilty, is equivalent to a ſpecial verdict in other caſes. It finds all which belongs to the jury to find, and finds nothing as to the queſtion of law; therefore, when the jury are ſatisfied of every fact within their province to find, they have been adviſed to find the defendant guilty, and in that ſhape to take the opinion of the Court upon the law; and no caſe has been cited of a ſpecial verdict, in a proſecution for a libel, leaving the queſtion of law upon the record to the Court, though to be ſure it might be left in that form; but the other is more ſimple and better.

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A criminal intent, from doing a thing in itself criminal, without a lawful excuse, is an inference of law. Where an innocent act is made criminal, when done with a particular intent, there the intent is the material fact to constitute the crime. The subject-matter of these three objections has arisen upon every trial for a libel since the revolution, now near 100 years ago. In every reign there have been many such trials, both of a private and public nature. In every reign there have been several defended with all the acrimony of party animosity, and a spirit ready to contest every point, and to admit nothing; but, during all this time, as far as it can be traced, one may venture to say, that the direction of every judge has been consonant to the doctrine of Mr. J. *Buller*, and no counsel has complained of it by an application to the Court. Counsel for the crown to remove the prejudices of the jury, and to satisfy the by-standers, have expatiated upon the enormity of the libel. Judges, with the same view, have sometimes done the same thing; both have done it wisely, with another view, to obviate the captivating harangues of defendants' counsel to the jury, that they can and ought to find that, in law, the paper is no libel. But the formal direction of every judge, under which every lawyer has so far acquiesced as not to complain of it to the Court, seems to me, ever since the revolution, to have been agreeable to the direction given in this case. It is difficult to cite cases; the trials are not printed; unless a question arises, notes are not taken; nobody takes a note of a direction of course not disputed. We must, as in all cases of tradition, trace backwards, and presume from the usage, which is remembered, that the preceding usage was the same.

His lordship here cited the prosecution for the famous *Hague* letter, in 9 St. Tr. 255; *The King* v. *Owen*, State Trials, 10 St. Tr. Ap. 196; and *The King* v. *Nutt*. In the year 1756 I came into the office I now hold, and, upon the first prosecution for a libel which stood in my paper, I think it was the case of *The King* v. *Shebbeare*, I made up my mind as to the direction I ought to give; and I have uniformly given the same almost in the same form of words. No counsel ever complained of it to the Court. Upon every defendant being brought up for judgment, I have always stated the direction I gave, and the Court has always assented to it. The defence of a lawful excuse never existed in any case before me; therefore I told the jury, "*if they were* "*satisfied with the evidence of the publication, and that the mean-*"*ing and innuendos were as stated, they ought to find the de-*"*fendant guilty; the question of law was upon the record for* "*the judgment of the Court.*" The direction being as of course, and no question raised concerning it in the Court, though I have had the misfortune to try many libels in very warm times against defendants most obstinately and factiously

tiouſly defended, there are no notes or reports of what paſſed. In one caſe, *The King* v. *Woodfall*, on account of another kind of queſtion, there is a report; and there the direction is adopted by the whole Court as right, and the doctrine of Mr. Juſtice *Buller* laid down in expreſs terms. Such a judicial practice in the preciſe point, from the Revolution, as I think, down to the preſent day, is not to be ſhaken by general theoretical arguments, or popular declamation. Every ſpecies of criminal proſecution has ſomething peculiar in the mode of procedure; therefore general propoſitions, applied to all, tend only to complicate and confound the queſtion. No deduction, or concluſion, can be drawn from what a jury may do, from the form of the procedure, to what they ought to do upon the fundamental principles of the conſtitution, and the reaſon of the thing, if they will act with integrity and a good conſcience. The fundamental definition of trials by jury depends upon an univerſal maxim, without an exception, *ad queſtionem*. Where the queſtions can be ſevered by the form of the pleadings, the diſtinction is preſerved upon the face of the record, and the jury cannot encroach upon the juriſdiction of the Court. But where, by the form of pleading, the two queſtions are blended together, and cannot be ſeparated upon the face of the record, the diſtinction is preſerved by the honeſty of the jury. The conſtitution truſts that, under the direction of the judge, they will not uſurp a juriſdiction which is not their province. They do not know, and are not preſumed to know, the law; they are not ſworn to decide the law; they are not required to do it. If it appear upon the record, they ought to leave it there, or they may find the facts ſubject to the opinion of the Court upon the law; but, upon the reaſon of the thing, and the eternal principles of juſtice, the jury ought not to aſſume the juriſdiction of law: they do not know, and are not preſumed to know, any thing of the matter; they do not underſtand the language in which it is conceived, or the meaning of the terms; they have no rule to go by but their paſſions and wiſhes. It is ſaid, if a man give a right ſentence upon hearing one ſide only, he is a wicked judge, becauſe he is right by chance only, and has neglected taking the proper method to be informed; ſo a jury, who uſurp the judicature of law, though they happen to be right, are themſelves wrong, becauſe they are right by chance only, and have not taken the conſtitutional way of deciding the queſtion. It is the duty of the judge, in all caſes upon general iſſues, to tell the jury how to do right, though they have it in their power to do wrong, which is a matter between God and their own conſciences. To be free is to live under a government by law. The liberty of the preſs conſiſts in printing without any previous licenſe, ſubject to the conſequence of law. The licentiouſneſs of the preſs is *Pandora*'s box, the ſource of every

every evil. Miſerable is the condition of individuals, dangerous is the condition of the ſtate, if there is no certain law (or, which is the ſame thing), no certain adminiſtration of law to protect individuals, or to guard the ſtate (1). Jealouſy of leaving the law to the Court, as in other caſes, is *now*, in the preſent ſtate of things, puerile rant and declamation. The judges are totally independent of the miniſters that may happen to be, and of the king; their temptation is rather to the popularity of the day, and I agree with the obſervation of Mr. Juſtice *Foſter*, that a popular judge is an odious and pernicious character. The judgment of the Court is not final: in the laſt reſort it may be reviewed in the Houſe of Lords, where the opinion of all the judges is taken. In oppoſition to this, what is contended for? That the law ſhall be, in every particular cauſe, what any twelve men, who ſhall happen to be the jury, ſhall be inclined to think, liable to no review, and ſubject to no controul, under all the prejudices of the popularity of the day, and under all the bias of intereſt in this town, where thouſands, more or leſs, are concerned in the publication of newſpapers, paragraphs, and pamphlets. Under ſuch an adminiſtration of law, no man could tell, no counſel could adviſe, whether a paper were or were not puniſhable. I am glad that I am not bound to ſubſcribe to ſuch an abſurdity, ſuch a ſoleciſm in politics; but that, agreeably to the uniform judicial practice ſince the Revolution, warranted by the fundamental principles of the conſtitution of trials by jury; and, upon the reaſon and fitneſs of the thing, I am of opinion this motion ſhould be rejected, and the rule diſcharged. — But the judgment was afterwards arreſted on a defect in the indictment.

When a defendant is brought up for judgment, his acts ſubſequent to the trial may be conſidered, either by way of aggravating or mitigating the puniſhment, even though they be ſeparate and diſtinct offences, for which he may be afterwards puniſhed. But in ſuch caſes the Court will take care not to inflict a greater puniſhment than the principal charge itſelf will warrant.—In this caſe, the defendant being brought up to receive judgment for writing and publiſhing a libel, Lord KENYON, Ch. J. reported, that on the trial he had ſtated to the jury, there were two queſtions for their conſideration; FIRST, Whether the defendant was guilty of publiſhing the pamphlet? And, SECONDLY, Whether the inuendos were true? And that the jury had found the defendant guilty. ON THE

The King *v.* Withers, Mic. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 428.

(1) All governments muſt ſet their faces againſt libels, and whenever they come before the Court and a jury, they will ſet their faces againſt them; and, if juries do not prevent them, they may prove fatal to liberty, deſtroy government, and introduce anarchy; but tyranny is better than anarchy, and the worſt government better than none at all.—*Entick* v. *Carrington*, Mic. Ter. 6 *Geo.* III. C.B. 2 *Wilſ.* 275.

PART OF THE PROSECUTION, by way of aggravating the puniſhment, an affidavit was produced to the Court, to which was annexed another pamphlet, written by the defendant after the trial, and which he called an *apology*, but which was, in fact, more libellous than the publication for which he was tried. And it was objected to the reading of this ſecond pamphlet; but Lord KENYON, Ch. J. ſaid, It is well ſettled that the conduct of a defendant, ſubſequent to the time when he is found guilty, may be taken into conſideration, either by way of aggravating or mitigating the puniſhment. In general, it is done for his benefit, in order to extenuate the offence; but it is alſo done, if required, to aggravate (1); though in ſuch caſes the Court will always take care not to inflict a greater puniſhment than the principal offence itſelf will warrant. THE COURT, however, gave the defendant an opportunity of anſwering the affidavit now filed, and committed him in the mean time; and, when he was brought up on a ſubſequent day, not producing any affidavits in anſwer, he was ſentenced to pay 50l. to be impriſoned twelve months in Newgate, and afterwards to find ſureties for his good behaviour for three years, himſelf in 200l. and two ſureties in 100l. each.

Rex v. Almon, Mich. Ter 11 Geo. 3. B.R. 5 *Burr. Rep.* 2686.

Evidence of buying a libel in the ſhop of a known bookſeller is ſufficient *primâ facie* evidence to convict him of publication.—The defendant having been convicted of publiſhing a libel (*Junius*'s letter) in one of the magazines called the London Muſeum, which was bought at his ſhop, and even profeſſed to be "*printed for him.*" It was moved for a new trial, upon the foot of the evidence being inſufficient to prove any *criminal intention* in Mr. *Almon*, or even the leaſt *knowledge* of their being ſold at his ſhop: and they had affidavits to prove, that it was a frequent practice in the trade for one publiſher to put another publiſher's name to a pamphlet, as printed for that other, when, in fact, it was publiſhed for himſelf. That this was the fact in the preſent caſe, Mr. *Miller* being the real publiſher of this muſeum, but having advertiſed it, and publiſhed it, as printed for Mr. *Almon*, without conſulting Mr. *Almon*, or having his conſent or approbation. That, on the contrary, as ſoon as he ſaw his name put to it, as being printed for him, he immediately ſent a note to Mr. *Miller*, expreſſing his diſapprobation and diſſatisfaction. That he himſelf had no concern whatever in this *London Muſeum*; that he was not at home when they were ſent to his ſhop; that the whole number ſent to his

(1) The ſame point was afterwards ruled in this term, in *R. v. Walter*, for a libel; in which caſe Lord *Kenyon* ſaid, the ſame thing had been done many years ago, in Dr. *Smollet*'s caſe.

ſhop

ſhop was 300; that about ſixty-ſeven of them had been ſold there by a boy in the ſhop, but without Mr. *Almon*'s own knowledge, privity, or approbation; that, as ſoon as he diſcovered it, he ſtopt the ſale, ordered the remainder to be carried up into his garret, and took the firſt opportunity to return them to Mr. *Miller*. That it was not proved that the perſon who ſold them was Mr. *Almon*'s ſervant, or employed by him, or that Mr. *Almon* was at all privy to the ſale. An affidavit was offered of Mr. *Mackworth*, one of the jury, who underſtood Lord *Mansfield* to have ſaid at the trial, "that this was concluſive evidence;" otherwiſe he, Mr. *Mackworth*, was convinced, in his own mind, that the defendant ought not to be found guilty; and, if he had apprehended that the jury were at liberty to exerciſe their own judgment, he would have acquitted the defendant. PER CURIAM: A juryman's affidavit, with regard to his ſentiments in point of law, at the trial, ought not to be admitted, whatever may be the caſe of his affidavit, tending to rectify a miſtake in fact. Lord MANSFIELD, in reporting the evidence, ſaid he had told the jury, that there was evidence of the publication, if they believed the witneſſes. And he ſaid, he had directed them (as he always had done, and as he took the law to be), that if they were not ſatisfied that the blanks were filled up in the information in the *true* ſenſe and meaning of the writer, they ought to acquit the defendant; and that the epithets uſed in the information were inferences of law, drawn from the paper itſelf, and not facts to be *proved*. AND THE COURT were of opinion, that none of the matters urged on behalf of the defendant, nor all of them added together, were reaſons for granting a new trial, whatever weight they might have in extenuation of his offence, and, in conſequence, leſſening his puniſhment; for, they were exceedingly clear and unanimous in opinion, that this pamphlet, being bought in the ſhop of a common known bookſeller and publiſher, importing by its title-page to be printed for him, is a ſufficient *primâ facie* evidence of its being publiſhed by him; not, indeed, concluſive, becauſe he might have contradicted it, if the facts would have borne it by contrary evidence; but, as he did not offer any evidence to repel it, it muſt (if believed to be true) ſtand good *till* anſwered, and be conſidered as concluſive till contradicted.

Upon an information for printing and publiſhing a ſeditious libel, the jury found the defendant guilty of printing and publiſhing only; and thereupon a *ven. fac. de novo*, was ordered. —In this cauſe it was moved, on behalf of the defendant, to *ſtay the entering up judgment againſt him*, upon the verdict found in this cauſe.—AND a croſs-motion was made at the ſame time, by the counſel for the crown, for the defendant to ſhew cauſe why the verdict ſhould not be entered according to the *legal import of the finding* of the jury.—It was an in-

Rex v. Woodfall, Mic. Te 11 Geo 3. R 5 *Burr. Re* 2661.

formation againſt the defendant, by the Attorney-general, for printing and publiſhing, in the Public Advertiſer, a ſeditious libel, ſigned *Junius*. Upon the trial, THE JURY FOUND HIM GUILTY OF THE PRINITNG AND PUBLISHING ONLY. On ſhewing cauſe it was inſiſted, on the part of the defendant, that the verdict, *as found*, did not amount to find Mr. *Woodfall* guilty of the charge in the information, but rather to acquit him of it; for, he is charged with printing and publiſhing this as a libel, with a *malicious and criminal intention*. But the jury find him guilty of printing and publiſhing *only*; and that, whatever the jury do not find, implies a negative. But this goes further; it ſays expreſsly, that they find this, and this *only*. ON THE PART OF THE PROSECUTION it was argued, that the preſent verdict could not be conſidered as a verdict of not guilty: it poſitively and explicitly finds him *guilty* of the *printing and publiſhing*, and it does not import any negation of his guilt, as to the reſt. The word "*only*" does not import the excluſion of any thing but *facts*: it cannot exclude *concluſion of law*. But it is certain that a verdict cannot be amended in matters of *fact*: but it may be perfected in point of *form*. The officer takes his note ſhort, but the neceſſary finiſhing of the ſentence may be ſupplied. The ſubſtance and matter of this iſſue is ſufficiently found; the Court may order it into a proper form. The *law* here implies the intention. The printing and publiſhing was all that the jury were to enquire about. This verdict is not imperfect, nor is there any need of ſupplying any thing by *intendment*. The intention muſt be collected from the libel itſelf: the intention is the giſt of the offence. The verdict ought to be entered according to the true meaning and intention of the jury. Something is always to be added to *every* verdict: the entry is never in the very identical words uſed by the jury, which are always conciſe, and not full and formal enough to ſtand ſupported againſt a writ of error.—Whether a jury *may* or may not take upon themſelves to judge of matters of law, they muſt, at leaſt, do it at their peril: but here they have not done it at all; they have not determined that this paper is not libellous: ſo that, whether they may at their peril do it, or whether they may not, they have not here riſked that peril. The import of their verdict is a general finding of the *facts*, without expreſſing any ſenſe of their own upon the *law*. PER CURIAM: The laſt rule muſt, from the nature of it, be firſt diſcuſſed, becauſe the ground of argument upon the other cannot be ſettled till this is diſpoſed of (1). This motion

(1) Lord MANSFIELD, Ch. J. ſtated the evidence on the part of the crown; and ſaid, on the part of the defendant, they called no witneſſes. His counſel objected to ſome of the inuendos; but they, principally, applied to the jury, to acquit the defendant, from the paper being innocent

tion conſiſts of *two* parts; firſt, to fill up the formal words of reference; the ſecond, to omit the word *only*. We are all of opinion, "that the *firſt* is a *technical* omiſſion of the clerk, "and ought to be ſet right;" as to the ſecond, "that the "word *only* muſt ſtand in the verdict." There is no ground, from any thing which paſſed, to explain the ſenſe of the jury, ſo as that the officer might have entered a *general* verdict. No argument can be urged for omitting the word "*only*," which does not prove "that it can have no effect "though inſerted;" and, therefore, it is a queſtion of law, upon the face of the verdict. The defendant's motion muſt be conſidered upon the ground of the word "*only*" ſtanding: was it omitted there could be no doubt. "Guilty of printing and publiſhing," where there is no other charge, is "*guilty*," for nothing more is to be found by the jury. In the caſe of *The King* and *Williams*, the jury found the defendant "guilty of printing and publiſhing the *North Briton*, No. 45." The clerk entered it up, "guilty," and no objection was ever made. Where there are more charges

cent, or not liable to the epithets given it by the information: or, that the defendant's intent in publiſhing did not deſerve the epithets in the information. There was no doubt but that evidence, if credited, amounted to proof of printing and publiſhing by the defendant. There may be caſes where the fact proved as a publication may be juſtified, or excuſed, as lawful or innocent. For, no fact which is not criminal, in caſe the paper be a libel, can amount to a publication of which a defendant ought to be found guilty. But no queſtion of that kind aroſe in this cauſe; therefore, I directed the jury to conſider, "Whether all the "inuendos, and all the applications, to matter and perſons, made by "the information, were, in their judgment, the true meaning of the "paper?" If they thought otherwiſe, they ſhould acquit the defendant: but if they agreed with the information, and believed the evidence as to the publication, they ſhould find him guilty. If the jury were obliged to find whether the paper was a libel, or whether it was a libel to ſuch a degree as to deſerve the epithets given it by the information; or to require proof of the expreſs intent of the defendant, in printing and publiſhing, and of its being malicious to ſuch a degree as to deſerve the epithets given it by the information, then this direction was wrong. In ſupport of it, I told them (as I have, from indiſpenſable duty, been obliged to tell every jury upon every trial of this kind), to the following effect: that "WHETHER THE PAPER, MEANING AS ALLEGED "'BY THE INFORMATION, WAS, IN LAW, A LIBEL,' WAS A "QUESTION OF LAW, UPON THE FACE OF THE RECORD: FOR AFTER CONVICTION, A DEFENDANT MAY MOVE IN ARREST OF JUDGMENT, IF THE PAPER IS NOT A LIBEL. That all the epithets in the information were formal inferences of law, from the printing and publiſhing. That no proof of expreſs malice ever was required; and, in moſt caſes is impoſſible to be given. That the verdict finds only what the law infers from the fact. Therefore, after conviction, a defendant may, by affidavit, leſſen the degree of his guilt. That where an act in itſelf indifferent, if done with a particular intent, becomes criminal; there the intent muſt be proved and found: but where the act is in itſelf unlawful, as in this caſe, the proof of juſtification or excuſe lies on the defendant; and, in failure thereof, the law implies a criminal intent.

than one, "guilty of ſome *only*," is an acquittal as to the reſt. But in this information there is no charge, except for printing and publiſhing. Clearly, there can be no judgment of *acquittal*, becauſe the fact found by the jury is the *very crime* they were to try. The only queſtion is, "Whether, by any "poſſibility, the word '*only*' can have a meaning which "would affect or contradict the verdict?" "That the *law*, "as to the ſubject-matter of the verdict, is as I have ſtated," has been ſo often unanimouſly *agreed by the whole Court*, upon every report I have made of a trial for a libel, that it would be improper to make it a queſtion now, in this place. Among thoſe that concurred, the bar will recollect the dead, and the living not now here. And we all again declare our opinion, "that the direction is right, and according to law." This direction, though often given with an expreſs requeſt from me, "that, if there was the leaſt doubt, they would "move the Court," has never been complained of in court. And yet, if it had been wrong, a new trial would be of courſe. It is not now complained of.—Taking, then, the law to be according to this direction, the queſtion is, "Whe-"ther any meaning can be put upon the word '*only*,' as it "ſtands upon the record, which will affect the verdict?" If they meant to ſay, "they did not find it a *libel*," or "did not find the *epithets*," or "did not find any *expreſs* malicious intent," it would not affect the verdict, becauſe none of theſe things were to be proved, or found, either way. If, by "*only*" they meant to ſay, "that they did not find the "*meaning* put upon the paper by the information," they ſhould have *acquitted* him. If they had expreſſed this to be their meaning, the verdict would have been *inconſiſtent* and *repugnant*; for, they ought not to find the defendant guilty, unleſs they find the meaning put upon the paper by the information; and judgment of *acquittal* ought to have been entered up. If they had expreſſed their meaning in any of the other ways, the verdict would not have been affected, and judgment ought to be entered upon it. It is impoſſible to ſay, with certainty, "what the jury really did mean;" probably they had different meanings.—If they could poſſibly mean that which, if expreſſed, would acquit the defendant, he ought not to be concluded by this verdict. It is poſſible ſome of them might mean not to find the *whole* ſenſe and explanation put upon the paper by the innuendos in the information. If a doubt ariſes from an ambiguous and unuſual word in the verdict, the Court ought to lean in favour of a *venire de novo*.—We are under the leſs difficulty, becauſe in favour of a defendant, though the verdict be full, the Court may grant a new trial. And we are all of opinion, upon the whole of the caſe, "that there ſhould be a *venire* "*de novo*."

Judgment

Judgment for a private libel.—The defendant was convicted on an information, for writing a libel againſt Admiral *Knowles*, in the *Critical Review*. He declared his ſorrow for his offence; that he had offered the Admiral reaſonable ſatisfaction, which was refuſed; and was now ready to do as the Court ſhould think proper. The Court fined him 100l. impriſoned him for three months, and ordered him to find ſecurity for his good behaviour for ſeven years, himſelf in 500l. and two ſureties in 250l. each. The King *v.* Dr. Smollet, Mic. Ter. 1 Geo. 3. B.R. 1 *Black. Rep.* 269.

The defendant was convicted on an information filed by the Attorney-general (for printing the *North Briton*, No. 45) in Eaſter, 1763; to which he pleaded in Trinity term, but was not brought to trial, till the ſittings after Trinity, 1764. He was brought up in Michaelmas term following for judgment, when he made affidavit, "that, on the 29th of April, "1763, Lords *Halliſax* and *Egremont*, then ſecretaries of "ſtate, told him, that the object of their reſentment was the "author, not the publiſher.—That, on the 16th of Novem-"ber, 1763, he waited on Lord *Halliſax*, who aſſured him, "upon his honour, he knew nothing of the proſecution; "and that, if he had any influence on the gentlemen who "conducted it, he ſhould not be puniſhed, unleſs it appeared "abſolutely neceſſary, which he ſuppoſed it was not." The Attorney-general then produced a letter from Lord *Halliſax* to Mr. *Yorke*, the then Attorney-general, dated the 9th of May, 1763, for filing the information; but no affidavit was produced from Lord *Halliſax*, without which the Court declared they muſt take the facts to be true, which were an implied, though not expreſs, undertaking, in point of honour, to excuſe the printer, if he would deliver up his principal: but, as they could not take notice of this in their judgment, they recommended an application to Lord *Halliſax*, to know whether he would inſtruct the Attorney-general to pray any and what judgment.—The defendant was afterwards diſcharged on entering into a recognizance of 200l. to appear when required. The King *v.* Kearſley, *et al.* Hil. Ter. 5 Geo. 3. B.R. 1 *Black. Rep.* 540.

Lien.

A DYER has no lien on goods delivered to him in the courſe of trade, but for the price of the dying.—This was trover for 2000 yards of ſerge. Verdict for the plaintiffs on this ſpecial caſe.—Meſſrs. *Henzleman* purchaſed from the plaintiffs the goods in queſtion, by their packer, and they were delivered to the defendants, their dyers, to be dyed on their (Meſſrs. *Henzleman*'s) account. Afterwards, Meſſrs. *Henzleman* Green *v.* Farmer, Ea. Ter. 8 Geo. 3. B.R. 4 *Burr.* 2214. 1 *Black. Rep.* 651.

Henzleman and the plaintiffs agreed, that the plaintiffs ſhould have their goods back again, who demanded them from the defendants, offering to pay what was due for the dying of them; but the defendants inſiſted upon being alſo paid a debt, due from Meſſrs. *Henzleman*, for dying other goods, over and above the price of dying theſe.—The occaſion of Meſſrs. *Henzleman*'s agreeing that the plaintiffs ſhould have their goods again, was their (the *Henzleman*'s) having failed in their circumſtances; and it was proved that, after notice of this failure, the defendants had delivered back eleven pieces to Meſſrs. *Aſton* and *Hodgſon*, which had, in like manner, been bought of them by Meſſrs. *Henzleman*'s packer, and ſent to the defendants to be dyed on Meſſrs. *Henzleman*'s account, without inſiſting on being paid more than was due for dying the ſame; and they had alſo delivered back to the plaintiffs five pieces in white, without being paid any thing for them. THE QUESTION was, Whether, under theſe circumſtances, the defendants had a lien upon theſe goods for any thing more than the price of dying the ſame? Lord *Mansfield* delivered the opinion of the Court: The caſe is the ſame, as if the action had been brought by Meſſrs. *Henzleman*; for, the plaintiffs ſtand in their place: and ſo I ſhall conſider it.—The general queſtion is, "Whether the plaintiffs, in this "action, ſhould be obliged to do juſtice to the defendants, by "paying what is due to them, before they are entitled to "demand the goods from them, and to recover their value "in caſe of refuſal?" Natural equity ſays, that croſs-demands ſhould compenſate each other, by deducting the leſs ſum from the greater; and that the difference is the only ſum which can be juſtly due.—But, *poſitive law*, for the ſake of the forms of proceeding and convenience of trial, has ſaid that each muſt ſue and recover ſeparately, in *ſeparate actions*. Where the nature of the employment, tranſaction, or dealings, neceſſarily conſtitutes an account, conſiſting of receipts and payments, debts, and credits; it is certain that only the *balance* can be the debt; and, by the proper forms of proceeding in courts of law or equity, the balance only can be recovered.—After a judgment, or decree, "to account," both parties are equally actors. Where there were mutual debts unconnected, the *law* ſaid they ſhould not be ſet off, but each muſt ſue: and courts of equity followed the ſame rule, becauſe it was the law; for, had they done otherwiſe, they would have ſtopped the courſe of law, in all caſes where there was a mutual demand. The natural ſenſe of mankind was firſt ſhocked at this, in the caſe of *bankrupts*; and it was provided for by 4 *Ann.* c. 17. § 11. and 5 *G.* 2. c. 30. § 28. *directing mutual demands to be balanced.* This clauſe muſt have every where the ſame conſtruction and effect, whether the queſtion ariſes upon a ſummary petition, or a formal bill,

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or an action at law. There can be but one right conſtruction; and, therefore, if courts differ, one muſt be wrong. Where there was no bankruptcy, the injuſtice of not ſetting off (eſpecially after the death of either party), was ſo glaring, that parliament interpoſed by 2 *G.* 2. c. 22. § 13. c. 24. § 5. for ſetting off mutual debts againſt each other. But the proviſion does not go to *goods* or other *ſpecific* things wrongfully detained; and, therefore, neither courts of law nor equity can make the plaintiff, who ſues for ſuch goods, pay firſt what is due to the defendant, except ſo far as the goods can be conſtrued a *pledge*; and then, the right of the plaintiff is only to redeem. The convenience of commerce and natural juſtice are on the ſide of liens; and, therefore, of late years, courts lean that way; 1ſt, where there is an *expreſs contract*; 2dly, where it is *implied* from the uſage of trade; or, 3dly, from the manner of dealing between the parties in the particular caſe; 4thly, or where the defendant has acted as a factor. The caſe, *ex parte Ockenden*, was well conſidered. Lord *Hardwicke*'s bias was ſtrong on behalf of liens; and his own determination in the caſe *ex parte Deeze* had been almoſt in point; yet he took time to conſider it, and ſearch for precedents: and, after conſideration, he thought he could not conſtrue it within the mutual credit clauſe of the bankrupt act, unleſs it could be ſo conſtrued in an action of trover (and that is certainly ſo). He reſted upon there being no room, in that caſe, to *imply* a lien, from uſage of trade, or from the particular manner of dealing. This caſe, and that *ex parte Deeze*, are well reported in *Atkyns*. Both were bankrupt caſes: I have notes of both. The one was the caſe of a packer, who was allowed to retain cloth for other debts, beſides what was due for packing; the other, of a miller, who was not allowed to retain corn for other debts than the price of the grinding. In this caſe, according to my own note, Lord *Hardwicke* ſaid, "*Here is* "*no evidence of a contract for a ſpecific lien, nor of a lien ariſing* "*by the general courſe of the trade. The law has created a* "*ſpecific lien for the price of grinding the corn; can I carry it* "*farther?*" *Atkyns* reports only what was ſaid on the 12th of Auguſt, 1754. It ſtood over to the 20th of December, and no precedents being then produced to the contrary, he determined according to his opinion in Auguſt, as reported by *Atkyns*.—If theſe two caſes at all claſh, the weight of authority is certainly more preponderant in the latter, which was more maturely conſidered. But I think them very conſtent. A packer, according to the courſe of trade, is certainly entitled to a lien upon all goods in his hands, being in the nature of a factor. Let me apply the principles of *Ockenden*'s caſe to the preſent: here is no factor, no agent, concerned; no tranſaction, but the mere manufacture of dying;

dying; no courſe of trade, or general uſage, to create a ſpecific lien; no particular circumſtances of their method of dealing with *Henzleman*. The very manner of dealing ſhews they relied merely on his perſonal credit. WE ARE, THEREFORE, ALL OF OPINION, that *the defendants had no lien in the preſent caſe, but for the price of the dying of theſe ſpecific goods.*—See *Kirkman* v. *Shawcroſs*, *ante*, vol. I. p. 549.

The King v. Bury, Ea. Ter. 19 Geo. 3. B.R. 1 *Doug.* 194. n. *b.*

Upon a rule to ſhew cauſe why an attachment ſhould not iſſue againſt the defendant, who was clerk of aſſize on the Norfolk circuit, for not obeying a writ of *certiorari* to remove an indictment for murder, and a ſpecial verdict founded upon it. *The defendant inſiſted, that he had a right to retain the record till he ſhould be paid his fees for drawing, ingroſſing*, &c. which the attorney for the priſoner refuſed to do, on the ground of their being exorbitant. However, on the attorney's undertaking to pay as much as ſhould, on a reference to the maſter, be reported to be due, the record was returned into court, upon which the rule was diſcharged. Lord MANSFIELD ſaid, he ſhould be very unwilling to determine that a clerk of aſſize has a lien on the records of the Court for his fees, for that he foreſaw great inconvenience from ſuch a doctrine.

Binſtead v. Buck, Mic. Ter. 17 Geo. 3. C.B. 2 *Black. Rep.* 1117.

There is no lien on a dog loſt for the expence of his keeping.—Trover for a pointing dog. The plaintiff proved the dog to be his property, and that it was found at the defendant's houſe twelve months after it was loſt. The defendant ſaid, the dog ſtrayed there caſually, *and demanded twenty ſhillings for twenty weeks keep before he would deliver up the dog.* A verdict was found for the plaintiff, ſubject to the opinion of the Court, whether this refuſal amounted to a converſion of the dog? The counſel for the defendant declined arguing the queſtion, and ſo—Poſtea to the plaintiff.

Nicholſon v. Chapman, Mic. Ter. 34 Geo. 3. C.B. 2 *Hen. Black.* 254.

So in this caſe, a quantity of timber, which had been placed in a dock on the banks of the river Thames, being accidentally looſened, was carried by the tide to a conſiderable diſtance, and left at low water upon a towing path.—The defendant, finding it in that ſituation, voluntarily conveyed it to a place of ſafety, beyond the reach of the tide, at high water.—And the Court, on an action of trover for this timber, held, that the defendant had no lien on the timber for the trouble or expence to which he put himſelf in the carriage of it, but was liable to an action of trover for not delivering it up to the owner on demand, though nothing was tendered him by the owner, by way of compenſation. But the Court inclined to think that the defendant might maintain an action againſt the owner for a compenſation.—Lord Chief Juſtice EYRE:—The only difficulty that remained with any of us, after we had heard this caſe argued, was upon the queſtion, Whether this tranſaction could be aſſimi-

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lated to ſalvage? The taking care of goods left by the tide upon the banks of a navigable river, communicating with the ſea, may, in a vulgar ſenſe, be ſaid to be ſalvage; but it has none of the qualities of ſalvage, in reſpect of which the laws of all civilized nations, the laws of Oleron, and our own laws in particular, have provided that a recompence is due for the ſaving, and that our law has alſo provided that this recompence ſhould be a lien upon the goods, which have been ſaved. Goods carried by ſea are neceſſarily and unavoidably expoſed to the perils, which ſtorms, tempeſts, and accidents (far beyond the reach of human foreſight to prevent), are hourly creating, and againſt which it too often happens that the greateſt diligence, and the moſt ſtrenuous exertions of the mariner, cannot protect them. When goods are thus in imminent danger of being loſt, it is moſt frequently at the hazard of the lives of thoſe who ſave them, that they are ſaved. Principles of public policy dictate to civilized and commercial countries, not only the propriety, but even the abſolute neceſſity of eſtabliſhing a liberal recompence for the encouragement of thoſe who engage in ſo dangerous a ſervice.—Such are the grounds upon which ſalvage ſtands; they are recognized by Lord Chief Juſtice *Holt* in the caſe which has been cited from 1 Lord *Raym.* 393. and *Salk.* 654. pl. 2; but ſee how very unlike this ſalvage is to the caſe now under conſideration. In a navigable river, within the flux and reflux of the tide, but at a great diſtance from the ſea, pieces of timber lie moored together in convenient places; careleſſneſs, a ſlight accident, perhaps a miſchievous boy, caſts off the mooring rope, and the timber floats from the place where it was depoſited till the tide falls, and leaves it again ſomewhere upon the banks of the river. Such an event as this gives the owner the trouble of employing a man, ſometimes for an hour, and ſometimes for a day, in looking after it, till he finds it, and brings it back again to the place from whence it floated. If it happens to do any damage, the owner muſt pay for that damage; it will be imputable to him as careleſſneſs, that his timber, in floating from its moorings, is found damage feaſant, if that ſhould happen to be the caſe. But this is not a caſe of damage feaſance; the timber is found lying upon the banks of the river, and is taken into the poſſeſſion, and under the care of the defendant, without any extraordinary exertions, without the leaſt perſonal riſk, and, in truth, with very little trouble. It is, therefore, a caſe of mere finding, and taking care of the thing found (I am willing to agree) for the owner. This is a good office, and meritorious, at leaſt in the moral ſenſe of the word, and certainly entitles the party to ſome reaſonable recompence from the bounty, if not from the juſtice of the owner; and of which, if it were refuſed,

refuſed, a court of juſtice would go as far as it could go, towards enforcing the payment (1). So it would, if a horſe had ſtrayed, and was not taken as an eſtray by the lord under his manerial rights, but was taken up by ſome good-natured man, and taken care of by him, till at ſome trouble, and, perhaps, at ſome expence, he had found out the owner. So it would be in every other caſe of finding that can be ſtated (the claim to the recompence differing in degree, but not in principle); which, therefore, reduces the merits of this caſe to this ſhort queſtion, Whether every man, who finds the property of another, which happens to have been loſt, or miſlaid, and voluntarily puts himſelf to ſome trouble and expence to preſerve the thing, and to find out the owner, has a lien upon it for the caſual, fluctuating, and uncertain amount of the recompence, which he may reaſonably deſerve? It is enough to ſay, that there is no inſtance of ſuch a lien having been claimed and allowed; the caſe of the pointer dog was a caſe in which it was claimed and diſallowed, and it was thought too clear a caſe to bear an argument. Principles of public policy and commercial neceſſity ſupport the lien in the caſe of ſalvage. Not only public policy and commercial neceſſity do not require that it ſhould be eſtabliſhed in this caſe, but very great inconvenience may be apprehended from it, if it were to be eſtabliſhed. The owners of this kind of property, and the owners of craft upon the river, which lie in many places moored together in large numbers, would not only have common accidents, from the careleſſneſs of their ſervants, to guard againſt, but alſo the wilful attempts of ill-deſigning people to turn their floats and veſſels adrift, in order that they might be paid for finding them. I mentioned, in the courſe of the cauſe, another great inconvenience, namely, the ſituation in which an owner, ſeeking to recover his property in an action of trover, will be placed, if he is, at his peril, to make a tender of a ſufficient recompence, before he brings his action. Such an owner muſt always pay too much, becauſe he has no means of knowing exactly how much he ought to pay, and becauſe he muſt tender enough. I know there are caſes in which the owner of property muſt ſubmit to this inconvenience; but the number of them ought not to be increaſed: perhaps it is better for the public that theſe voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, ſhould depend alto-

(1) It ſeems probable, that in ſuch a caſe, if any action could be maintained, it would be an action of *aſſumpſit* for work and labour, in which the Court would imply a ſpecial inſtance and requeſt, as well as a promiſe. On a *quantum meruit*, the reaſonable extent of the recompence would come properly before a jury.

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gether for their reward, upon the moral duty of gratitude. But, at any rate, it is fitting that he who claims the reward in such case, should take upon himself the burthen of proving the nature of the service which he has performed, and the *quantum* of the recompence which he demands, instead of throwing it upon the owner to estimate it for him, at the hazard of being nonsuited in an action of trover.—Judgment for the plaintiff.

Davis, *et al.* v. Bowsher, Hil. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 488.

A customer lodged bills of exchange in the hands of his banker generally, and when the banker advanced money to him, he applied it to the discount of such of the bills as happened to be nearest in value to the sum advanced, but without any special agreement to that effect: held that this did not invalidate the banker's general lien upon all the other bills in his hands, but that he might retain them in order to secure the payment of his general balance.—This was an action of assumpsit by the plaintiffs, as indorsees of a bill of exchange for 635l. 10s. against the defendant, as drawer. The defendant drew the bill in question on one *Ames*, payable to *Cook*, from whom he received no consideration for it. *Cook* was a trader at Bristol, and kept an account with the plaintiffs, who were bankers in the same place. The course of dealing between them was this: *Cook* lodged bills, payable at future days, with the plaintiffs, from time to time, and drew upon them for any money he wanted in advance: the plaintiffs charged no interest on these advances, but used to select out of the bills in their hands such as they pleased, and were nearest to the sum advanced, and discounted these bills, debiting *Cook* with the amount of such discount in his account. On the 26th of February the balance on *Cook*'s account with the plaintiffs was 103l. in his favour. On the 27th he directed his clerk to pay in to the plaintiffs other bills to the amount of about 3000l. which was done; and he applied for another advance, which the plaintiffs at first refused; but they afterwards consented to let him have about 1400l. and actually entered the discount on such of the bills as they selected, *amongst which the bill in question was not one.* And on the plaintiffs' refusing to make *Cook* any further advance, he demanded this, and the other bills which had not been discounted, none of which were then due: but the plaintiffs refused to deliver any of them up, alleging their right to detain them all, in case any of the discounted bills should prove bad. Those discounted bills had longer to run than the bill in question. At this time none of the discounted bills had been dishonoured; though some of them, beyond the amount of the present bill, afterwards were so: and, at the time of the demand and refusal, the sums which the plaintiffs had advanced to *Cook* were considerably more than covered by the amount of the discounted bills in their hands, in the event of their

their proving to be good bills. Before this action was brought, *Cook* became a bankrupt, and the plaintiffs proved their debt under his commiſſion for the balance of their account; and, in the affidavit uſual upon ſuch occaſions, they ſwore that they had no ſecurity for their debt, except certain bills which they ſpecified, and which only comprehended the diſcounted bills, and not the bill in queſtion. There was alſo ſome evidence at the trial of the general cuſtom of the bankers at Briſtol to keep their accounts in the ſame manner as the courſe of dealing ſhewn between the plaintiffs and *Cook*; namely, that *it was uſual with them, upon any advance to a cuſtomer, who lodged bills in their hands, to apply ſuch advance to the diſcount of particular bills, without any ſpecial agreement to that effect with ſuch cuſtomer, or with a view to ſelect ſuch particular bills as the baſis of the credit, or relinquiſh their general lien upon other ſecurities.* On the trial of the cauſe the jury found a verdict for the plaintiffs; to ſet aſide which a motion was made, and rule *niſi* granted in Michaelmas term laſt. AND NOW PER CURIAM: By the general law of the land a banker has a general lien upon all the ſecurities in his hands belonging to any particular perſon for his general balance, unleſs there be evidence to ſhew that he received any particular ſecurity under ſpecial circumſtances, which would take it out of the common rule. But it is taken for granted, by the counſel in ſupport of the rule, that the party had a right to demand of the bankers certain bills which were not diſcounted, without paying their general balance; and the whole argument is built on that miſtake. Now he had only a right to demand this bill *ſub modo*; namely, on paying all that was then due to the bankers: for wherever a banker has advanced money to another, he has a lien on all the paper ſecurities which come into his hands for the amount of his general balance. It has been urged, that the bankers abandoned their general lien in this caſe, by applying the money advanced to the diſcount of a particular bill: but nothing appears to warrant ſuch a ſuppoſition. So long as they were in advance upon the general account, they had a right to charge intereſt, whether in one ſhape or another. But, whether they could charge intereſt upon any particular bill, provided they were not in advance upon the general balance, is a queſtion not neceſſary to be decided now, but upon which they may, poſſibly, find themſelves miſtaken whenever it comes to be fully canvaſſed. There is nothing, however, in this caſe, contrary to the general rule of law, and the practice amongſt bankers. It is very proper that there ſhould be a known rule to govern the conduct of all perſons of this deſcription, whoſe dealings are very extenſive; and that rule is, that no perſon can take any paper ſecurities out of the hands of his banker, without paying

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him his general balance, unleſs ſuch ſecurities were delivered under a particular agreement, which enables him ſo to do. If we were to ſet aſide this verdict, we ſhould unſettle that which has always been conſidered as the law on this ſubject; and the conſtantly received courſe of trade founded upon that law. The rule for a new trial muſt be diſcharged.

Bent, *et al. v.* Puller, *et al.* Aſſignees of Caldwell and Co. Hil. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 494.

If *A.* and *B.* have a general running account, conſiſting of bills drawn by *B.* and *C.* in favour of *A.* and of bills and other ſecurities depoſited by *A.* with *B.*; and, upon the failure of *B.* and *C.*, *A.* be obliged to take up the bills received by him from *B.* whereby the balance of the accounts is in favour of *A.* ſtill he cannot maintain trover for the bills depoſited by him with *B.* unleſs they were ſpecifically appropriated to anſwer *B.*'s drafts on *C.* in favour of *A.* and depoſited for that purpoſe expreſsly.—This was an action of trover for two bills of exchange, one for 1000l. the other for 495l. 13s. On the trial the caſe appeared to be thus. The plaintiffs kept a banking account with *Caldwell* and Co. which conſiſted ſolely of bills received from them by the plaintiffs, drawn on the bankrupts in London (who acted as bankers for *Caldwell* and Co. at Liverpool), on one ſide, and of bills and negotiable ſecurities paid in by the plaintiffs on the other ſide. This account did not include any other dealings between them, though there exiſted other accounts between *R. Bent*, one of the plaintiffs, and *Caldwell* and Co. An intereſt account was regularly kept between the parties: when the bankers were in advance of caſh, they debited the plaintiff's account, with intereſt during ſuch advance; when they had caſh in hand, they gave credit for intereſt upon it. The account was balanced every three months; and the banker charged 5*s. per cent.* commiſſion on the amount of the bills drawn by them, which conſtituted their profit. On the 28th of February, 1793, the account was balanced, in which was included all the bills received by the plaintiffs from *Caldwell* and Co. to that time; and, ſuppoſing them all good, the plaintiffs would have been debtors in 3882l. 8s. 8d. On the 1ſt, 8th, and 15th of March, the plaintiffs received from *Caldwell* and Co. other bills, amounting together to 445l. 6s. 3d. On the 13th of March the plaintiffs ſent to *Caldwell* and Co. ſeven exciſe debentures, to the amount of 674l. 5s. 11d. which were received by the latter. On the 16th of March, *Forbes* and Co. ſtopped payment in London, at which time the plaintiffs had in circulation bills drawn on *Forbes* and Co. by *Caldwell* and Co. to the amount of 3326l. 7s. 4d. *Caldwell* and Co. ſtopped payment on the 18th of March. On the 16th of March, about five in the afternoon, the plaintiffs ſent to *Caldwell* and Co. fifteen bills (of which the two in queſtion were part, the action being brought on two only,

to try the right), amounting to 3953l. 5s. 4d. which, if placed to their credit, would turn the balance in their favour 799l. 16s. 4d. allowing all the bills received from *Caldwell* and Co. to be good; but thoſe bills were afterwards returned to, and taken up by, the plaintiffs, on the failure of the drawers and acceptors. THE QUESTION was, *Whether the bills in queſtion were paid by the plaintiffs to the houſe of* Caldwell *and Co. on a particular, or general account?* THE PLAINTIFFS CONTENDED, that they were depoſited with *Caldwell* and Co. for a particular purpoſe; namely, to anſwer the bills given by *Caldwell* and Co. to the plaintiffs, and which were then running; and that as the purpoſe for which they had been depoſited had failed, the plaintiffs had a right to have them reſtored. That theſe bills could only have been retained by *Caldwell* and Co. for the purpoſe of indemnifying them againſt the payment of their own paper then in circulation; that, as that paper had been returned to, and taken up by, the plaintiffs, the lien of *Caldwell* and Co. on the bills in queſtion (which exiſted only for a particular purpoſe) was deſtroyed; and that the defendants, who repreſented *Caldwell* and Co. could not ſet up any defence that *Caldwell* and Co. could not. ON THE OTHER HAND IT WAS INSISTED, on the part of the defendants, that the bills in queſtion were paid into the houſe of *Caldwell* and Co. on the general account that ſubſiſted between them and the plaintiffs, and were not depoſited with *Caldwell* and Co. to anſwer the ſpecific bills drawn by them on *Forbes* and Co. in favour of the plaintiffs; for that, ſo far from there being any proof that the latter was the agreement of the parties, the contrary was evident from their general courſe of dealing; and that, as the bills in queſtion had not only been paid into the houſe of *Caldwell* and Co. on that general account, but had been ſince actually negotiated by them to *Forbes* and Co. to whom they were then indebted, the plaintiffs had no right to recover them back. The jury, after inſpecting the plaintiff's books, thought that the bills were paid to *Caldwell* and Co. on the general account between them and the plaintiffs; and the plaintiffs were nonſuited. THE COURT were clearly of opinion, that the plaintiffs were not entitled to recover under the circumſtances of the caſe; and ſaid, that in order to make it a ſpecific appropriation of bills, there muſt be a lodging of a bill for a bill; or, at leaſt, ſeveral depoſited at once as one entire tranſaction, to anſwer ſome particular purpoſe; whereas, here the bills were paid in on a general running account; and the amount of the bills claimed as a depoſit not even correſponding with the amount of thoſe for which they where ſuppoſed to be depoſited. That the plaintiffs, therefore, were not entitled to recover theſe bills on the ground that the particular purpoſe for which they were

were depoſited had not been anſwered, becauſe it did not appear that they were depoſited to anſwer that particular purpoſe: and that this caſe muſt be conſidered in the ſame manner as if the queſtion had ariſen before the bankruptcy of *Caldwell* and Co. in which caſe the plaintiffs could not have compelled the bankers to deliver up the bills in queſtion on paying the others.

If *A.* depoſit goods with *B.* for ſale, and *B.* promiſe to pay the proceeds to *A.* when ſold; *B.* has no lien on them (if not ſold) for the balance of his general account ariſing upon other articles.—On the trial of this action of trover for cotton, a ſpecial caſe was reſerved, of which the following is the ſubſtance. In March, 1793, and for ſeveral years before, *Caldwell* and Co. were partners, as bankers; two of the partners, *Caldwell* and *Smyth*, reſided at Liverpool; the other two, *Forbes* and *Gregory*, in London. On the 18th of March, 1793, they became bankrupts: and, on the ſame day, *Greaves* and *Denniſon* alſo became bankrupts, in conſequence of the failure of *Caldwell* and Co. Previous to the above bankruptcies, the cotton, for the recovery of which the action was brought, was depoſited with *Caldwell* and Co. by Meſſrs. *Hodgſons*, as a ſecurity for money which had been advanced to *Hodgſons* by *Caldwell* and Co. At the time of the bankruptcy of *Caldwell* and Co. Meſſrs. *Hodgſons* were indebted to them in a very large ſum of money. *J. Forbes*, jun. who was not a partner with *Caldwell* and Co. was, on the 11th of March, 1793, ſent down from London to Liverpool to procure bills of parcels of goods, which goods were to be depoſited, in the name of *J. Forbes*, with brokers in Liverpool, and on which a large ſum of money was intended and expected to be raiſed. In conſequence thereof, on the 13th of March, 1793, the cotton in queſtion was put into the hands of *Greaves* and Co. by *Caldwell* and Co. to procure the advance of money by the ſecurity of brokers' certificates, to be made out by *J. Forbes*; and, thereupon, *Greaves* and Co. gave the following acknowledgement or receipt: "Liverpool, 13th March, 1793; received from *J. Forbes*, jun. (ſo many bags of cotton, marked, &c. amounting to, &c.) for ſale; for the net proceeds of each parcel when and as received we promiſe to be accountable, and to pay the ſame to the ſaid Mr. *J. Forbes*, jun. or his order." Such depoſit was made, and ſuch acknowledgment given to *J. Forbes*, jun. in order to enable *Caldwell* and Co. to obtain a loan of money for the accommodation of themſelves and of *Forbes* and *Gregory*, on whom they drew bills in London. *J. Forbes* returned from Liverpool to London on the ſame 13th of March, 1793, after the delivery of the cotton in queſtion, taking with him the bills of parcels and brokers' certificates of the goods ſo depoſited. On his arrival

Walker *et al.* aſſignees of Caldwell and Co. bankrupts, *v.* Birch *et al.* aſſignees of Greaves and Deniſon, bankrupts, Ea. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 258.

rival in London on the 15th of March, the bills of parcels and brokers' certificates were produced to the friends of *Caldwell* and Co. and of *Forbes* and *Gregory*; but a difficulty arose in raising the money. On the night of the 15th of March it was found that *Forbes* and *Gregory* must become bankrupts; and on the 16th they did become bankrupts. *Greaves* and Co. were indebted to *Caldwell* and Co. at the time of the bankruptcy of the latter, in 16251. 15s. 5d. for cash and bills advanced by *Caldwell* and Co. Of the bills so advanced by *Caldwell* and Co. for *Greaves* and Co. bills to the amount of 11871. 10s. 10d. have not been paid; and the same have been proved by the holders at the time of the bankruptcy of *Caldwell* and Co. against the estate of *Caldwell* and Co. and of *Forbes* and *Gregory*, who had accepted the same; and, also, against the estate of *Greaves* and Co. Previous to the bankruptcy of *Caldwell* and Co. and of *Greaves* and Co. several bills of exchange, amounting to 7000l. were drawn by *Caldwell* and Co. on *Forbes* and *Gregory*, in favour of *Greaves* and Co. and indorsed by them; which bills were so drawn and indorsed at the request, and for the account of, *G.* and *H. Brown*, who are now bankrupts. Other bills of exchange, to the amount of 5106l. 8s. were likewise drawn by *Caldwell* and Co. on *Forbes* and *Gregory*, in favour of *Greaves* and Co. and indorsed by them; and they were so drawn and accepted at the request and on the account of *J. P. Richard*, who is still solvent. The above bills were charged by *Caldwell* and Co. in their books to the several accounts of *G.* and *H. Browne* and *J. P. Richard* respectively, and not to the account of *Greaves* and Co.; and *G.* and *H. Browne* and *J. P. Richard* were respectively indebted to *Caldwell* and Co. at the time of the bankruptcy of *Caldwell* and Co. on the balance of accounts. None of these bills were in the hands of *Greaves* and Co. at the time of their bankruptcy, nor were they then due, nor have the defendants yet paid any dividends thereon: but all, or the greater part of them, have been, or may be yet proved against the estate of *Greaves* and Co. as the indorsers; as they have been already proved against the estate of *Caldwell* and Co. as drawers; and of *Forbes* and *Gregory*, as acceptors. The plaintiffs, when they demanded the cotton in question (which was before the action was brought), tendered to the defendants fifty guineas, which exceeds any demand that *Greaves* and Co. or the defendants, had against *Caldwell* and Co. or the plaintiffs, or *J. Forbes*, jun. independently of such right as the defendants may have to detain the cotton as an indemnity against any payment which the defendants may eventually make as dividends on the above indorsements of the bills so drawn by *Caldwell* and Co. PER CURIAM: There is no doubt; and, indeed, the point as been long settled

settled, that it ought not now to be brought into dispute, but that, *in general, a factor has a lien for his general balance on the property of his principal coming into his hands.* But the question here arises on the application of that proposition to the present case. It is a maxim, as old as our law, *conventio vincit legem. The parties may, if they please, introduce into their contract an article to prevent the application of a general rule of law to it.* In order to determine the present case, it is not necessary to consider how the case would have been, if there had been no express stipulation between the parties in this case: for the whole resolves itself into this, that the goods in question were deposited with the defendants for a particular purpose. It does not appear that it was known that *J. Forbes* was the agent of *Caldwell* and Co.: as, between him and them it was perfectly well understood; but his situation with them does not seem to have been communicated to *Greaves* and *Denison.* And, indeed, it is of little importance whether it were or not, since the cotton was deposited with them, by *J. Forbes*, for the particular purpose mentioned in the note signed by them; and a special receipt was given by them for it: in that note they acknowledged that they had received the cotton for sale, and promised to pay the proceeds of it, when sold, to *J. Forbes* or his order. The lien, which a factor has on the goods of his principal, arises upon an agreement which the law implies: but, where there is an express stipulation to the contrary, it puts an end to the general rule of law. Here the parties are bound, by their express stipulation, which excludes all ideas of a lien; and the goods in question, not having been sold, are to be returned to the plaintiffs who represent *Caldwell* and Co. The goods are the property of the plaintiffs; they are in the possession of the defendants, who have refused to deliver them: these propositions have been made out in this case, and nothing is stated on behalf of the defendants which can justify their detention of the goods.—Postea to the plaintiffs.

Light-house Duties.

BRITISH ships, in passing the Eddystone, and other light-houses in the Channel, not touching at any place in Great Britain or Ireland, are not liable to pay the light-house duties to the Trinity-house.—The question in this action was, Whether British-built ships, the property of British subjects, are liable to the payment of the various light-house duties for passing by the Eddystone, and other light-houses in the Channel, in sailing from foreign port to foreign port, not having

The Trinity-house *v.* Sorsbie, Tr. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 768.

touched at any place in Great Britain or Ireland.—The ſtatute, 4 *Ann.* c. 20. enacts, that there ſhall be paid, by the maſters and owners of all Engliſh ſhips, hoys, and barks, which ſhall paſs by the ſaid light-houſe (except coaſters), the duty of 1d. *per* ton outward bound; and alſo 1d. *per* ton inward bound; that is to ſay, of the merchant one moiety, and of the owner of the ſhip the other moiety; and for all ſtrangers' or aliens' ſhips 2d. for every ton; and for coaſters 2s. for each time they ſhall paſs; the ſaid ſeveral duties to be collected and received by ſuch perſon as the maſter, &c. ſhall appoint in that behalf, in ſuch port or place whence ſuch ſhip, &c. ſhall ſet forth, or where ſuch ſhip, &c. ſhall arrive before they load or unload the goods therein.—PER CURIAM: It is moſt evident, that the words *inward and outward bound* reſtrain the payment of theſe duties to ſuch veſſels as depart from, or touch at, Britiſh ports. This is clearly proved by the act of the legiſlature, who deemed it neceſſary to paſs the ſtat. of 8 *Anne*, c. 17. in order to extend the liability to pay to ſuch ſhips as touched in Ireland only. It is impoſſible to argue that foreign ſhips, ſailing from foreign port to foreign port, are liable to be called upon for this duty. Upon principles of public policy then, we ought not to impoſe upon our own ſhips, when engaged in foreign ſervice, any burdens to which foreigners are not ſubject. In time of peace, our tranſports are engaged in foreign ſervice, to the great increaſe of our navigation, the encouragement of trade, and the ſupport of our ſeamen. But if ſubject to duties to which foreigners are not, the latter will be able to let their ſhips at a lower rate, or the Britiſh freighter muſt pay the duties out of his own pocket, which will put a total ſtop to this ſpecies of trade.—Judgment for the defendant.

Limitations (Statutes of).

Knight v. Bate, Hil. Ter. 18 Geo. 3. B.R. *Cowp.* 738.

IF a ſtatute for allotting waſte lands, within a manor, direct all diſputed claims to be tried by a feigned iſſue; and limit the time of bringing ſuch action to ſix months: an action, brought againſt a copyholder, within time, if abated by his death, muſt be revived againſt the heir, within ſix months after the plaintiff has notice of the deſcent, entry, and poſſeſſion of the heir; though the heir be not actually admitted till long after that time; for the admittance is entirely out of the queſtion, being a matter only between the lord and tenant.

One

Fairclaim *ex dim.* Empſon *v.* Shackleton, Ea. Ter. 10 Geo. 3. B.R. 5 *Burr.* 2604. 2 *Black. Rep.* 690.

One tenant in common ſhall not bar the other by the ſtatute of limitations, where there is no adverſe poſſeſſion.—This was a caſe reſerved on the trial of an ejectment; and the facts were, in ſubſtance, as follows: 17th of Auguſt, 1721, at a court held for the foreſt of Knareſborough (where lands paſs by ſurrender and admittance), *Jane Shackleton* and *Patience Readſhaw* were reſpectively admitted tenants in fee-ſimple, each to one undivided moiety of certain lands in the occupation of *William Lawſon*. 17th of July, 1723, *Emanuel Empſon*, and *Patience* his wife (late *Readſhaw*), were admitted on their own ſurrender, to her moiety; to hold, to ſaid *Emanuel* and *Patience*, their heirs and aſſigns: 1724 ſaid *Patience* died; and 20th of *April*, 1728, ſaid *Emanuel* died; both without iſſue. 29th of May, 1728, *Benjamin Empſon* was admitted to ſaid moiety, in fee-ſimple, as brother and heir of ſaid *Emanuel*. Hil. 2 *Geo.* II. (1728-9) *Benjamin Empſon* obtained judgment, by default in ejectment, againſt *William Lawſon*, in the Common Pleas; and ſaid *Lawſon*, 10th of April, 1729, attorned tenant to *Benjamin Empſon*, and paid him afterwards one year's rent of ſaid moiety; 5th of June, 1734, *Benjamin Empſon* died; and the 24th of July, 1734, *Benjamin Empſon* (an infant of nine years) was admitted to ſaid moiety in fee-ſimple, as nephew and heir of the other *Benjamin*. 9th of Auguſt, 1754, this *Benjamin* died; leaving *James*, the leſſor of the plaintiff, his ſon and heir, an infant of ten years, who, on the 15th of October, 1766, was admitted tenant in fee-ſimple. *Jane Shackleton* died in 1729, leaving the defendant her ſon and heir; who, being an infant, was admitted to her moiety in fee-ſimple the 13th of Auguſt, 1729. In 1744 *William Lawſon*, by leave of Mr. *Shackleton*, gave up the farm to his ſon *Chriſtopher*, who paid Mr. *Shackleton* the whole rent then due for the premiſes, and has paid Mr. *Shackleton* the whole rent ever ſince: and no other payment appears than is above ſtated. A verdict was taken for the plaintiff, ſubject to the opinion of the Court on this queſtion. WHETHER the plaintiff was barred from recovering by the ſtatute of limitations? IT WAS ARGUED FOR THE PLAINTIFF, that *Shackleton* and *Empſon*, being tenants in common, the poſſeſſion of one was the poſſeſſion of both; and for this was cited *Reading* and *Royſton*, *Salk.* 423. *Ford* and Lord *Grey*. *Salk.* 285. 6 *Mod.* 44. FOR THE DEFENDANT a difference was taken between tenants in common and joint tenants: becauſe they differ in title; and becauſe the ſtatute of Queen *Anne* gives an action to tenant in common, againſt his partner; which reduces tenants in common to the ſame ſtate as other perſons. And it was urged, that in the Earl of *Suſſex* and *Temple*, Lord *Raym.* 310. the opinion of *Holt*, Chief Juſtice, differed from the caſe of *Reading* and *Royſton*; alſo *Storey* and Lord *Windſor*, 2 *Atk.* 632, was cited. Lord MANSFIELD, Ch. J.

laid it down, that there muſt be an adverſe poſſeſſion, in order to enable the ſtatute of limitations to run. There muſt be a diſſeiſin; and a diſſeiſin ſtrictly proved. But here is no diſſeiſin. The ſole title of the defendant is his admittance, in 1729, to an undivided moiety of the premiſes. He is ſo far from a diſſeiſor, that he allows the title of the other. If there had been a queſtion about ouſter, it might have been a fact to be left to the jury. But I am clear, that the defendant never meant to diſſeiſe the plaintiff, nor thought of it. The tenant was never deſired to attorn for the whole: he only attorned for an undivided moiety, and once paid rent for the ſame. And *Shackleton* once received rent alone, for the whole, without paying any of it over to the other. But this is *no actual ouſter*.—PER CURIAM: Here is *no adverſe* poſſeſſion; no keeping the plaintiff *out of poſſeſſion*. One tenant in common has received the rent, and not accounted for it to the other. But here is *no expulſion, no ouſter*.—Poſtea to the plaintiff.

King *v.* Walker, Ea. Ter. 1 Geo 3. B.R. 1 *Black. Rep.* 286.

The ſtatute of limitations extends to perſons in Scotland.—This was aſſumpſit. Plea *non aſſumpſit infra* 6 *annos*. Replication: That the plaintiff was reſident in foreign parts out of the kingdom of England, viz. at Glaſgow, in Scotland; and, therefore, could not bring this action ſooner.—Demurrer, and joinder in demurrer. The queſtion was, Whether perſons, out of the juriſdiction of the courts of this country, though not literally beyond the ſeas, or out of the king's ſubjection, are not entitled to the ſame benefit.—PER CURIAM: The ſtatutes, 21 *Jac.* 1. and 4 and 5 *Anne*, are both expreſs, that the party to be excuſed muſt be *beyond the ſeas*. Here the plaintiff pleads, that he was in *foreign parts*, viz. in Scotland. What does he mean by *foreign parts*? He muſt be *beyond the ſeas*. That is the old and true expreſſion. Before the Union, England was an iſland of itſelf: ſince the Union, Scotland is made a part of it. The ſtatute of limitations ought to be conſtrued liberally. It is a noble beneficial act. *Intereſt Reipublicæ, ut ſit finis litium*. There is no ſuch kingdom as England now; the plaintiff, therefore, while in Scotland, was not *out of this realm*. Beſides, that is not now the phraſe: the legiſlature, by altering it, to *beyond the ſeas*, at ſuch a critical conjuncture, ſeem to have pointed at this very caſe, of dwelling in Scotland. It is true, that ſince the Union, a writ of *ne exeas regno* has been iſſued from the court of Chancery to prevent a man's going to Scotland. *Done*'s Caſe. 1 *P. W.* 263. But the condition of the recognizance was a ſpecial one; not to go out of this realm *or to Scotland*. Had theſe words been omitted, going to Scotland would not have forfeited the recognizance.

Perry, *et al.* *v.* Jackſon, bart. *et al.* Hil. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 516.

If one plaintiff be abroad, and the others in England, the action muſt be brought within ſix years after the cauſe of action ariſes.—This was an action on a bill of exchange for

100l.

100l. by the payees againſt the drawers. The declaration ſtated that the defendants, on the 24th of November, 1767, at New York, in parts beyond the ſeas, to wit, at London, &c. drew the bill in queſtion, requeſting *R. Willis* to pay, at 40 days' ſight, the contents to the plaintiffs: that *Willis*, in January, 1768, refuſed to accept, and, afterwards, to pay it; by reaſon whereof, and, according to the uſage and cuſtom of merchants, the defendants became liable to pay, &c. The defendants pleaded ſeverally the ſtatute of limitations: to which the plaintiffs replied, that when the cauſe of action accrued to the plaintiffs, one of them was abroad in parts beyond the ſeas, and out of the kingdom of Great Britain, to wit, at New York, in America; and that he remained ſo abroad, in parts beyond the ſeas, continually from thence, until October, 1787, when he returned, &c.; averring, that they exhibited their bill within ſix years after his return. The defendants demurred generally to theſe replications.—PER CURIAM: This is the firſt time that this queſtion has been brought into a court of law, though the circumſtance upon which the queſtion ariſes muſt have frequently occurred. It being admitted that there is no decided caſe on this point, it muſt depend on the reaſonable conſtruction to be put upon this act of parliament. The proviſo on which the queſtion ariſes was introduced into this ſtatute in order to protect the intereſts of thoſe perſons which there was no one of competent age, of competent underſtanding, or competent, in point of reſidence, in this country, to protect. Now two of the plaintiffs in this cauſe have always been reſident here: and it was their duty to watch over thoſe intereſts in which they themſelves were equally concerned with the partner who reſided abroad. It is admitted that one partner may do ſeveral acts to bind the intereſts of all; he may releaſe as well as create a debt; he may alſo, by his acknowledgment, take a caſe out of the ſtatute of limitations; and there is no reaſon why the ſame rule ſhould not hold, alſo, in the preſent inſtance. The third ſection of this act of parliament limits the time of bringing actions on the caſe, in all caſes, to ſix years after the cauſe of action accrues; the plaintiffs, therefore, were bound to commence their action at an earlier period, unleſs they come within the exception in the laſt clauſe of the act; by which it is enacted, "that if any *perſon or perſons* entitled to ſuch "actions, &c. be beyond the ſeas, then ſuch perſon or per-"ſons ſhall be at liberty to bring the ſame actions, ſo as "they take the ſame within ſuch time as before limited, "after their return from beyond the ſeas, as other perſons, "having no ſuch impediment, might have done." Now the words of this clauſe, grammatically ſpeaking, do not apply to the preſent caſe; they only extend to caſes where the

the perſon individually, a ſingle plaintiff, or *perſons*, in the plural, when there are ſeveral plaintiffs, are not in a ſituation to protect their intereſts. Neither does this caſe come within the policy of the law, which provides, that if parties neglect their intereſts for ſuch a length of time as ſix years, they ſhall loſe the benefit of ſuing to enforce their demands: therefore, both on the words of the act of parliament, and on grounds of policy, the plaintiffs are barred by the ſtatute of *James*.

Struthorſt *v.* Græme, eſq. Mic. Ter. 11 Geo. 3. C.B. 3 *Wilſ.* 145. 2 *Black. Rep.* 723

But the ſtatute of limitations can never begin to run againſt a plaintiff, who is a foreigner, until he comes into this realm.—PER CURIAM: If the plaintiff is a foreigner, and doth not come to England in 50 years, he ſtill hath ſix years, after his coming into England, to bring his action; and if he never comes to England himſelf, he has always a right of action while he lives abroad; and ſo have his executors or adminiſtrators after his death. An infant may ſue before he comes of age, if he pleaſes; but, if he does not, he has ſix years after he comes of age to bring his action. While any of the diſabilities mentioned in the ſtatute of limitations continue, the party may, but is not obliged, to commence his action: the ſtatute doth not run, while any of thoſe diſabilities continue.

Leabeter, executrix, *v.* Markland, adminiſtratrix, Hil. Ter. 17 Geo. 3. C.B. 2 *Black. Rep.* 1131.

An attachment of privilege, though informal, being returnable on a general return, is a ſufficient commencement of an action to avoid the ſtatute of limitations.—In this caſe, an attachment had been ſued out againſt the defendant, as adminiſtratrix of *Eaton*, teſted the 23d of January, 1775, and returnable *Oct. Pur.* which was returned *non eſt inventus*. For the defendant it was urged, that the writ of attachment being returnable *Octab. Pur.* which is a general return-day, and not on a day certain, as it ought to be, was *null* and *void*; and, therefore, did not ſtand in the way of the ſtatute of limitations.—BUT PER CURIAM: This is not made returnable on an impoſſible day, like the caſe in 11 *Mod.* 120. nor on the ſame day that it is teſted, like that of *Green* and *Rivet*, *Salk.* 421. Lord *Raym.* 772, which, by the courſe of the Court, is equally impoſſible: but upon a known day, at a competent diſtance; *contrary, however, to the ſtrict rule of the Court, which requires ſuch writs to be returned on ſome certain day, before or after ſuch days of general return.* This, therefore, is no nullity, but a mere informality, which the Court on application would have amended. Beſides, in *Green* and *Rivet*, the writ is ſo ill pleaded, that it could not be clearly decided, whether it was ſtated to be returnable on the day of the *teſte*, or a year afterwards; both which were too abſurd. We think ſuch an informal writ as the preſent is ſufficient to bar the ſtatute of limitations; ſince, had the cauſe proceeded, and the plaintiff recovered, and afterwards judgment

judgment had been ſtaid or reverſed for this irregularity, the plaintiff, by ſect. 4. of the ſtatute of limitations, would have a year's time to proceed in a new action after the judgment ſo reverſed. Which ſhews the ſpirit of the ſtatute of limitations to be, that a ſuit actually begun, however informally, or irregularly, ſhould be ſufficient to ſtop the limitation.—Therefore judgment for the plaintiff, on the demurrer.

But an attachment of privilege is not a continuance of a bill of Middleſex, ſo as to avoid the ſtatute of limitations.— This was caſe upon promiſes. Pleas, the general iſſue, and the ſtatute of limitations. Replication: That within ſix years after the cauſe in the firſt count accrued, namely, on the 28th of November, 1785, the plaintiff ſued out a bill of Middleſex againſt the defendant and another, returnable Monday next after eight days of St. Hilary: that, on a return that thoſe defendants were not found, another writ was iſſued, returnable Wedneſday next after fifteen days from the day of Eaſter; that regular continuances were entered till Friday next after the morrow of All Souls, at which day the plaintiff appeared and offered himſelf againſt the defendants in that plea; but the ſheriff did not return the precept, nor did any thing therein; therefore, the plaintiff afterwards, on the 6th of November, 1789, proſecuted out of this court, againſt this defendant, an attachment of privilege for the ſame cauſe of action; to which the defendant appeared, &c. And the plaintiff averred, that the bill of Middleſex firſt ſued out and returned, and the ſeveral other writs, and the writ of attachment of privilege, were ſeverally ſued out, with a view to exhibit his bill, or declare for the ſame cauſe of action as is mentioned in the firſt count. There was alſo a replication, as to the reſidue of the promiſes in the other counts, that the defendant undertook and promiſed within ſix years before the exhibiting of the plaintiff's bill; on which laſt, iſſue was taken. To the firſt replication there was a demurrer, and joinder; and, in ſupport of the demurrer, it was inſiſted, that the replication could not be ſupported, inaſmuch as the attachment of privilege could not be conſidered as a continuance of a ſuit commenced by a bill of Middleſex. But the bill of Middleſex ought to have been regularly continued on the record. PER CURIAM: In order to prevent the ſtatute of limitations from running, it is abſolutely neceſſary, not only that a writ ſhould be ſued out, but that it ſhould be regularly continued; and when we ſpeak of writs being continued, we mean that it muſt appear on the record that the Court has, from time to time, kept the original ſuit alive; *and that the plaintiff is proceeding to bring the defendant into court on the ſuit originally commenced.* But it muſt appear on the record, that it was a continuance of the original writ.—Where, indeed, the plaintiff has been guilty of an omiſſion, or

Smith, *et al.* v. Bower, Tr. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 662.

or mere irregularity, the Court will interpoſe, and grant him an indulgence, for the ſake of preſerving the right of action; and it is on that ground that we permit continuances to be added afterwards. But where it is admitted that the party has diſcontinued, he cannot ſue out a writ of a different nature and conſider it as a continuation of the former action; he muſt purſue his action in the mode allowed by the Courts. Now here a bill of Middleſex was ſued out, which was continued down to a certain time, when that proceeding ſtopped; and then the plaintiff ſued out an attachment of privilege, which was not a continuance of the former writ; for it has no connection with it.—Therefore, this was not a continuance of the former ſuit, and the replication cannot be ſupported.

Harris, *qui tam.* v. Woolford, Ea. Ter. 36 Geo. 3. B R. 6 *Ter. Rep.* 617.

And it is not ſufficient to ſhew that a writ was ſued out in time; in order to ſave the ſtatute of limitations, the plaintiff muſt alſo ſhew that it was returned.—This was an action of debt on the ſtatute, 27 *Geo.* III. c. 1. againſt illegal lotteries, and the offence was proved to have been committed on the 23d of July, 1791. The memorandum of the declaration was of Hilary term, 1795. To ſhew that the action was brought within the time, two writs were produced at the trial; the firſt a latitat, teſted the 13th of July, 31 *Geo.* III. returnable on the morrow of All Souls, indorſed the 27th of July, 1791. The other was an alias, teſted the 28th of November, 32 *Geo.* III. returnable on Monday next after eight days of St. Hilary, indorſed the 13th of January, 1792. It was objected for the defendant, that the writs ſhould have ſpecified the cauſe of action, according to the directions of the 27th of *Geo.* III. c. 1. ſ. 2.; and, ſecondly, that the plaintiff could not recover, as no continuance of the writs appeared.—PER CURIAM: With reſpect to the firſt objection (1), it ſeems as if that furniſhes a ground to ſtay proceedings for irregularity, rather than for a nonſuit; and ſuppoſing the parties to have proceeded to iſſue and trial on a writ, by which the ſuit has been improperly commenced, that objection does not ſhew that it has not been commenced in due time, which is the point to be conſidered by the judge at *Niſi Prius*; and not whether the proceedings have been regular or not. In anſwer to the want of continuances, the caſe of *Bates qui tam* v. *Jenkinſon*, Eaſter 24 *Geo.* III. has been relied on; in which caſe the plaintiff, to ſhew that his action was brought in due time, having given in evidence two writs, the firſt of which was not ſerved on the defendant, it was objected that the firſt writ

(1) In ſupport of which were cited *King qui tam* v. *Horne*, *ante*, vol. I. p. 513, and *Goodwin qui tam* v. *Parry*, *ante*, vol. I. p. 515.

ſhould

ſhould have appeared to have been continued; which objection Lord *Mansfield* over-ruled; and the Court, on a motion for a new trial, held that the continuances might be entered at any time. This caſe the counſel for the defendant have diſtinguiſhed from the preſent, by obſerving, that in *Bates qui tam* v. *Jenkinſon*, the firſt writ was returned; which, in this caſe, was not done at the time of the trial; and, upon looking into the authorities, there ſeems ground for that diſtinction; and the reaſon, as collected from what *Holt*, Ch. J. ſaid in *Atwood* v. *Burr.* 7 *Mod.* 3. is, that until the return of the firſt writ the Court is not in poſſeſſion of the cauſe, ſo as to award an alias or pluries. That caſe was a proceeding on a *ſcire facias*; and it was objected, that the judgment was on an alias *ſcire facias*, and the firſt *ſcire facias* appears, by the record, not to have been returned. In conſidering that queſtion, *Holt* ſaid, "in pleading the "ſtatute of limitations he always uſed to plead the return, "and not the purchaſe, of the writ; for it was the return "that gave the poſſeſſion of the cauſe to the Court, and if "one were to continue a latitat for ſeveral years, he muſt get "the firſt returned; upon which return you make your con-"tinuances down, though you never take out another; but "there muſt be a return to the firſt writ. So if a *capias ad* "*ſatisfaciendum* be taken out within a year, you may con-"tinue it down as long as you pleaſe upon a *vicecomes non* "*miſit breve*, and not be put to a *ſcire facias*; ſo there is "a vaſt difference between the writ to which the defendant "has an anſwer, and one to which he has none; for if it be a "writ to which the defendant has a plea, there muſt be ſome "ſort of a return, or that it came *tardè*; but ſtill there muſt "be ſome return. And can the Court hold plea of a writ "before it comes back to them?" In *Brown* v. *Babington*, 2 Lord *Raym.* 883. *Holt*, Ch. J. ſaid, "here is a fatal "fault, that the plaintiff does not ſhew that the original was "ever returned: now if he ſhews a writ, and does not re-"turn it, that will not avoid the ſtatute of limitations." And in the caſe of *Bates qui tam* v. *Jenkinſon*, cited by the plaintiff, *Buller*, J. ſaid, "If the firſt writ had been ſued out, "and kept in the plaintiff's pocket, there might have been "great objection, but not any when returned of record, and "not merely indorſed by the ſheriff." On theſe grounds it ſeems that the plaintiff ſhould have ſhewn, at the trial, that the firſt writ had been returned; and, conſequently, there ought to be a judgment of nonſuit.—Rule for entering a nonſuit made abſolute.

But where an action is limited by a ſtatute to be brought within three months, it is ſufficient for the plaintiff to prove a writ ſued out within ſuch time, and his declaration within a year

Parſons v. King, Mich. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 6.

a year afterwards; without ſhewing ſuch writ returned.—PER CURIAM: There is a manifeſt diſtinction between the caſe of *Harris* v. *Woolford*, and the preſent. In that caſe two writs were given in evidence; and it was neceſſary, in order to ſave the time, to ſhew that the ſecond writ, on which the plaintiff had declared, was a continuation of the firſt writ, which could only be done by ſhewing that the firſt was returned, in order to warrant the iſſuing of the alias writ. But here the plaintiff gave in evidence a writ ſued out in proper time, which will warrant his declaration; and, therefore, there is no neceſſity to ſhew the writ returned. The miſtake proceeds upon the ſuppoſition that the plaintiff could not declare upon that writ after two terms: but although if he do not declare within that time, the defendant may ſign judgment of non-pros; yet, if the defendant omit ſo to do, the plaintiff may declare at any time within a year after ſuing out his writ.

Trott *et al. v.* Welchand Swan, Mic. Ter. 3 Geo. 3. B.R. 1 *Black. Rep.* 392. 1 *Burr.* 1357.

The limitation of the action to one month, in the ſtat. 26 *Geo.* II. c. 21. for prohibited goods, muſt be after condemnation, provided due diligence be uſed.—This was an action for 200l. by a cuſtom-houſe officer, againſt the defendant, for having prohibited goods in his cuſtody, upon ſtat. 26 *Geo.* II. c. 21. ſ. 3. and a ſubſequent proviſo, ſ. 7. That if the officer neglects or refuſes to proſecute with effect, within one month, any common informer may. The defendant pleaded a judgment, recovered againſt him by a common informer. The plaintiff replied (by proteſtation, that this was a covinous judgment) that he brought his action, *within a month after condemnation of the goods*. To this there was a demurrer and joinder therein.—It appeared that the ſeiſure was the 2d of May; the information the 22d; the condemnation on the 13th of November.—THE COURT held it to be very clear, that the month mentioned in the ſtatute muſt be referred to the time of the condemnation, provided due diligence be uſed by the officer in laying the information, which he had done in the preſent caſe. That the right of action *attached* in him, by his *ſeizure*, exhibiting an information, and proceeding to condemnation. By any other conſtruction, the ſtatute would be ſhamefully evaded.——Judgment for the plaintiff.

Leader v. Moxon, Mic. Ter. 14 Geo. 3. C.B. 2 *Black. Rep.* 925. 3 *Wiſ.* 461.

On a caſe reſerved at *Niſi Prius*, one objection was, that the plaintiff having ſtated in her declaration that the commencement of the action was by *original*, a *capias* was no evidence thereof. But the Court held clearly, that it is ſufficient, in ſuch caſes, to ſhew a *capias*, which every body underſtands to be now the commencement of a ſuit in this Court; and that there is no neceſſity to file an *original*, but in caſe of outlawry, &c. and that the Court always intends, that an

original

original has regularly iſſued, whereupon the *capias* is grounded; ſo that a *capias* in this, and all other ſtatutes of limitations, is ſufficient evidence of an *original*.

Where a bill of exchange is drawn, payable at a certain future period, for the amount of a ſum of money lent by the payee to the drawer at the time of drawing the bill, the payee may recover the money in an action for money lent, although ſix years have elapſed ſince the time when the loan was advanced; the ſtatute of limitations beginning to operate only from the time when the money was to be repaid; that is, when the bill became due. Wittersheim *v.* The Counteſs Dowager of Carliſle, Ea. Ter. 31 Geo. 3. C.B. 1 *Hen. Black.* 631.

An acknowledgment of the debt, though it be but a ſlight one, takes it out of the ſtatute of limitations: thus in aſſumpſit on a promiſſory-note; and *non aſſumpſit infra ſex annos* pleaded. On the trial it appeared, that the defendant was ſurety in the note for *J. S.*; and that ſix years were elapſed ſince the note was given; but that, upon demand, within the ſix years, the defendant ſaid, "you know I had not any "of the money myſelf, but I am willing to pay half of it."—THE COURT were of opinion that this promiſe took it out of the ſtatute of limitations; for the ſlighteſt acknowledgment of the debt has been held ſufficient; as to ſay, "Prove "your debt, and I will pay you:" or, "I am ready to "account, but nothing is due to you." Yea Bar. *v.* Fouraker, Mic. Ter. 1 Geo. 3. B.R. 2 *Burr.* 1099. *Buller's* N.P. 149. *Cowp.* 548.

The acknowledgment of one, out of ſeveral drawers of a joint and ſeveral promiſſory-note, takes it out of the ſtatute of limitations, as againſt the others; and may be given in evidence on a ſeparate action againſt any of the others.—The plaintiff produced a joint and ſeveral note, executed by the defendant, and three others; and, having proved payment, by one of the others, of intereſt on the note, and part of the principal, within ſix years, the judge thought *that* was ſufficient to take the caſe out of the ſtatute, as againſt the defendant, and a verdict was found for the plaintiff.—PER CURIAM: When caſes of fraud appear, they will be determined on their own circumſtances. Payment by one, is payment for all; the one acting, virtually, as agent for the reſt: and, in the ſame manner, an admiſſion by one, is an admiſſion by all; and the law raiſes the promiſe to pay, when the debt is admitted to be due; beſides, the defendant has had the advantage of the partial payment, and, therefore, muſt be bound by it. Whitcomb *v.* Whiting, Ea. Ter. 21 Geo. 3. B.R. 2 *Doug.* 651.

One of two makers of a joint and ſeveral promiſſory-note became a bankrupt, and the payee received a dividend under the commiſſion, on account of the note; THE COURT held that the payment of the dividend, under the commiſſion, was ſuch an acknowledgment of the debt, as took the caſe out of the ſtatute of limitations, and prevented the other maker Jackſon *v.* Fairbank, Tr. Ter. 34 Geo. 3. C.B. 2 *Hen. Black.* 340.

maker from availing himſelf of the ſtatute of limitations, in an action brought againſt him for the remainder of the money due on the note, the dividend having been received within ſix years before the action brought.

Carling *et al.* executors of Tuthill *v.* Skoulding *et al.* Hil. Ter. 35 Geo. 3 B.R. 6 *Ter. Rep.* 189

Alſo, if there be a mutual account of any ſort between the plaintiff and defendant, for any item of which credit has been given within ſix years, that is evidence of an acknowledgment of there being ſuch an open account between the parties, and of a promiſe to pay the balance, ſo as take the caſe out of the ſtatute of limitations.—The teſtator was an attorney at Haleſworth: the defendant, *Skoulding*, and another partner, who ſuffered judgment by default, were merchants, dealers in ſpirituous liquors, and tallow-chandlers; and by agreement, on the 4th of October, 1778, they hired of *Tuthill* the premiſes in queſtion, for the purpoſe of carrying on their trade, for fourteen years and a half, from the 5th of April, 1779, at the rent of 22l. a-year, payable half-yearly. *Tuthill* died on the 28th of October, 1788, and, at his death, there was due for rent 209l. for nine years and a half, from Lady-day, 1779, to Michaelmas, 1788; and alſo 20l. for caſh, on account, on the 19th of October, 1781. During the time that theſe arrears of rent were becoming due to the teſtator the defendants furniſhed him with various articles in the way of their trade; with candles from May, 1779, to January, 1784, to the amount of 28l. and upwards, and from Auguſt, 1781, to October, 1788, with liquors to the amount of above 28l. The balance due to his eſtate at his death was above 171l. There never was any ſettlement of accounts between the teſtator and the defendants. The laſt half year's arrear of rent, and one or two of the laſt articles of the defendants' bill were within ſix years before the plaintiffs' writ was ſued out. On the trial of the cauſe a verdict was found for the plaintiffs, with leave to the defendant to move to enter a nonſuit, if this Court ſhould be of opinion that the plaintiffs could only recover for the rent that became due within the laſt ſix years before the commencement of the action; the amount of the articles furniſhed by the defendants within the laſt ſix years being more than ſufficient to cover the laſt half year's rent.—PER CURIAM: Where there is no item of account at all within ſix years before the action brought, the plaintiff will be precluded, unleſs he can bring his caſe within the exception in the ſtatute concerning merchants' accounts; and, in ſuch a caſe, his replication muſt bring his caſe within the ſtatute. But it muſt be remembered, that there the plaintiff is not barred, though there has been no tranſaction of any kind between the parties for ſix years: for, by his replication, he inſiſts that his caſe never was within the ſtatute, for that "the ac-

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"counts were between merchant and merchant," &c. But the preſent caſe ſteers wide of that objection; it is not doubted but that a promiſe or acknowledgment within ſix years will take the caſe out of the ſtatute; and the only queſtion is, whether there is not evidence of an acknowledgment in the preſent caſe. Here are mutual items of account; and it has been clearly ſettled, that every new item and credit in an account, given by one party to the other, is an admiſſion of there being ſome unſettled account between them, the amount of which is afterwards to be aſcertained; and any act which the jury may conſider as an acknowledgment of its being an open account is ſufficient to take the caſe out of the ſtatute. Daily experience teaches us that if this rule be now overturned, it will lead to infinite injuſtice. In *Cotes* v. *Harris* all the items were on one ſide; and *Deniſon*, J. who well knew what was the proper replication in ſuch caſes, and was well acquainted with the import of the ſtatute of limitations, ſaid, where all the items are on one ſide, the laſt item, which happens to be within ſix years, ſhall not draw after it thoſe that are of longer ſtanding: but it was not doubted there but if there had been mutual demands the plaintiff might have recovered.—THE COURT were clearly of opinion that the plaintiffs were not barred by the ſtatute of limitations.

A letter, written by a defendant (who has pleaded the ſtatute of limitations) to the plaintiff's attorney, on being ſerved with a writ, may be left to the jury to conſider whether it amount to an acknowledgment of the debt, ſo as to take it out of the ſtatute.—This was aſſumpſit for work and labour, by the plaintiff, as an attorney. Pleas, the general iſſue, and the ſtatute of limitations: at the trial the plaintiff produced the following letter, written to his attorney, by the defendant, in January, 1788, in order to take this caſe out of the ſtatute of limitation: "I have lately "been ſerved by Mr. *Meredith Price* with a writ *at the ſuit of* "*one* Lloyd. I am at a loſs to know whether it was your orders, "or was it ſome other of the ſame name. For ſeveral reaſons "I cannot ſuppoſe that an old particular friend would ever be "guilty of cauſing an action to be commenced, without firſt "adviſing him on it. I believe that you have had no cauſe "to contradict my ſaying, that I always ſerved you, on all "occaſions that ever lay in my power; therefore, I flatter "myſelf, that you have no concern in this buſineſs. How-"ever, if it ſhould appear to the contrary, I muſt beg leave "to inform you, that before I will pay any coſts, more than "defending, will abſolutely *take houſe in the liberty of Car-*"*marthen* (1), which I am fully ſatisfied will anſwer my ex-

Lloyd v. Maund, Mic. Ter. 29 Geo. 3. B.R. 2 *Ter. Rep.* 760.

(1) Which means in that part of the country going to Carmarthen gaol.

"pectations in buſineſs much better than here at *Landovery*. "As to Mr. *P.*'s views, I am no ſtranger at all to, and ſee "through them without a ſpectacle; and, as to your part, "cannot expect to reap any benefit from that quarter, as he "ſays you are indebted to him to the amount of 700l. There- "fore, if you ſeriouſly conſider your own intereſt, you can- "not be any gainer by endeavouring to injure a man who has "always been your friend. However, you are to act as you "think proper. As *in reſpect to matters between you and me, "will be rectified, when I can ſettle my affairs, which, I be- "lieve, will now ſoon be.* Mr. *Rice Davies*, of Swanſea, has "received poſitive orders from Mr. *R. Price* and ſon, to ſell "the Erwaſtod and Combdu eſtates, and will be advertiſed "ſoon: I cannot believe that they will be ſufficient to diſ- "charge the mortgage and Mr. *Davis*'s demand, which "amounts, in caſh lent, and buſineſs done, to 1000l." The learned judge, being of opinion that this did not amount to a promiſe, or acknowledgment, of the debt, ſo as to take it out of the ſtatute of limitations, nonſuited the plaintiff. Afterwards, on a motion to ſet the nonſuit aſide, THE COURT made the rule abſolute.—PER CURIAM: It has been held that the ſlighteſt acknowledgment will take the caſe out of the ſtatute of limitations; as where the defendant ſaid, "I am ready to account, but nothing is due to you," *Cowp.* 548. The defendant, in his letter, affects not even to know at whoſe ſuit the action was commenced: but it is evident that that is merely a pretence. The whole of it is a begging letter, and it is evidently intended to gain time; and though it is written in ambiguous terms, there are ſome parts of it, from which the jury might, perhaps, have inferred an acknowledgment of the debt; therefore, it ſhould have been left to the jury.

Stadholme, executor. *v.* Hodgſon, Ea. Ter. 28 Geo. 3. B R. 2 *Ter. Rep.* 390.

In this caſe the Court held that, after a defendant has obtained an order for time to plead, on the terms of pleading iſſuably, he cannot plead the ſtatute of limitations, or any other plea, which does not go to the merits: and that, if he plead ſuch a plea, the Court will ſet it aſide on motion.—*Per Curiam:* The reaſon for rejecting the plea of the ſtatute of limitations after time to plead is, that it excludes the merits, and, when the defendant aſks a favour of the Court, it is under the expreſs condition of pleading to the merits only. And they ſaid, that the rule was poſitive, and could not be diſpenſed with in any inſtance.—But this caſe was afterwards over-ruled in the following caſe.

Rucker *et al.* *v.* Hannay, bart. Hil. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 124.

In this caſe, the defendant having, after an order for time to plead on the terms of pleading iſſuably, pleaded the general iſſue and the ſtatute of limitations. It was moved to ſet the laſt of the pleas aſide, on the authority of the laſt caſe; and on cauſe ſhewn, it being ſaid, that the ſtatute of limitations was conſidered, in the court of Common Pleas, as

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an iſſuable plea within the meaning of the order, THE COURT ordered the caſe to ſtand over; and Lord *Kenyon* now ſaid that, though they had had no opportunity of conſulting with the reſt of the judges on the ſubject, this Court was of opinion, that the defendant was not precluded from pleading the ſtatute of limitations after an order for time to plead. That the court of Common Pleas had always ſo conſidered it; and that, in many caſes, it was a very fair plea.

The Court refuſed to ſet aſide a nonſuit voluntarily ſuffered by the plaintiff, and to give him leave to reply *de novo*. He had replied, "that the cauſe of action aroſe within ſix "years;" which fact he could not prove. He wanted, therefore, to ſet aſide the nonſuit, and reply *de novo*; which, if he had ſucceeded in, he would have replied, "that the "writ of *latitat* iſſued within the ſix years. But THE COURT ſaid, that that would make a quite new queſtion; which the plaintiff had before pretermitted, and had put the iſſue upon quite another foot, and upon a point which he could not eſtabliſh.—Rule diſcharged.

Hutchinſon, Executrix, *v.* Brice, Hil. Ter. 11 Geo. 3. B.R. 5 *Burr.* 2692.

Limitation of Eſtates.—See titles DEVISES: ESTATE: and SETTLEMENT.

London.

Exemptions from toll.]—*Freemen of the city of London have a right to be exempt from the payment of all tolls and port duties throughout England* (except the priſes of wines), *in whatever place they reſide, and though they have obtained their freedom by purchaſe.*—This was an action on a writ (1) *de eſſendo quietum de theolonio*, with an *aliàs* and *pluriès*; upon which, an appearance being entered, a declaration was delivered (2). The declaration (3) alleged, that the plaintiffs, among other liberties and privileges, had immemorially enjoyed this privilege, namely, "that the *citizens* of the ſaid city, and all their goods, ſhould be quit and free of and from all toll, paſſage, and laſtage, and other cuſtoms, throughout the whole kingdom of England, and the ports of the lord the king, except only his due and ancient cuſtom and priſes of wines;" which liberties have been confirmed by divers acts of parliament. That the king, by his certain writ, commanded

The Mayor, &c. of London, *v.* the Mayor, &c. of Lenne Regis, commonly called King's Lynn, in the county of Norfolk, Ea. Ter. 29 Geo. 3. C.B. 1 *Hen. Black.* 205.

(1) So denominated in *Regiſtr. Brev.* 258. b.
(2) See vol. II. p. 741.
(3) The writs, and the declaration, are ſtated at large in *H. Blackſt. Rep.* C.B. 206.

the defendants to permit the plaintiffs to be quit of yielding ſuch toll, &c. as aforeſaid, or on a certain day paſt, to ſignify to him cauſe wherefore they had not executed his commands; yet that the defendants, not regarding the writ, had not ſignified to him, &c.; and ſince the time of the ſaid writ, *ſs.* on the 1ſt of December, 1787, *diſquieted the ſaid citizens on the occaſion aforeſaid*, and then and there *required of O. Denton* [and four other perſons by name], citizens of, &c. and of other citizens, &c. toll, &c. within their ſaid borough, &c. *in contempt of the king*, and *to the damage of the ſaid mayor, commonalty, and citizens, of* 100l. &c. The defendants, in their firſt plea, traverſed the right of exemption claimed by the plaintiffs, and, in the ſecond plea, pleaded that *O. Denton*, and the four other perſons named in the declaration, were not citizens of the ſaid city; on both which pleas iſſue was joined. Iſſues being joined, there was a trial at bar. THE EVIDENCE ON THE PART OF THE PLAINTIFFS was, in ſubſtance, as follows: It was firſt proved, that the (1) perſons named in the declaration were citizens and freemen of London, by the book in which their freedom was entered; and that, in February, 1786, they had obtained their freedom by (2) purchaſe. An *inſpeximus* charter of *Car.* 2. was then produced, reciting and confirming various others; the moſt ancient of which was in the reign of *Henry* 1. and which contained theſe words (3), "*omnes homines London erint quieti et* "*liberi, et omnes eorum res, per totam Angliam, et per portus* "*maris, de theolonio, et paſſagio, et laſtagio, et omnibus aliis con-* "*ſuetudinibus*, &c." "*Et ſi quis theolonium vel conſuetudinem,* "*à civibus meis London, ceperit, cives London in civitate* "*capiant de burgo, vel de villâ, ubi theolonium vel conſuetudo* "*capta fuerit, quantum homo London, pro theolonio dedit, et* "*proinde de damno receperit* (4). The other charters (5) were to the ſame effect, and nearly in the ſame words, as that of *Henry* 1. Moſt of them excepted the king's right of priſage of wines, and uſed the words *cives* as ſynonimous with *homines*. There were alſo extracts read from other documents, and from the patent rolls in the Tower, recognizing this right of the citizens of London. Amongſt theſe was a charter of the 5th of King *John*, to the biſhop of Norwich, empowering him to hold a fair at Lynn, and to

(1) Theſe perſons were inhabitants of Lynn.

(2) The expence of which was 30l. 12s.

(3) It was agreed, that the word *conceſſimus*, or *conceſſiſſe*, was uſed in theſe charters, as well to ſignify a recognition, as an original grant of privileges, &c.

(4) See *Hargrave*'s Tracts, "*De portubus maris*," and "concerning the cuſtoms."

(5) Which were granted by *John*, *Hen.* 2. *Hen.* 3. *Ed.* 1. and *Ed.* 3. take

take cuſtoms, rights, &c. "*ſalvâ libertate civitatis London*, &c." and another in the ſame year of the ſame king (1) to the burgeſſes of Lynn, that the borough ſhould be free, and that they ſhould be free from *toll*, *laſtage*, *paſſage*, &c. "*ſalvâ libertate civitatis London*;" likewiſe giving a power of diſtreſs to the mayor of Lynn, if any one ſhould take toll, &c. in any part of England, from the burgeſſes, "*exceptâ ut ſuperiùs civitate London.*" In this head of evidence was a (2) petition to parliament from *Thomas Chaucer*, the king's chief butler, in the 11th year of *Hen.* 4. complaining that reſidents at the out-ports had purchaſed the freedom of the city of London, to entitle them to an exemption from *priſage of wines*, and *other cuſtoms and duties*, and praying that parliament would entreat the king to ſend for the mayor and aldermen of the city, and command them to ceaſe from granting to any foreigners (3) the freedom of the ſaid city in future, on peril of forfeiting their franchiſe; and alſo to repeal the freedoms already granted to *foreigners*, that the king and his ſucceſſors might not be deprived of his *priſage of wines*, by the franchiſes of the city of London. The anſwer of the king was, that he would ſend for the mayor and aldermen. It was then declared, by the advice of the lords in parliament, that no one ſhould have, or enjoy, *ſuch franchiſe*, unleſs he were a citizen reſident and dwelling within the ſaid city; and "*que toutz autres demeurantz en autres citees, burghs, ou "villes, aient, et enjouient leur franchiſes à eux grantez, "ſauvant tout jourz, à notre ſeigneur le roy, ſon enheritance en "ce cas.*" It was alſo proved by parol evidence, that non-reſident freemen of London had been nominated to the office of ſheriff; that they paid the fine for not ſerving it; that they had been aldermen, and had a right to vote for the election of members of parliament for the city. Alſo, that they were exempted at Exeter from the payment of tolls and port duties; at which place an action was brought by the corporation againſt a freeman of London there reſident, to compel ſuch payment: but the record being withdrawn, the defendant obtained judgment as in caſe of a nonſuit; and afterwards himſelf brought an action againſt the corporation, for the taking his goods on the ſame account, in which the corporation ſuffered judgment by default.—It was likewiſe proved by parol evidence, that the ſame exemption was allowed at Plympton fair, Exmouth, Briſtol, Newcaſtle, Dartmouth, and other ports, to freemen of London, reſident

(1) Within the time of legal memory, *i. e.* ſince the reign of *Ric.* 1.
(2) Vide *Hargrave's* Tracts, 128.
(3) By *foreigners* were meant perſons not inhabitants.

at thoſe places (1). Alſo, that they were exempt at the port of London, whether reſident or not, from paying toll on corn, and at Smithfield market on the ſale of cattle. On THE PART OF THE DEFENDANTS there was firſt produced (2) the record of a fine levied in the 2d year of *Hen.* III. by *Henry de Hammel* of laſtage, in the counties of Norfolk, Suffolk, and Lincoln. Next, an (3) *inquiſitio poſt mortem* taken on his death, whereby it appeared that he was ſeiſed of laſtage in Lynn, holden of the crown by the ſervice of keeping the king's falcons; that he died ſo ſeiſed, that his ſon held it by the ſame ſervice after his death, and that his wife had an intereſt in it by way of ſettlement. In the 52d year of *Hen.* 3. *Thomas de Hammel* was entered on the roll in the Tower, as holding in *capite*, by the ſervice of falconry, *a cuſtom or duty in the port of Lynn, of all merchandize, &c. paſſing that port.* It alſo appeared from that roll, that an action had been brought by *Thomas de Hammel*, againſt certain perſons who had exported goods from Lynn, without paying the duty, but in which no determination was to be found. In the 12th year of *Ed.* 2. the then heir of *Thomas de Hammell* obtained the king's licence to alienate in *mortmain*, and accordingly conveyed the right of laſtage in Lynn, to the biſhop of Norwich, in whoſe ſucceſſors it continued without interruption, till the 15th year of *Hen.* 8, when a *quo warranto* iſſued againſt the then biſhop, requiring him to ſhew his title to the duty in queſtion. The biſhop ſet forth the conveyance to his predeceſſor from the heir of *Thomas de Hammell*, reciting the right to have been from time immemorial in the family of *De Hammell.* In this ſuit the right of the biſhop was admitted, and confirmed by the attorney-general. In the 27th year of *Hen.* 8. a private act of parliament paſſed, to veſt it in the king, who afterwards, in the 29th year of his reign, granted it to the corporation of Lynn, in whom it continued to the preſent time. This part of the evidence was founded on the reſpective records and documents, which were produced duly authenticated. (4) Several witneſſes were then called, who proved that they

(1) It appeared from the teſtimony of one of the witneſſes, that a non-reſident freeman of London being in partnerſhip with a non-freeman, and having a certain ſhare in the trade, ſuch ſhare was exempted from the payment of the port duties at Dartmouth; but that thoſe duties were paid by the non-freeman partner for his ſhare.

(2) Taken from the chapter-houſe of Weſtminſter.

(3) From the rolls in the Tower.

(4) The defendants were not permitted to give in evidence their corporation books, to prove their own rights. On their counſel citing the caſe of *The Mayor of Hull* v. *Horner*, *Cowp.* 102. (where ſuch evidence was admitted), Mr. Juſtice *Wilſon* ſaid he was counſel in that caſe, and that the books of the corporation were there produced by conſent.

had,

had, for many years, paid the duty of laſtage at the port of Lynn (viz. one penny on the exportation of every quarter of corn), and that they had never heard of any exemption, except for the freemen of Lynn, and ſome perſons of the borough of Cambridge (1). The exemption in favour of Cambridge was by virtue of a ſpecial agreement entered into in 1664, between Cambridge and Lynn, which was read. A leaſe of tolls made by the corporation of Lynn was laſt produced (in purſuance of notice from the plaintiffs), by which it appeared, that an exemption was alſo allowed to certain perſons in the Cinque Ports. (2) Lord LOUGHBOROUGH, Ch. J. after diſtinctly recapitulating the evidence, obſerved to the jury, that as on the part of the defendants, the right to the duty of laſtage, had been traced up to the family of *De Hammell* early in the reign of *Hen.* 3. and was at that time ſo eſtabliſhed in them, as to be the ſubject of a family ſettlement, it was fair to preſume (as the counſel for the defendants had contended) that it was veſted in them before the time of legal memory. But allowing that preſumption, the general right of the corporation of Lynn did not deſtroy the particular exemption proved by the city of London, as it had not been ſhewn that the citizens of London ever, in fact, paid the duty at Lynn. The two rights, therefore, not being inconſiſtent, might exiſt together; the corporation of Lynn might have the ſame right to laſtage as the *De Hammells* had enjoyed, but that right might be with an exception in favour of the citizens of London; which exception had been clearly proved on the part of the plaintiffs, and not contradicted by the defendants. His lordſhip ſaid, that the other part of the caſe was reſolved into a queſtion, Whether the perſons mentioned on the record, not being reſident citizens of London, but in fact reſiding at Lynn, and having lately purchaſed their freedom for the expreſs purpoſe of being exempt from laſtage at the port of Lynn, were entitled to the privilege they claimed? As to this, he ſtated, that the counſel for the plaintiffs had inſiſted ſtrongly on the parliamentary declaration in the reign of *Hen.* 4. that the freemen of London muſt be there reſident, to entitle them to an exemption from priſage of wines, but that reſi-

(1) But there was no proof that *any freemen of London* had ever *actually paid it at Lynn.*

(2) The evidence being cloſed, much converſation enſued how far non-reſident freemen of London, and thoſe who had purchaſed their freedom, were to be conſidered as citizens within the true meaning of the ſecond iſſue. On theſe points the caſes of *Hanger* v. *Waller*, 3 *Bulſt.* 1. and *The City of Oxford*'s caſe, 2 *Ventr.* 106. were cited. But as in the form in which the iſſue ſtood upon the record, the queſtion was, Whether, in point of fact, the perſons named were citizens or not? it was at length agreed, that the matter was proper to be left to the jury.

dence in London was not neceſſary with reſpect to other franchiſes. This he ſaid was of conſiderable weight; and as the non-reſident freemen were liable to ſerve offices, and bear other burdens in conſequence of their freedom, there ſeemed to be no reaſon why they ſhould be deprived of the beneficial rights of that freedom; or why the term *citizens of London*, or *men of London*, ſhould be confined to ſuch citizens or men who were reſident in London, as the counſel for the defendants contended: that, in point of fact, this diſtinction was not made at Briſtol, Newcaſtle, or the other places, where non-reſident freemen of London were exempted; that the point was given up by the city of Exeter, the only place where it had been conteſted, and the defendant, a non-reſident citizen of London, left in the enjoyment of his right. Upon the whole, therefore, his lordſhip ſaw no reaſon to ſay, if the jury thought upon the evidence, that the right claimed by the citizens of London, and which had been proved to be enjoyed by thoſe who were non-reſident, was the ſame right which the plaintiffs had made out in evidence, that there was any legal ground, which, by a legal concluſion, could deprive them of that right. The jury found a verdict for the plaintiffs on both the iſſues, and gave 1s. damages, which damages were remitted on the record. *And the court of Common Pleas gave judgment* "*that the citizens of the ſaid city, and all their goods, be quit of yielding ſuch toll, paſſage, laſtage, and other cuſtoms, as aforeſaid, of their goods and things, in the ſaid borough and port thereof; and the ſaid mayor and burgeſſes of the ſaid borough in mercy,*" &c.

Lynn Corporation *v.* London Corporation in Error. Hil. Ter. 31 Geo. 3. B. R. 4 *Ter. Rep.* 130.

THE DEFENDANTS AFTERWARDS REMOVED THE RECORD INTO THE COURT OF KING'S-BENCH BY A WRIT OF ERROR; and, upon the argument it was objected, for the plaintiffs in error, FIRST, that the writ was only a *prohibitory* writ, which was iſſued by the crown to its own bailiffs and ſervants, and not a *remedial* writ, on which the parties could plead (1).—SECONDLY, but if any action could be maintained in this caſe, it ſhould have been a *qui tam* action, 4 *Com. Dig.* title "*Prohibition*," *J.* and 12 *Rep.* 61.—THIRDLY, at all events, the action ſhould have been brought by the party grieved, *Fitzherbert*, 520, 521. *Waller* v. *Hanger*, 3 *Bulſtr.* 1.—AND, FOURTHLY, that the count ought to have ſtated by what deſcription of citizens the exemption is claimed. *All* the citizens, whether reſident or not, cannot be entitled to the exemption: it ſhould have been claimed for the *reſident citizens* only. FOR THE DEFENDANTS IN ERROR it was contended, in anſwer to the firſt objection, that it appeared from the precedents of

(1) *Fitz. N. B.* 518. 4to. ed. *Finch.* 506, 490, c. 48.

proceedings

proceedings on this writ, as well as from analogy to other caſes of a ſimilar nature, that this was a *remedial* writ, on which an action might be maintained, *Reg.* 258. b.; *Ryl. Plac. Parl.* 13; *Madox's Firma Burgi*, 138; *Fitz. N. B.* 521. 34; 2 *Inſt.* 654, 5. And that it was not *neceſſary that the plaintiffs ſhould have received an actual injury to entitle themſelves to this action*; for, in the precedent in the *Reg.* 258. no diſtreſs is ſtated, either in the writ *de theolonio*, or in the attachment upon it. And Lord *Coke*, *Co. Lit.* 100. a. commenting on the writ of *meſne* ſays, "there be ſix writs in the law that may be maintained, *quia timet, before any moleſtation, diſtreſs, or impleading*; 1ſt, a writ of *meſne* before he be diſtrained; 2dly, *warrantia chartæ*, before he be impleaded; 3dly, a *monſtraverunt*, before any diſtreſs or vexation," &c. And it was urged, that the writs *de theolonio*, *monſtraverunt*, *ne injuſtè vexes*, and that *de warrantia chartæ*, are all analogous, and may be ſued out merely for the purpoſe of bringing the queſtion of right into diſpute, without regard to any actual injury to the parties ſuing, *F. N. B.* 312; *Hob.* 21, 22, and 23; and that theſe ſeveral writs may be ſued out *quia timet*, before any actual injury is done, on which proceedings may be had; and the party complaining may recover a *judgment on the right claimed*, though before diſtreſs, &c. he cannot recover damages. It was urged, that the precedents in *Ryl.* on this very writ, and that in 2 *Inſt.* on the writ of *monſtraverunt*, which is analogous to it, ſhew that it is not neceſſary that this ſhould have been a *qui tam* action: that in *Madox* was indeed ſuch; but, conſidering all the authorities together, it may be either way; as in prohibition, *Raſt.* "Prohibition in Spiritual Court," pl. 3, 4, 5, 6, and 7. *Off. Brev.* 15. *Brow. Vade Mecum*, 549, 550. and *Co. Entr.* 453, b.; or as in actions for an eſcape on, or for a falſe return to, a *copias utlagatum*. *Barrett* v. *Winſcombe*, 1 *Rol. Rep.* 78. *Cro. Jac.* 360. S. C. *Slipper* v. *Maſon*, 1 *Lutw.* 121. *Brownl. Red.* 33. 1 *Brown. Entr.* 18. *Dawſon* v. *The Sheriff of London*, 2 *Vent.* 84. *Rob. Entr.* 9. *Hern. Entr.* 167. 1 *Com. Dig.* 247. tit. "Action upon Statutes." E. 2. *As to the third objection*, it was contended, that the precedents cited ſhew that the action need not be brought by the party grieved. *And as to the fourth objection*, that there was no foundation for it in this ſtage of the proceedings, for the defendants in error claim this exemption for *all* the citizens; and, if it had appeared on the trial that any particular claſs was not entitled to it, they muſt have failed in proving their allegation. But it is claimed in a general unqualified way, extending to all the citizens; and the verdict is co-extenſive with their claim. Lord KENYON, Ch. J.—It is admitted that, for near five centuries, no ſuch proceeding as the preſent has been inſti-

tuted;

tuted; but the ſubjects, who have had rights to aſſert, or had to complain of the undue exertion of the claims of others, have been content to have recourſe to more modern proceedings, in order to obtain redreſs; but the city of London have now thought proper to travel out of this ordinary courſe, not for the purpoſe of obtaining redreſs for any injury which they have actually ſuffered, but *merely to aſſert their claim.* Generally ſpeaking, the object of the laws in civilized countries is to ſecure to every ſubject his rights, and to afford him protection when thoſe rights are invaded; and that principle is founded in good ſenſe. But this declaration does not complain of any injury having been done to any individuals: it only alleges that the defendants (below) *diſquieted* the plaintiffs, and *required* of five citizens, by name, *certain tolls*, &c. Arguing *à priori*, in point of policy we ſhould lean againſt ſuch a proceeding as this; for, if this action can be maintained againſt the corporation of Lynn, it may be equally ſupported againſt any individual in the kingdom for the moſt minute toll, ſuch as a toll in a market, &c.; and it frequently happens that ſuch tolls are in the hands of perſons who are neither able or willing to diſpute ſuch a claim as the preſent. And though it is ſaid that a judgment of this ſort is not to be followed up by coſts (upon which I am not prepared to give any opinion), yet the expences of a party's defending himſelf againſt ſuch a claim as this would, in many inſtances, be more than adequate to the claim in diſpute. In point of policy, therefore, it is to be wiſhed that a party, who has done no act to enforce his claim, and who would rather abandon his right than diſpute it, ſhould not be dragged *nolens volens* into a court of juſtice, to agitate ſpeculative queſtions of right. But, if ſuch be the law, it muſt be ſubmitted to, however oppreſſive it may be to any bodies of men, or to individuals. Then we muſt conſider whether theſe proceedings can be ſupported by the precedents which have been cited on this very writ, or by arguments drawn from analogy to other proceedings of the ſame nature: for it is perfectly clear, that *they cannot be ſupported from the general analogy of the law, which does not permit any perſon to be impleaded for claiming rights which he does not aſſert.* Now ſome precedents on this very writ have been cited; the firſt of which, in point of time, are thoſe in the regiſter, which we are told is coeval with the law itſelf. It is not neceſſary to go through each of theſe; but the reſult from them all is, *that they complain of a damage to the party*, and, in the ſubſequent proceedings on the writ, uniformly ſtate what the nature of that damage was. *Fitzherbert, F. N. B.* 519. ſays, in commenting on this writ, "And upon that (namely, the writ), he may have an *alias*, and a *pluries*, and *an attachment, if need be, againſt thoſe who take the toll.*" Then two precedents

cedents were cited at the bar; the one from *Madox's Firma Burgi*, the other from *Ryl. Plac. Parl.* which were urged as decisive authorities in favour of these proceedings: but a complete answer was given to those by the counsel for the plaintiffs in error, and it was shewn that in both an actual injury was complained of, *for the parties complaining were distrained.* The same observation applies to the writ *ne injuste vexes*; and to that of *monstraverunt*, of which it is said, that if, after the writ sued out, the lord *distrain the tenant*, the latter may proceed. The last authority, which was cited by the defendants in error on the general question; was that in 1 *Inst.* 100. This struck me at first as worth further consideration (1): but now I think it will not be found to govern this case. The opinion of Lord *Coke* arises in his comment on the text in *Littleton*, who himself seems to have thought that, if the lord would not acquit the tenant, *but suffered him to be distrained*, the latter should have a writ of *mesne* against the lord, and recover damages. The text, therefore, is confined to the case of an *actual damage* by distress: it is true, indeed, that Lord *Coke*, commenting on the writ of *mesne*, says, that there are six writs in law which may be maintained, *quia timet*, before any distress, or impleading. But I do not think that this passage breaks in upon the argument of the plaintiffs in error; they do not object to the writ itself, but to the subsequent proceedings on it. Lord *Coke* does not say that the tenant may *count* on that writ, unless damage be done to him. But, without determining that point, it is sufficient for us, in deciding on the writ *de theolonio*, to say, that however this may resemble the writ of *monstraverunt*, it is not that writ, neither is it classed by *Fitzherbert* under the same head, but is treated by him as a writ totally distinct from it: it is *sui nominis*, at least, if not *sui generis*. And as Lord *Coke*, when he was enumerating all those writs in the passage alluded to, omitted this, why are we to insert it under that class? If, indeed, this had been a writ extremely beneficial to the subject, and if the same reasons which applied to those writs also extended to this, we should perhaps have held, that the proceedings on the one were applicable to the other. These are the grounds which influence my judgment strongly against these proceedings. *In the first place, it is against the general principles of the law, that a party, who has not received any injury, should compel another to answer him in a court of justice*; in the next place, it is also against policy, for the reasons I have mentioned; and, lastly, these proceedings are not warranted by the precedents, with respect to this writ itself: but they are directly contrary to the form of every proceeding of

(1) This was not cited on the first argument.

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this kind, which is to be found from the earlieſt times down to the preſent moment; and, when we are driven to the precedents mentioned by Lord *Coke*, it is ſufficient to ſay, that this is not one of them; and, perhaps, on a further inveſtigation, many reaſons might occur, to ſhew that this ſhould not be included under thoſe. There is a very ſtrong reaſon why the party may ſue the *warrantia chartæ* before he is impleaded, namely, to bind the lands of the vouchee which he has at the time of ſuing out the writ. That is a ſubſtantial reaſon why that particular writ ſhould be iſſued *quia timet*; but it cannot extend to this caſe, and there appears to be no fair reaſon why theſe proceedings ſhould be ſupported. The plaintiffs ought to be ſatisfied, if the law be prompt to give them redreſs when their rights are invaded. Theſe points do not appear to have been much canvaſſed in the court of Common Pleas; and, therefore, we have leſs reluctance in delivering it as our opinion now, without further conſideration, THAT THE JUDGMENT OUGHT TO BE REVERSED. ASHHURST, J.—It is a general principle of law, that, in order to found an action, there muſt be *damnum cum injuriâ*, except in ſome few particular caſes; and the defendants in error have not ſhewn that this is one of thoſe. In the preſent caſe it is not pretended that the parties have, at preſent, ſuſtained any actual damage: no injury is ſtated in the declaration; and, though damages were given at the trial, they have been ſince remitted. This action proceeds merely on the ground that the city of London have been threatened to be diſtrained for toll; but I think that it cannot be maintained; it is ſufficient that the law of this country has provided a remedy for the ſubjects when they actually receive an injury. In this caſe, the action is brought by the corporation at large, and not by the individuals, whereas the injury (if any) muſt have been ſuſtained by the individuals. The corporation cannot be injured *quâ* corporation; but, in truth, no injury whatever is ſtated to have been ſuſtained, even by the individual members of it. This caſe, therefore, falls within the general rule, that there has been no *damnum*; and we ought not to make a new exception, at leaſt in a caſe like the preſent. The opinion of *Finch* is extremely ſtrong againſt this opinion. It is obſervable, too, that Lord *Coke*, when he was enumerating the ſeveral *anomalies*, or exceptions to the general rule, does not mention this writ. And the precedents cited from *Ryley* and *Madox* are clearly diſtinguiſhable from the preſent caſe, for the reaſons already given: they both ſtate an actual injury. BULLER, J.—The firſt ground on which the defendants in error have attempted to ſupport theſe proceedings are the precedents; but, without going through them minutely, it is ſufficient to ſay, that there is no authority for the preſent caſe; they are all diſtinguiſh-

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able from this caſe, *inaſmuch as they all ſtate an actual diſtreſs.* Then it was ſaid that this was the ſame as the writ of *monſtraverunt*, but no authority has been cited to prove it; and *Fitzherbert* treats of them diſtinctly, under different chapters, as if they were different writs; and he ſays expreſsly, that the party may declare on the latter, without ſaying that he may on the former. Then it was urged, that in *monſtraverunt* the corporation at large may declare; but how is that eſtabliſhed? *Fitzherbert*, in every inſtance (except one), ſtates, that there muſt be an actual diſtreſs, in order that the attachment may iſſue, and that it muſt be ſtated to the damage of the perſons ſuing: and in that one paſſage he ſays, "if any be *compelled to pay toll*, all the corporation may bring the writ." But even this fortifies the firſt objection, that the toll muſt be taken; and though he ſays that the writ may be ſued out by all the corporation, yet he does not ſay that they may *all maintain the action*, ſo that all the paſſages may be reconciled. The attachments ſpoken of in *Fitzherbert* were of two ſorts; one was in the nature of a criminal proceeding, for a contempt in having diſobeyed the king's writ, and that might be ſued by all the corporation; the other was to bring the parties into court to anſwer in an action. And it is clear, that the attachment which *Fitzherbert* mentions in the laſt paſſage was the criminal attachment for the contempt, on which no further proceedings could be had. Though civil proceedings may be inſtituted on a writ founded originally on the prohibitory writ, yet that writ, whatever it be, which brings the parties into court, muſt be conſidered as the original writ in the cauſe; it muſt be founded on *damage* actually done, and muſt be ſued out by the party actually grieved. It is ſtated in the books, that the attachment, ſued out by the party grieved, is that writ; the foundation of the action on that the plaintiffs proceed; and count, according to *Fitzherbert*. Then it was contended, that the party may have this writ before diſtreſs, for which a marginal note in *Fitz. F. N. B.* 32. was relied on: but thoſe marginal notes do not deſerve much attention; they were not made by *Fitzherbert*; and in the old editions thoſe notes are not added. But even ſuppoſing that the writ of *monſtraverunt* might have been ſued out before diſtreſs, it does not follow that this writ may. The text in *Littleton*, on which Lord *Coke* comments, is this: "and if he (the lord) doth not acquit him (the tenant), *but* "*ſuffereth him to be diſtrained*, &c. he ſhall have againſt his "lord a writ of *meſne*, and ſhall recover againſt him his "damages, &c.;" the text, therefore, is confined to a writ of *meſne*, and to the caſe of a diſtreſs, and does not apply. On the laſt point, which was argued at the bar, I think we are bound to give ſome opinion, as it is very material to the caſe. The printed report of this caſe refers to a MS. of

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Lord *Hale*, publiſhed by *Hargrave*, Law Tracts, 128. in which it is ſaid, "*bona civium* muſt not be intended of every freeman of London; but, firſt, *he muſt be a freeman of London*; ſecondly, *he muſt be a freeman and inhabitant of London*; for, though he be a freeman, yet, if he inhabit out of London, he ſhall not be exempted from priſage, even for the wines imported into London." The anſwer which the counſel for the defendants in error have given to this objection is, that this is a queſtion of fact, which the jury have determined: but I think it involves in it a queſtion of law, as well as of fact. The objection ariſes on the record: for it is contended by the counſel for the city, that the word *citizens includes all freemen, whether reſident or not*; IF IT DO, *ſuch a cuſtom cannot exiſt in point of law.* 3 *Buſſtr.* 1.; *Thomſ. Entr.* 302.; 30 *Ed.* 3. fo. 16.; and *Robinſon* v. *Marſhall*, C.B. lately. If ſuch a cuſtom could be ſupported, it might be attended with the moſt ſerious conſequences, ſince it would be in the power of the city of London, which is one of the oldeſt corporations in the kingdom, to ſell the privileges of every other corporation. GROSE, J.—The principal queſtion is, Whether or not ſufficient appear on the count to enable the plaintiffs to recover a judgment? Now that count, as it has been obſerved already, undoubtedly ſtates no damage, no ſpecific injury to any perſon whomſoever. It is the policy of the law to give redreſs to thoſe only who are grieved; and all the precedents in our books ſtate, not only that the party complaining has ſuſtained an injury, but the manner alſo in which he has ſuſtained it. The plaintiffs themſelves, in this caſe, conſidered that that was neceſſary, becauſe they alleged in their count, that it was *to the damage of the plaintiffs*; and damages were even given at the trial, though they were afterwards remitted. The arguments of the defendants in error are drawn, firſt, from analogy to other caſes, and next from the precedents, but not from principles of reaſon or policy. As to the firſt, I think there is a ſtrong analogy between this writ and that of *monſtraverunt*. The latter was brought by the tenants in ancient *demeſne*, in order (amongſt other things) to be quit of toll; and it only takes its name from one of the Latin words uſed in the writ. *Finch*, indeed, conſidered this only as a prohibitory writ: in this I differ from him; I conſider it as a remedial as well as a prohibitory writ. In the firſt inſtance, it is to prohibit the party to take the toll from thoſe who claim the exemption; and on that prohibition not being attended to, comes the attachment, which is the remedial part of the writ; and under it thoſe who have ſuffered by the diſobedience of the former writ may recover damages. Then, if there be this analogy between this writ and the *monſtraverunt*, it will appear from all the writers on this ſubject (except Lord *Coke*), that theſe proceedings

ceedings cannot be ſupported. *Fitzherbert*, commenting on the *monſtraverunt*, ſays, if the lord diſtrain, then the tenants may ſue an attachment, and recover their damages; and in page 34, he ſays, "the plaintiffs in the writ of attachment may count ſeverally, and recover ſeveral damages; but they may count together in one count, and declare how they were ſeverally *diſtrained*, &c." But, throughout the whole comment, there is not a ſingle paſſage which does not conſider the proceedings upon the attachment as founded upon a grievance actually ſuſtained by the party ſuing. So, in his comment on the writ *de theolonio*, he ſays, "the party may have an attachment againſt the bailiffs, *or thoſe that do grieve him*, &c." The general principle, therefore, to be collected is, that on both theſe writs *the party grieved* may count. The precedents too, which have been cited, all agree with this; they all ſtate an actual grievance. In one, which was not alluded to at the bar, *Lib. Intrat.* 97. it is expreſsly ſtated in the count in *monſtraverunt*, that the defendant *diſtrinxit*; ſo do thoſe in *Ryley*, *Madox*, and 2 *Inſt.* In that in *Ryley* it is obſervable, that there was a claim of exemption from *all tolls*; and yet, as the parties afterwards inſiſted on an exemption from ſome in particular only, there was a judgment for thoſe parts. In the one in *Madox*, there was not only a diſtreſs, but an avowry on it. So alſo in 2 *Inſt.* a diſtreſs was ſtated, and a judgment given for twenty marks, and an inhibition to the defendants not to diſtrain again. In addition to theſe caſes, which were all cited on the firſt argument, a paſſage from *Co. Lit.* has been cited this day; but, after giving it the beſt conſideration, I continue of the ſame opinion that I held before. Notwithſtanding Lord *Coke*'s opinion is always of conſiderable authority, yet it has been ſometimes doubted in particular inſtances; and in this his comment is totally different from the text. *Littleton* was only ſpeaking of a diſtreſs; and if what Lord *Coke* ſays, relative to the judgment of acquittal, were meant to apply to any other writ than that of *meſne*, which was the ſubject before him, he is certainly miſtaken: it is merely an opinion of his own, not ſupported by any authority, and it is contradicted by thoſe of *Finch* and *Fitzherbert*, and by all the precedents in the law books. On the whole, therefore, I am of opinion, that *the plaintiffs have not alleged any real injury in their count, and, conſequently, cannot recover a judgment.* I think it is not neceſſary to give any opinion on the laſt point made at the bar, becauſe this is ſufficient to reverſe the judgment in the Common Pleas. At the ſame time I muſt make one obſervation reſpecting the claim ſtated in the declaration: I believe it has been decided, that the word "citizens," *ex vi termini*, means *reſident citizens*; however, I do not wiſh to give any decided opinion on this point.—Judgment reverſed.

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Lord KENYON, Ch. J. then mentioned the case of *R. v. Ponsonby*, vid. *Say.* 245. and 5 *Bro. Parl. Cas.* 287. in which Mr. *Henley*, who was then at the bar, considered it as ridiculous and absurd that a *quo warranto* information could be granted for a *mere claim*; and Lord Ch. J. *Ryder*, in delivering the opinion of the Court, adopted the opinion of Mr. *Henley*, and said that no information could be granted in such a case, because no injury was done either to the crown, or to the subject.

BUT THE ABOVE JUDGMENT OF THE COURT OF KING'S BENCH WAS AFTERWARDS REVERSED IN THE HOUSE OF LORDS, May 2, 1796.

Lockyer *v.* East-India Company, Mic. Ter. 2 Geo. 3. C.B. 2 *Wils.* 136.

Juries.]—An action of covenant upon a charter-party was tried at the bar by a special jury of the citizens of London, who all consented to be sworn, and waived any privilege as citizens of London, in not being obliged to go out of the city to serve on juries.

The King *v.* The Mayor and Aldermen of London, Mic. Ter. 27 Geo. 3. B.R. 1 *Ter. Rep.* 423.

Auditors.]—A *mandamus* to the mayor and aldermen of London, to admit a person to the office of auditor of the chamberlain's and bridgemaster's accounts, who had served it three years successively, and been elected again the fourth by the livery, was refused, because the custom of the city appeared to be, *that no person should be elected to, or serve, the said office for more than two years successively.*—On a rule, calling on the defendants to shew cause why a writ of *mandamus* should not issue directed to them, commanding them to admit *Thomas Tomlins* to the office of one of the auditors of the chamberlain's and bridgemaster's accounts of the city of London. It appeared *(inter alia)* by the affidavits on which the rule was founded, that *Tomlins*, at Midsummer, 1783, had been duly elected and admitted to, and served, the office of auditor for one year. That there was a similar election and admission at Midsummer, 1784, and a service of the office. That at Midsummer, 1785, there was a third election of *Tomlins* by the livery; but the recorder then declared that the court of aldermen *gave no opinion as to this election*; and he accordingly served that third year. At Midsummer, 1786, *T. Tomlins*, together with three others, were elected and chosen auditors for the year ensuing, by a majority of the livery; but the court of aldermen, by the recorder, then declared to the livery, that the usage in the election of auditors was, *that a liveryman having served the office of auditor for two years successively should go out of that office, and another should be elected in his stead.* Notwithstanding such declaration, a poll was demanded under the stat. 11 *Geo.* 1. c. 18. and *Tomlins* had a majority of votes. But at the close of the poll, the recorder declared the other candidates duly elected.—

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The ground on which the rule had been obtained was, that the uſage was rather an exemption in favour of a perſon who had ſerved the office two years, than a diſqualification to fill it a third year.—The affidavits in anſwer to this application ſtated the uſage in the election of auditors to be, *that no perſon ſhould be elected to, or ſerve the ſaid office for more than two years ſucceſſively*; and alſo a by-law made in common council on the firſt day of Auguſt, 1552, by which it was ordained that the ſurveyors of the beer-brewers (now called aleconners) ſhould be elected in a particular manner, and *then in the end of the ſecond year the ſame freſh two commoners to be amoved from the ſaid office, and other two then to be thereunto newly elected and choſe, in like ſort and form as the auditors of the chamberlain, and of the bridge of the ſaid city, are yearly elected and choſen.* PER CURIAM: An application for a *mandamus* is made to the diſcretion of the Court, but that diſcretion muſt be governed by certain principles. It is never granted merely for aſking; ſome reaſon muſt be aſſigned for it: but in the preſent caſe no ground whatever has been laid before the Court. The party making the application has neither taken upon him to impeach the cuſtom ſet up in oppoſition to his claim, nor has he produced any one inſtance of any perſon having been elected a third year, after having ſerved the office for two years ſucceſſively. We would grant the *mandamus*, in order that the right might be tried, if there were any ground for it. But here is nothing to be tried. The *mandamus* is applied for, merely to ſee whether there is any thing to be tried or not. On the other hand, there is a poſitive cuſtom ſtated, that no perſon *ſhall be elected to, or ſerve the office of auditor for more than two years ſucceſſively.* And this is further corroborated by what is ſaid in the by-law made in *Edward* the Sixth's time; in which it is ordered that the ſurveyors of the beer-brewers are to be amoved *at the end of every ſecond year, in like ſort and form as the auditors of the chamberlain, and of the bridge of the city.* That is a deciſive ground to ſhew that the uſage, with reſpect to the office of auditors, has ſubſiſted at leaſt as far back as the time when that by-law was paſſed.

Right to a cuſtomary duty.]—The corporation of London having a cuſtomary duty on corn imported, it is a good cuſtom, that factors, free of the corporation, ſhall receive to their own uſe that part of the duty which ariſes from corn conſigned to them as factors.—" From time immemorial, " there hath been paid to the corporation of London, for " their uſe, a toll or duty of one farthing on the quarter of " corn, by all perſons, not being free of the city, importing " corn into London, or the liberties thereof, coaſtwiſe, eaſt- " ward of London bridge, except from the Cinque Ports, " or

Cockſedge v. Fanſhaw, Ea. Ter. 19 Geo. 3. B.R. 1 *Doug.* 119.

" or the county of Kent." Freemen are exempt from this toll; and ſuch freemen as are corn-factors claim a right to have the duty collected on all corn conſigned to them in London, to be ſold on account of their correſpondents, although ſuch correſpondents be not freemen, returned to them. The corporation inſiſt, that they are entitled to retain the duty paid for ſuch corn, the property of ſtrangers, though conſigned to freemen-factors. To try this queſtion, the preſent plaintiff, being a freeman-factor, brought an action for money had and received to his uſe againſt the defendant, who was the city officer, who had collected the duty on a quantity of corn conſigned to the plaintiff, but which was the property of a non-freeman. On the trial of the cauſe, a verdict was found for the plaintiff; and, on the day for ſhewing cauſe againſt a rule for a new trial, Lord MANSFIELD reported the evidence, in effect as follows: On the behalf of the plaintiff, one *Green*, an officer of the cuſtoms forty-ſix years, proved that, during that time, the toll of the farthings were always returned, when the corn belonged, or was conſigned to freemen. *Fiſher*, who had been in the corn-trade for fifty years, proved that the farthings had always been returned to him as a factor, and always underſtood the exemption to extend to freemen as factors.—On his croſs-examination, he ſaid, they always charged the farthings to their correſpondents. *Anderſon*'s evidence was to the ſame purpoſe; that he ſometimes ſold, as clerk to a factor, 5000 quarters in a day, and he always had the farthings returned. *Read*, clerk to the defendant, ſaid, at firſt, that the farthings were never allowed to factors, and that he would not have allowed them if the perſons claiming had declared that the corn was conſigned on commiſſion: but, on being preſſed, he acknowledged that he never knew the queſtion aſked, Whether the perſon claiming the farthings was, or was not, a factor? He had returned the farthings to *Nelſon*, to the amount of 100l. in a year. When the demand of a return of the farthings was made, the freeman making the demand uſed to write thus (in what is called a certificate), "*for your humble ſervant*," or, "*on account of your humble ſervant.*" He knew that nineteen out of twenty parts of the corn ſold in London was ſold by commiſſion, and he knew of no inſtance where freemen had paid the duty. He had known the duty amount to 1100l. in a year, but it was now reduced to 200l.—*Richard Reed* ſaid, he was clerk to *Wear* and *Taylor*, corn-factors They had always paid the duty before they took up their freedom, and never ſince: on proof of their being freemen, the farthings had always been returned, without further enquiry.—On his croſs-examination he ſaid, they always charged the farthings to their correſpondents in this manner, "*for the farthing*," and not "*paid for the farthing.*" Lord MANSFIELD

MANSFIELD told the jury, that the whole depended on the uſage; that the factors, charging their correſpondents the farthings did not amount to a deciſive acknowledgement that the city was entitled to them. It might raiſe a queſtion between them and their employers. The practice of ſelling by commiſſion may have been as ancient as this duty; and, if in the original grant of the duty there was an exemption as to all corn conſigned to freemen, ſuch exemption would be good. On ſhewing cauſe againſt a new trial, it was contended, that the evidence was irreſiſtible. The reaſon of the exemption, at firſt, might have been to encourage freemen to become importers of corn, or to induce men to purchaſe the freedom of the city; and that it was not true, as had been urged at the trial, that ſuch an exemption was as broad as the grant, for non-freemen might import corn, either on their own account, or as factors; and they, in either caſe, muſt pay the duty. On the part of the defendant it was urged, that the exemption claimed would amount to a breach of the oath taken by all freemen of London, viz. "Ye ſhall *colour* no *foreign* goods under or in your name, "whereby the king, or this city, might or may loſe their "cuſtoms or advantages." Lord MANSFIELD: Independent of the oath, there is no doubt but that *colouring* goods would be a fraud. But the argument founded upon the oath turns in a circle. If the cuſtom extends to factors, as well as to owners, then a perſon cannot be ſaid to colour goods, unleſs he covers with his own name corn, which he is neither owner of, nor employed to ſell as a factor. The words "*foreign goods*," in the oath, certainly mean the goods of non-freemen. If a new trial is granted, it can only be, either on the ground of apparent fraud, or becauſe ſuch an exemption as is claimed by the plaintiff cannot be ſupported by any uſage. To ſay this would be to decide the cauſe completely againſt the plaintiff, whereas, if we ſhould not grant a new trial, the city of London will not be concluded by the preſent verdict. They will only have the diſadvantage of a recent verdict againſt them, in caſe they ſhould try the queſtion again in another action. ASTON, Juſtice: By the ſtatute of 1 *Hen.* 8. c. 5. ſ. 6. it is enacted, "That no citizen of London, or "other the king's ſubjects, inhabiting within the Cinque "Ports, or any other, being free of priſage or butlerage of "wines, by grant, cuſtom, or otherwiſe, cuſtom no wines of "any perſon or perſons, not being free of any priſage or "butlerage." By a charter of 1 *Ed.* 3. the king had granted to the city of London, "*Quod de vinis civium nulla priſa fiat, "ſed perpetuè inde eſſent quieti.*" The object of the ſtatute of *Hen.* 8. clearly was to prevent the abuſe of that privilege. Now the words in the oath taken by freemen have nearly the ſame import as to all goods, as thoſe of the ſtatute have

as to wines; and, when we compare the words of the charter and of the ſtatute together, it ſeems that none but freemen, for their *own* wines, are exempted from priſage. In the caſe of *The King* and *Waller* v. *Hanger*, reported in 3 *Bulſtrode*, the queſtion was, Whether the defendant, as executrix of a citizen of London, was exempted from priſage of wine which had belonged to the teſtator, and was ſhipped in his life-time, but not unloaded till after his death? There was no deciſion, the Court being equally divided; but it is laid down by *Dodderidge*, Juſtice (although he was of opinion with the defendant), that, to be entitled to the exemption, the party muſt have the *whole* property, *Loc.* cit. p. 17. In the preſent caſe, therefore, if it ſtood clear of uninterrupted uſage, I ſhould think there would be a great deal in the objection. It is obſervable, that there are none of the notes or certificates which expreſsly and confeſſedly ſtate the goods to have come to the parties as factors. The parole evidence is, that the exemption does extend to freemen-factors. The point to be determined is, To what extent the conſtant uſage has been carried? If there ſhould be a new trial on that ground, the opinion of the Court in granting it will not occaſion any bias in the ſecond jury.—CURIA ADVISARE VULT. But PER CURIAM (Lord *Mansfield*, Ch. J.): Several things which have been urged do not weigh with me againſt the uſage; for inſtance, the argument drawn from the exemption relative to priſage, for the words creating that exemption expreſsly confine it to the wines of citizens—"*De vinis civium.*" The oath proves nothing, becauſe it ſtill leaves the queſtion to be, Whether this is *colouring* foreign goods, or not? The gradual diminution of the income from this duty is equally inconcluſive. There has, of late, been a ſcarcity of corn in England, and a great deal has been imported from abroad, which is a thing formerly not known. Yeſterday, after the argument, I revolved the queſtion in my mind, on the nature of the claim, and the preſumption upon which it muſt be ſupported, viz. that the exemption might have commenced with the grant; and it ſeemed to me next to impoſſible from the nature of the thing. It is an exemption in favour of citizens, from a duty granted to the city of London. Such an exemption muſt relate to ſomething which a citizen muſt otherwiſe have paid. But that is not the caſe, for the citizen-factor would not have paid any thing. If the citizen-factor were to take the benefit to himſelf, then the exemption would, in truth, operate as a grant, for the owner would have the duty to pay, and the factor would receive it, inſtead of the corporation. Either the freeman muſt allow the farthings to his employers, and then this would be an exemption in favour of owners not freemen, and inconſiſtent with the grant to the city, or elſe he is entitled to receive it for his own

own benefit, and then it is a grant to him; therefore, it ſtrikes me as a thing which cannot be ſupported by way of exemption. This, however, is not an objection in point of law. It is matter to be left to a jury; for, if they find the exemption to have conſtantly exiſted in point of fact, it muſt operate as evidence of a grant. But this diſtinction not having been particularly pointed out to the jury on the laſt trial, it is proper that the cauſe ſhould be reconſidered; therefore we are all of opinion, that there ſhould be a new trial. On the ſecond trial, a verdict was again found for the plaintiff. On a motion for a new trial, Lord MANSFIELD ſtated the evidence on the ſecond trial, whereupon it appeared that, on the ſecond trial, the uſage had been proved more ſtrongly than before; and there was no evidence that the city had ever received, to their own uſe, the duty on corn conſigned to freemen as factors: but, though it appeared on the firſt trial that the duty had diminiſhed in its produce, there was no evidence of this on the laſt. For the plaintiff it was contended, that the uſage was evidence of an original grant from the crown or parliament. That, in the original grant to the corporation, there might have been a proviſo, that, whenever corn, ſubject to the duty, ſhould be conſigned to free-factors, they ſhould be entitled to receive the farthings to their own uſe. That, if there was any doubt whether that could be the origin of the exemption, it might have ariſen from a ſubſequent grant by the city to the free-factors, or an agreement between the city and them. The jury were told, that the ground on which the new trial had been granted was an intrinſic objection to the exemption; that the practice might have commenced in fraud, and yet have been carried on fairly afterwards; that it muſt have been an exemption as to factors, in the original grant to the city, or an original grant to the factors; that there could be no exemption, unleſs in favour of perſons otherwiſe liable; but here the factor would not have been liable, but the owner, and he was not exempted. As to its being a grant, they were told by his lordſhip, that he had never heard or read of ſuch an inſtance as a grant to factors; but that this was matter of evidence. He did not know of any law againſt ſuch a grant; and, upon the whole, he left it to them to conſider, whether they thought the uſage coeval with the right of the city to the duty. That the exemption alſo might have originated in a ſubſequent grant from the city, or an agreement with them, though this origin was leſs probable than the other. On ſhewing cauſe againſt the rule for a ſecond new trial, THE DEFENDANT INSISTED, that the practice of the factors was nothing elſe but *colouring* the goods of non-freemen. If the city did formerly know of the abuſe, without correcting it, that was no reaſon why it ſhould not now be corrected. While the frauds of the factors were

kept within bounds, they were not enquired into; but, as they had increaſed ſo much to the detriment of the city, it had become neceſſary to check them. No queſtions were aſked of the factors, becauſe the notes were contrived to anſwer the queſtions which might have been aſked. The idea of an exemption, which was the only ground on the firſt trial, was abandoned on the ſecond, as not capable of being maintained; but the ſuppoſition of the privilege claimed being part of the original grant, was equally untenable, becauſe the importation of corn into the city muſt have been of a much earlier date than the exiſtence of factors. It was the intereſt of the corporation, that freemen ſhould have an exemption for themſelves, becauſe this rendered it a deſirable thing to purchaſe the freedom of the city; but it was not their intereſt, that the free-factors ſhould be entitled to receive a duty on corn from other freemen, which would be, in ſubſtance, the caſe, if the plaintiff prevailed, becauſe the owner would charge the farthing duty, which he muſt pay to his factor, in the price of the corn ſold to other freemen, for their conſumption. It was ſaid, that, though factors might not be able to take by a direct grant, the city might in truſt for them; but the objection was, that no poſſible reaſon could be imagined for ſuch a grant in their favour: though a cuſtom need not have a legal origin, it muſt not be unreaſonable, which this was. The caſes cited were not ſimilar to the preſent. The Newcaſtle caſe had been compromiſed, but there was nothing unreaſonable in a cuſtom for reſident freemen to have an excluſive privilege, in what *they* only could uſe. In that caſe, the reſident freemen did not claim a right of putting on the cattle of ſtrangers, nor did the freemen ſhip-owners, in the caſe in *Levinz*, ſet up a right to take ballaſt, in order to ſell to other perſons. The corn-factors are not admitted to their freedom under that deſcription, but belong to any company in which they chooſe to be admitted (the plaintiff belonged to the ſtationers' company).—The main argument for the defendant was, that all the proof which had been, or could be, produced, could not outweigh the internal evidence againſt the claim; and it could not, it was ſaid, be fairly urged againſt the preſent application, that there had already been two concurrent verdicts, for they had been given on different grounds. Lord MANSFIELD, Ch. J. The oath cannot avail the defendant, becauſe the claim, whether well or ill founded, is between the factor and his correſpondent. He does not *colour* the goods. He takes the money to himſelf, and does not make a deduction in his account with his employer. Till this diſpute, no queſtions were ever aſked. The farthings were always returned to *Nelſon*, who dealt ſo largely, and never but as a factor. Perſons, who only dealt as factors, have paid 30l. for their freedom,

freedom, in order to acquire this privilege. But the internal objection is, that the uſage muſt have commenced in fraud ſome hundred years ago. This objection I cannot anſwer, and I left it to the jury in the ſtrongeſt terms; but they have again found for the plaintiff. If I did wrong in leaving it to the jury, that would be a ground for a new trial: but I think I did right, and that this was not ſubject for a ſpecial verdict, being merely a matter of evidence. If the jury thought there was evidence of a grant to the city, but that freemen ſhould be exempted, and ſhould receive a farthing a quarter on corn conſigned to them as factors, I ſee no objection to it, in point of law. If we were to grant a third trial, we might as well grant a fourth and fifth; there would be no end. The city will not be concluded by the verdict.—ASTON, J. This is a point of an uncommon nature, but the uſage is very ſtrong. The only queſtion now is, Whether the matter was fit to be left to the jury? If it was not, the laſt new trial ought not to have been granted: the Court ſhould have determined the cauſe. But I think the matter was proper for the deciſion of a jury, and that the evidence was ſufficient in this cauſe, between a factor and the city collector.—WILLES and ASHHURST, Juſtices, of the ſame opinion.—The rule was accordingly diſcharged; but the city not being ſatisfied, they ſtill refuſed to return the farthings, and the plaintiff was obliged to bring another action. This ſecond action coming on to be tried, the evidence for the plaintiff was of the ſame ſort and import, but more correct, explicit, and circumſtantial. The defendant now demurred to the evidence; and, upon the argument, it was contended on behalf of the defendant, 1ſt, that, from the nature of a demurrer to evidence, and upon the evidence put on the record, the Court might, and ought to, diſbelieve that the uſage had been immemorial; 2dly, that the claim, whether as founded on an exception, or proviſo, in the original grant, or as a truſt, or otherwiſe, could not have had a legal origin in reſpect of the perſons of the claimants; 3dly, in reſpect of thoſe who receive the duty; 4thly, in reſpect of thoſe who pay it; nor, 5thly, in reſpect of the nature of the duty itſelf. Lord MANSFIELD: The foundation upon which the plaintiff reſts his title is this, that, by immemorial uſage, to which there has been no interruption ſince the time of *Richard* I. freemen-factors have a right to take, to their own uſe, that part of the farthing duty which is paid for corn conſigned to them. The defendant denies the fact, and ſays, there is no ſuch uſage or cuſtom. I ſpeak to the fact now; the legal objection I will conſider by and by. But this is the fact upon which the parties are at iſſue, and this is to be tried by the jury: nobody elſe can try it, becauſe it is a concluſion of fact from the evidence. Almoſt all the objections that have been made

are ſuch as were very proper to be ſtated to a jury, to induce them to doubt of the fact of ſuch immemorial uſage; to induce them to conclude that it began in fraud, or miſtake; that it could not begin in the way in which it is claimed; that ſuch an uſage could not poſſibly be immemorial: and, on the ſecond trial, all this was ſtrongly put to the jury. But, what is now brought before the Court on this demurrer? Not a queſtion, whether the evidence was ſufficient to ſatisfy the jury of the fact of the cuſtom; for, by the demurrer, the defendant admits every fact which the jury *could* have found upon the evidence. The only queſtion before the Court is, Whether, ſuppoſing the fact to be as the plaintiff contends, and that, immemorially, without any exception ſince the time of *Richard* I. the uſage has been for the freemen-factors to receive the farthings, ſuch uſage could, by any poſſibility, have a legal commencement? The plaintiff was not bound to find out what the actual commencement was, becauſe it has exiſted from time immemorial. The city itſelf has no writing, or grant, to ſhew; they only ſay, the duty has been paid to them as a right, time out of mind, by all but freemen for their own corn. The plaintiff ſays, there is another qualification: "it has not been paid by freemen-factors for corn "conſigned to them; they have always enjoyed that privi-"lege." If, by no poſſibility, ſuch a privilege could have a legal commencement, then, to be ſure, the fact of its exiſtence does not decide the queſtion, becauſe, in point of law, that does not eſtabliſh the right; but the rule of law is, that, wherever there is an immemorial uſage, the Court muſt preſume every thing *poſſible* which could give it a legal origin; whether *probable* or not, is for a jury to decide. Now, why is it not poſſible that, in the original grant, the crown may have ſaid, for the purpoſe of encouraging perſons to take up their freedom, that no freeman ſhould pay the duty to the city, either for his own corn, or for corn conſigned to him as a factor? Would ſuch a grant be void? Certainly there may have been ſuch a grant. But further, in caſes of this ſort, an act of parliament may be preſumed. Many, if not all the uſages and cuſtoms of the city of London, are confirmed by act of parliament; or, the privilege may be founded on a by-law, made before time of memory. Suppoſe, after the grant to the city, there had been a by-law made, by which, for the purpoſe of encouraging factors to become free, and, by that means, introducing the corn trade, the corporation gave them, when freemen, all the farthings ariſing on corn conſigned to them; ſurely there is nothing impoſſible in this, and there is a colour for ſuppoſing *that* to be the ground, from the evidence, becauſe it is, in proof, that the factors purchaſe the freedom on purpoſe to acquire the privilege. The only point now before the Court was very fully conſi-

dered,

dered, upon the ſecond motion for a new trial, and we were all of opinion, that, if ſupported by immemorial uſage, it was impoſſible for the Court to ſay, that the privilege could not have a legal commencement.—WILLES, Juſtice, agreed, and ſaid, as to one thing urged, viz. that there could be no corn-factors in the time of *Richard* I. though, perhaps, they did not then exiſt by that name, yet, as London was a flouriſhing city long before that period, it muſt have been ſupplied with corn in great quantities; and it would be abſurd to ſuppoſe that the growers themſelves brought their own corn from all parts of the kingdom to the London market. When they did not come themſelves, they muſt have employed factors, agents, or conſignees, to ſell it for them. ASHHURST, J. was of the ſame opinion, and ſaid, As to the evidence, there is certainly enough to have warranted the jury in inferring, that the uſage had exiſted as far back as the time of memory. There was ſufficient to be left to a jury, and that is all that is requiſite.—BULLER, J. It ſeems to me that there are but two queſtions in the cauſe; the firſt, What is the nature of a demurrer to evidence? the ſecond, Whether the cuſtom ſet forth in this demurrer-book, as ſtated by the plaintiff's counſel, be or be not good in law? With reſpect to the firſt, it is the province of a jury alone to judge of the truth of facts, and the credibility of witneſſes; and the party cannot, by a demurrer to evidence, or any other means, take that province from them, and draw ſuch queſtions *ad aliud examen*. I think the plain and certain rule is this: the demurrer admits the truth of all facts, which, upon the evidence ſtated, might be found by the jury in favour of the party offering the evidence. The caſe of a ſpecial verdict has been put, and it has been ſaid, the reaſon for a demurrer to evidence is, that the party demurring does not chooſe to truſt the jury. In a certain degree that is true; but the reaſon of not truſting the jury is, becauſe they may, if they pleaſe, refuſe to find a ſpecial verdict, and then the facts never appear on the record. But whether the caſe comes before the Court on a demurrer to evidence, or on a ſpecial verdict, the law is the ſame. Now, if this cauſe had been put into the ſhape of a ſpecial verdict, what muſt have been ſtated on the record? The jury could not find all the evidence ſet forth in the demurrer, but muſt have pronounced upon the fact, whether or not ſuch an immemorial cuſtom had exiſted, and then it would have been for the Court to decide, whether ſuch a cuſtom was good in law. I am clear that there was ſufficient to be left to a jury, and, therefore, on the firſt queſtion, there ſeems to me to be no doubt at all; as to the ſecond, he likewiſe had no doubt.—Judgment for the plaintiff.

Upon this judgment the defendant brought a writ of error in

in the Exchequer Chamber, where, after the cauſe had been twice argued, it was, in E. 22 *Geo.* 3. affirmed. Afterwards, a writ of error was brought in the Houſe of Lords; and, after the caſe had been argued there, the following queſtions were put to the judges, viz. 1ſt, Whether the evidence and facts admitted, upon which this demurrer has been joined, are ſufficient, in law, to maintain the iſſue for the defendant in error? 2dly, Whether, if the evidence be inſufficient, or uncertain, a new *venire* ought to have been awarded? The unanimous opinion of the judges upon the firſt queſtion was delivered in the affirmative; and the firſt queſtion being ſo anſwered, any anſwer to the ſecond was unneceſſary. Upon this, the judgments of the court of B.R. and *Cam. Scacc.* were (5 June, 1783) unanimouſly affirmed.

Bulbrook *v.* Sir Robert Goodere, *et al.* Mic. Ter. 6 Geo. 3. B.R. 3 *Burr.* 1708. 1 *Black.* 569.

Water-bailiff.]—The water-bailiff of the Thames has no right to ſeize engines, or fiſh, in a perſon's own fiſhery, as prohibited by 1 *Eliz.* c. 17. without a previous preſentment on conviction.—This was an action for a treſpaſs committed in breaking and entering the plaintiff's cloſe, called the river Thames, and taking up, breaking, and deſtroying, his burks there erected and placed for the catching of fiſh, and taking his fiſh out of the burks, and carrying them away and converting them to their own uſe.—The defendant juſtified, as water-bailiff, between Staines bridge and the head of the river, under a grant from the crown, and that the plaintiff was fiſhing with unlawful nets, contrary to the ſtat. 1 *Eliz.* c. 17. which enacts, that no one ſhall take fiſh with any other than the nets or trammels therein ſpecified, under forfeiture of a pecuniary ſum, and of the fiſh ſo taken, and alſo of the unlawful engines. The plaintiff, in his replication *(inter alia)*, inſiſted that all offences done and committed by unlawful fiſhings in the river Thames, ought to be preſented, or information thereof made at a court of conſervancy, or other court having competent authority, and there tried and determined. Then he averred, that no information, preſentation, conviction, or adjudication whatſoever, had ever been made before the committing this treſpaſs, &c. The defendants demurred generally; to which there was a joinder in demurrer. The only queſtion is, "Whether they could ſeize the nets before conviction?" And it was inſiſted, that the water-bailiff had a right to ſtop and prevent an illegal nuiſance, contrary to the act of parliament, and to remove and abate this private nuiſance (though he had a right alſo to proceed ſubſequently for the penalty). Lord MANSFIELD, Ch. J. An offence is here created by an act of parliament. If you take advantage of this act, you muſt purſue the method preſcribed by it. This is the plaintiff's *own* fiſhery, and he might have done what he

would in it, before this prohibition by the act of parliament. WILMOT, J. This is not to be considered as a nuisance, either public or private. The violation of this public law is not within the idea of a nuisance.—YATES, J. This was the plaintiff's own fishery, and the defendants have taken up the burks, and taken the fish: this laying the burks was no nuisance; and no power is given by the act "to seize." The defendants are not to be their own judges; they ought to have followed the method prescribed by the act: the water-bailiff has no right to take the nets of a person fishing in his own fishery.

Lands embanked from the Thames to be free from taxes.]— Houses, built on lands embanked from the Thames, in pursuance of 7 *Geo.* 3. c. 37. which vests those lands in the owners, free from taxes, are not liable to be assessed to the land-tax.—The statute 7 *Geo.* 3. c. 37. "for completing the bridge across the river Thames, &c." by the 51st section (after enabling private persons to inclose and embank, at their own expence, under the direction of the mayor, &c. of London) enacts, that "the ground and soil of the said river so to be inclosed and embanked in the front of every such respective wharf or ground should vest, and the same was thereby vested, in the owner or owners, proprietor, or proprietors, of such adjoining wharf or ground, according to his, her, or their respective estates, trusts, or interests therein, *free from all taxes and assessments whatsoever.*" And in this case it was held, that the house in question, which had been built on soil recovered from the river, was not liable to be assessed to the land-tax, levied under an act passed since that time. PER CURIAM: It cannot be contended, that a subsequent act of parliament will not control the provisions of a prior statute, if it were intended to have that operation; but there are several cases in the books to shew, that where the intention of the legislature is apparent, that the subsequent act should not have such an operation, there, even though the words of such statute, taken strictly and grammatically, would repeal a former act, the courts of law, judging for the benefit of the subject, have held that they ought not to receive such a construction. In *Bro.* tit. "Parliament," 52. is this passage: "where a statute is, that the merchant "shall import bullion of two marks for every sack of wool "exported, and then another statute was made, that the "merchant should not be charged, unless for the ancient "custom only, this does not repeal the first statute, *Vi.* "*causam*, *ib.* 4 *Ed.* 4. 12." And the reason is, that it clearly was not the intention of the legislature, that it should have that effect. So here, though (strictly speaking) the land-tax is an annual statue, and the words of the land-tax act

Williams v. Pritchard, Mic. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 2.

act are general and ſufficiently large to ſubject theſe lands to the payment of the tax in queſtion, yet, as the land-tax is one of the ways and means for raiſing the ſupplies every year, and is now become part of the conſtant reſources of the country, the legiſlature, in paſſing the 27 *Geo.* 3. could not intend to repeal the proviſions of the 7 *Geo.* 3. which exempted theſe lands from the land-tax.—Poſtea to the plaintiff (1).

Eddington *v.* Borman, Mic. Ter. 31 Geo. 3. B R. 4 *Ter. Rep.* 4.

Neither are ſuch houſes liable to be aſſeſſed to the paving rates made under the 11th of *Geo.* 3. c. 29.—In this caſe, the former occupier was aſſeſſed to and paid the poors'-rate, as alſo the houſe-tax, commutation-tax, conſolidated rate, church rate, tythes, watch, and orphans'-tax; and the preſent occupier was, in like manner, aſſeſſed to, but reſiſted the payment of, all ſuch rates, upon the ground of his being exempt therefrom by the 7 *Geo.* 3. c. 37. And the place in which the plaintiff's houſe is ſituate has been regularly paved, cleanſed, and lighted by the commiſſioners under the authority of the act of the 11 *Geo.* 3. PER CURIAM: This queſtion ſeems concluded by the laſt caſe. In that, the difficulty aroſe from the circumſtance of the land-tax being an annual act, and that the act, under which the diſtreſs was taken, was paſſed ſubſequent to the ſtatute containing the exemption. But this act of parliament, in deſcribing the perſons who are liable to be rated, refers to the poor-rates, which have exiſted ever ſince *Elizabeth*'s time, as well as to the land-tax: nor is there any foundation for the argument, that the occupiers of houſes are liable, though the lands be exempted. The ſtat. 7 *Geo.* 3. c. 37. enacts, that the lands to be incloſed and embanked ſhall veſt in the owner, &c. "*free from all taxes and aſſeſſments whatſoever.*" If then the lands themſelves be exempted, ſo muſt alſo the houſes built thereon.

Barlow *v.* Norman, Mic. Ter. 25 Geo. 3. C.B. 2 *Black Rep.* 959.

Buildings.]—The builder of a houſe in London, on an entire new foundation, may not erect half his flank or ſide wall on his neighbour's vacant ground.—Treſpaſs for pulling down a wall. After a great length of pleading, the queſtion upon demurrer was, Whether, under the ſtatute 12 *Geo.* 3. c. 73. for regulating buildings in London, a perſon, building a new houſe upon an entire new foundation, was entitled to build his ſide or flank wall, one half on his own ground, and the other half on the vacant ground of his neighbour; or, whether that proviſion extended only to party walls between houſes already built, or carrying up at one and the ſame time. And it was held by *Gould* and *Blackſtone*, Juſtices (*abſentibus De Grey*, Chief Juſtice, and *Nares*, Juſtice), that this ſtatute,

(1) In *Yarraway* v. *Conſtable*, E. 20 *Geo.* 3. this very queſtion was decided on a ſpecial caſe reſerved.

now

now repealed and varied by ſtatute 14 *Geo.* 3. c. 78. extended only to the latter caſe; for no man has a right to preſume that his neighbour will hereafter build a houſe adjoining to his, and, in conſequence of ſuch preſumption, erect half of his outſide wall on his neighbour's ground.—Judgment for the defendant.

Upon the 11 *Geo.* 1. c. 28. "for the better regulating of "buildings, and to prevent miſchiefs that may happen by fire, "&c." *(an act ſince repealed)*, the workmen had certified to the ſeſſions, purſuant to the firſt clauſe of that act, "that a "party-wall of a ſtable was defective and ruinous, and ought "to be pulled down." And the Court held, that that act of parliament was confined to party-walls between *houſes*, and did not extend to party-walls between *ſtables*. Rex *v.* John Pratt, Ea. Ter. 9 Geo. 3. B.R. 4 *Burr.* 2298.

A leſſee for twenty-one years at a pepper-corn rent for the firſt half year, and a rack rent for the reſt of the term, who, by agreement, was to put the premiſes in repair, and covenanted to pay the land-tax, and all other taxes, rates, aſſeſſments, and *impoſitions*, having aſſigned his term for a ſmall ſum in groſs, was held not to be liable to pay the expence of a party-wall, either by the proviſions of the ſtatute or the covenant; but that charge muſt, in ſuch caſe, be borne by the original landlord(1).—This was an action in replevin; and the defendant avowed, as bailiff of *J. Winter*, for 30l. for a quarter's rent of a houſe in Shugg-lane. At the trial, the jury found a verdict for the plaintiff, ſubject to the opinion of the Court on the following caſe, *in order to try the ſingle queſtion*, WHETHER Lygow, *the aſſignee of the leaſe of the houſe, for which the rent was claimed to be due, or* Winter, *was to pay the moiety of the expence of rebuilding a party-wall between that houſe and an adjoining one? Winter* is the landlord of the premiſes in queſtion, and is ſeiſed in fee thereof. *Lygow* is occupier, and the aſſignee of a leaſe thereof, granted by *Winter* to one *Foulſton*, deceaſed, for twenty-one years, dated the 3d of July, 1786; by which leaſe (reciting an agreement in writing, dated the 14th of October, 1784, between *Winter* and *Foulſton*, that the latter ſhould repair the meſſuage and premiſes therein mentioned, according to the particulars aſcertained by a ſurveyor, and that he would, on or before the 24th of June, Southall *v.* Leadbetter, Mic. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 458.

(1) By 14 *Geo.* 3. c. 78. ſ. 41. it is enacted, that the perſon at whoſe expence any party-wall ſhall be built, agreeably to the directions of that act, ſhall be reimburſed *by the owner or owners, who ſhall be entitled to the improved rent of the adjoining building, in the proportion therein mentioned.* That the firſt builder ſhall leave, at the adjoining building, an account of the ſum to be paid by ſuch owner; whereupon it ſhall be lawful for the tenant, or occupier, of ſuch adjoining building to pay ſuch proportionable part of the expence to the firſt builder, and to deduct the ſame out of the rent which ſhall become due from him to ſuch owner, or owners, under whom he holds, until he be reimburſed the ſame.

1785, at his own coſts and charges, put the ſaid meſſuages, &c. into good and ſufficient repair; on finiſhing which, *Winter* would make a leaſe thereof to *Foulſton*, to commence from Midſummer-day then laſt, for twenty-one years, under the rent of a pepper-corn for the firſt half-year of the term, and under the clear yearly rent of 120l. for the remainder of the term, and alſo reciting that *Foulſton*, in purſuance of that agreement, had repaired, &c.) *Winter* demiſed the premiſes to *Foulſton*, his executors, adminiſtrators, and aſſigns, according to that agreement. The leaſe alſo contained a covenant by *Foulſton*, to pay, "from time to time, and at all times, during "the term, the land-tax, and all other taxes, rates, aſſeſſments, "and *impoſitions* whatever, already laid, aſſeſſed, or impoſed "upon the ſaid premiſes, or any part thereof, or upon the ſaid "*John Winter*, his heirs and aſſigns, in reſpect thereof, by "authority of parliament, or otherwiſe howſoever." The caſe then ſtated, that *Foulſton* laid out and expended in the repairs of the premiſes 150l.; and that, though the conſideration ſtated in the aſſignment to *Lygow* appears to be only 5s. yet the ſum actually paid as the conſideration for it was 160l. The old wall was condemned in the year 1788, and the preſent party-wall was built according to the terms of the act of parliament. *Lygow* has paid for a moiety of the party-wall, the bills for which exceed the quarter's rent, for which the diſtreſs was made: thoſe bills were tendered to *Winter* before the diſtreſs, but he refuſed to allow them. The premiſes in queſtion were previous to the commencement of the preſent leaſe let by *Winter* at a rent of 110l. *per annum*, out of which he allowed to the tenant the land-tax.—By the 14 *Geo.* 3. c. 78. this *onus* is thrown on the owner of the improved rent. Lord KENYON, Ch. J.—The improved rent mentioned in this act of parliament ſtands contradiſtinguiſhed from ſome other rent, but here no other rent was reſerved, but that at the granting of the leaſe. But it is ſaid, that the leſſee received from his aſſignee *a ſum in groſs*, as the conſideration for the purchaſe, which is equivalent to an improved rent: if, indeed, a large ſum were paid to the purchaſe of a leaſe, though no improved rent were reſerved to the original leſſee, I think he would be liable to pay this expence within the act of parliament. But that is not the preſent caſe; for, when *Winter* granted this leaſe, he reſerved the beſt rent which could be procured for it at that time, ſince this rent exceeds the rent formerly reſerved by 10l. *per annum*, and the whole of the land-tax; and the caſe ought not to be varied by the circumſtance of the eſtate's gradually increaſing in a ſmall degree. Where the parties contract for a leaſe at rack-rent, the landlord is the perſon who ought to bear the expence of the party-wall. Then it was contended, that the full rent was not reſerved originally,

originally, becauſe it was ſtipulated, that the tenant ſhould lay out a conſiderable ſum of money in improving the eſtate; but it muſt alſo be remembered, that in conſideration of that the leſſee was to pay no rent for the firſt half year; which might have been conſidered at the time as commenſurate with the ſum to be laid out in the repairs. Neither is the leſſee concluded by the covenant to pay the taxes, aſſeſſments, impoſitions, &c. for that only extends to the land-tax, and all other taxes *ejuſdem generis*: but this is not a tax. Therefore the plaintiff in replevin is entitled to judgment, becauſe he has overpaid the rent diſtrained for. ASHHURST, J.—The legiſlature intended to throw this burden on the leſſees of building leaſes, by whom the value of the eſtate is conſiderably improved, and who afterwards make under leaſes, reſerving improved rents. But here it does not appear that any greater rent was reſerved to the firſt leſſee than there was at the time of granting the leaſe. BULLER, J.—The caſe which the legiſlature had in view was, where a ſmall ſum is reſerved, as a ground-rent, on a long building leaſe; and the leſſee, in conſequence of the improvement, underlets, reſerving an improved rent. But here the plaintiff and defendant ſtand in the relation of landlord and tenant; and in *Stone* v. *Greenwell*, *M.* 24 *Geo.* 3. B.R. Lord *Mansfield* ſaid, as the parties ſtood in the relation of landlord and tenant, the former was liable, under this act of parliament, to pay this expence. GROSE, J. —It does not appear to me that the ſtatute is merely confined to building leaſes; the words of the act are ſo framed as to comprehend other caſes. The ſtatute ſays that the owner of the improved rent ſhall pay: but in this caſe there is only one rent reſerved, and that is payable to *Winter*; he, therefore, is liable to pay this expence.—Poſtea to the plaintiff.

So alſo in this caſe it was held, that the owner of the improved rent, not of the ground-rent, is liable to pay the expences of a party-wall, built under the 14 *Geo.* 3. c. 78.: alſo that the three months' notice required by ſ. 38. is only neceſſary where the perſon, who, at the time when it is neceſſary to build, &c. is liable to pay, cannot agree with the owner of the adjoining houſe.—On the trial of an action of aſſumpſit to recover for half of the expence of a party-wall between the plaintiff's and defendant's houſe, built by the former, under the ſtat. 14 *Geo.* 3. c. 78. ſ. 41. a ſpecial caſe was reſerved for the opinion of this Court, as follows: On the 18th of November, 1788, the defendant entered into an agreement with *W. Pateman* for a building leaſe of a piece of ground adjoining to the plaintiff's houſe in Princes-ſtreet, Weſtminſter, whereon was ſtanding a meſſuage and other buildings, for ſixty-one years, to commence from the 29th of September then laſt, at the yearly rent of 8l. free from all deductions whatſoever,

Peck v. Wood, Hil. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 130.

whatſoever, whether parliamentary or parochial, then or thereafter to be impoſed or aſſeſſed either on the landlord or tenant; and it was agreed that the defendant ſhould immediately proceed to pull down the premiſes, and erect thereon at leaſt one good ſubſtantial brick dwelling-houſe, with neceſſary convenient out-houſes and offices, &c. and to lay out and expend in the erection of ſuch new building 300l. at leaſt. Purſuant to this agreement a leaſe of the premiſes was granted and executed in January, 1789, by *Pateman* to the defendant. The plaintiff, previous to the defendant's entering into the agreement with *Pateman* for the leaſe, had pulled down the old wall, which was ſtanding between his (the plaintiff's) houſe and the houſe and premiſes which the defendant took upon leaſe as aforeſaid. On the 29th of September, 1788, the party-wall was begun to be built; and on the 17th day of January following it was finiſhed. In June, 1790, the defendant let the houſe, held of *Pateman*, to *J. Beach*, at the yearly rent of 31l. 10s.; the land-tax and ſewers'-tax deducted. It was abſolutely neceſſary that the old wall ſhould be pulled down. The defendant enjoys the improved rent; and *Pateman* is ſtill the ground landlord. The plaintiff did not give three months' notice in writing to *Pateman*, the then owner and ground landlord of the houſe and premiſes, which were afterwards leaſed to the defendant, prior to his pulling down the party-wall; but he applied to *Pateman* for that purpoſe, who agreed that it ſhould be pulled down, if *Hawkins*, the then tenant, would conſent; and *Hawkins* did conſent. The new party-wall is built agreeably to the directions of the ſtatute 14 *Geo.* 3. c. 78. The defendant has the benefit of the party-wall, and that in a greater degree than the plaintiff; his houſe extending farther back than the plaintiff's.—PER CURIAM: In this caſe *Pateman* is the owner of a ground rent of 8l. *per annum*, and the defendant of the improved rent of 31l.; the latter, therefore, is the perſon who ought to, and whom the legiſlature has, in direct terms, ſaid, ſhould pay a proportionable part of the expence of the party-wall. Nor is there any foundation for the objection, that the defendant ought to have had three months' notice (1). The plaintiff ſeems to have complied with the requiſitions of the act of parliament. The notice required is three months before the beginning to build: but, at that time, the defendant had no intereſt in the premiſes; and *Pateman*, in whoſe ſituation the defendant is now placed, actually knew of the plaintiff's intention to build the party-wall, and, to a certain degree conſented to it. No

(1) The words of ſec. 38. are, *in caſe the owner of the adjoining houſe cannot agree.*

further

further notice, therefore, to him was neceſſary; and the defendant is not more entitled to notice than *Pateman*.—Poſtea to the plaintiff.

Sangſter, *v.* Birkhead, Tr. Ter. 38 Geo. 3. B. R. 1 *Pul. & Boj.* 303.

But if the leſſee of a houſe at a rack-rent, underlet it at an advanced rent, he is liable to contribute to the expences of the party-wall.—In replevin of goods and chattels. Avowry for rent in arrear, and iſſue thereupon. The caſe was as follows: One *Woodward* and his wife being ſeiſed in fee of a houſe in London, by leaſe, bearing date the 29th of March, 1777, demiſed it to the defendant for a term of twenty-one years, which expired at Lady-day, 1798, at the yearly rent of 44l. deducting the land-tax. The defendant demiſed the houſe for eighteen years and ten months from the 1ſt of May, 1779, to one *Robert Sugden*, at the yearly rent of 60l. alſo deducting the land-tax. In this leaſe amongſt the other uſual covenants on the part of the leſſee, there was one to make "*all needful* "*and neceſſary reparations and amendments*," in which no exception was made as to accidents by fire, nor was there any covenant on the part of the leſſee to inſure. The leaſe was aſſigned by *Sugden* for a valuable conſideration, and after ſeveral meſne aſſignments came on the 19th of May, 1787, to the preſent plaintiff; in May, 1795, a fire having happened in the adjoining houſe, by which that houſe was entirely conſumed, and the roof of the plaintiff's injured, the owners of the ſcite of the adjoining houſe being deſirous to rebuild, had the party wall examined by four ſurveyors, and delivered a certificate to the plaintiff, according to 14 *Geo.* 3. c. 78. ſ. 38. that the wall was, by the opinion of the ſaid ſurveyors, condemned as decayed and ruinous. It was accordingly rebuilt, and the plaintiff called upon for a moiety of the expence. This he paid, and deducted out of the rent due to the defendant, who diſtrained for rent in arrear to that amount. A verdict was taken for the defendant, in order to aſcertain the ſum due, ſubject to the opinion of the Court; and THE FIRST QUESTION was, Whether the defendant could be conſidered as the owner of the improved rent within 14 *Geo.* 3. c. 78. ſ. 41? THE SECOND, Whether, under the terms of the leaſe, the plaintiff was not bound to repair the wall at his own expence, or whether he is relieved from the performance of his covenant by 14 *Geo.* 3. c. 78? But the Court ſaid, they could not meddle with the ſecond queſtion, as the legiſlature certainly never meant to incumber itſelf with the covenants which parties might make with each other.—PER CURIAM: EYRE, Ch. J.: The leading object of the legiſlature was to make the owner of the improved rent liable, as oppoſed to the ground landlord. But though that may have been the leading object, yet the expreſſions of the act being ſuch as they are, we muſt deal with them as well as we can, and find an owner of the improved rent in all caſes, though there ſhould be no ground

rent reſerved. Here the original landlord made a leaſe for twenty-one years to a perſon who again underlet the premiſes. Who then is the perſon to be conſidered as the owner of the improved rent, but the man who on all the ſubſiſting leaſes has the beſt rent? But, whether he be the perſon or not, I have much doubt, as the queſtion now ſtands, if the defendant can avail himſelf of the objection which he has taken. I think that it was intended by the legiſlature that the tenant ſhould pay a moiety of the expence to the perſon building the wall, and reimburſing himſelf by deducting the amount out of the rent of his immediate landlord, leaving it to him to make his claim on ſuch other perſons as he may think liable. That appears to me the beſt conſtruction for putting the buſineſs in a practicable ſhape. I ſhould incline to that opinion, even if it were made out that the covenant on the part of the tenant to repair included this caſe: for though the conduct of the tenant might be a breach of covenant, it would be fitter that the damages ſhould be ſettled in an action of covenant, than to break in on the rules eſtabliſhed by the ſtatute. It is eaſy to ſee, that this is an ill-penned law, and its meaning is left uncertain; but in the preſent caſe I do not know how to determine, who is the owner of the improved rent, if it be not the perſon who takes the beſt rent. Poſſibly it may be ſaid, that *Woodward* and the defendant ſhould pay in certain proportions; let them, however, ſettle that in ſuch actions as they may think fit to bring. I know no way of executing this law, if we enter into all the derivative claims of different landlords. If the tenant pays the money, let him reimburſe himſelf, and leave the other parties to diſpute among themſelves.—BULLER, J. I agree in opinion with my lord, and think his conſtruction of the act clear and intelligible. There are three parties in this buſineſs—the man who built the wall, the tenant, and the tenant's immediate landlord. The owner of the adjoining houſe purſued the directions of 14 *Geo.* 3. c. 78. which gave him a right to call on the plaintiff for a moiety of the expence; that being ſettled, how does the caſe ſtand between the tenant and his landlord? I agree that we muſt conſider whether the landlord be the owner of an improved rent: but in this caſe he has an improved rent, ſince he receives more than the perſon of whom he took the premiſes. And if the landlord has the improved rent he certainly is liable, though there be only one year of the term to come. As to the queſtion, Whether the expence can be apportioned, that does not ariſe here; but if any thing could be found to warrant an opinion thrown out by Lord *Mansfield*, in *Stone* v. *Greenwell*, that the parties might be liable to a rateable proportion in ſome caſes, it would tend much to the advancement of juſtice. The building a party-wall is certainly a great improvement to the premiſes, and every perſon intereſted in the fee and receiving a benefit

a benefit from it ought to contribute.—HEATH, J. The legiſlature ſeems to think that there muſt be an owner of an improved rent in reſpect of every houſe; and we need not look further than the landlord immediately above the tenant who pays.—ROOKE, J. agreed.

But the leſſor of a houſe at rack rent *(there being no other perſon entitled to any kind of rent)* is liable to contribute to the expences of a party-wall, though the leſſee has improved the houſe demiſed. In replevin: the caſe was as follows: The premiſes, for which the rent was claimed, conſiſted of a dwelling-houſe, &c.; and for ſome few years before, and down to the 22d of March, 1787, the plaintiff and his partner, *W. Galley*, ſince deceaſed, occupied the premiſes, and carried on the buſineſs of ſtock-brokers and lottery-office keepers there, at the annual rent of 90l. Mr. *Blount* being ſeiſed in fee of the premiſes, by indenture, dated the 22d of March, 1787, leaſed them to the plaintiff and *Galley* for a term of 60 years from the 25th of December then laſt, at the annual rent of 100l. The leaſe contains a covenant for payment of the rent of 100l. "without any deduction or abatement for, or by means of any taxes, rates, aſſeſſments, contributions, *impoſitions*, *payments*, *or charges* whatſoever that now are, or ſhall, or may, be charged or impoſed upon the premiſes, or on Mr. *Blount*, in reſpect of the ſame by authority of parliament, or otherwiſe howſoever, the land-tax only excepted;" and alſo a general covenant (1) to repair the premiſes. At the time of granting this leaſe the premiſes were greatly out of repair, and ſoon afterwards the leſſees, *Beardmore* and *Galley*, made conſiderable repairs and alterations therein, and expended about the ſum of 700l. In the end of the year 1795, and beginning of 1796, the wall between the houſe and the adjoining houſe was pulled down by the owner of the adjoining houſe, who built a new party-wall. The expence, which the 41ſt ſection of the ſtatute of 14 *Geo.* 3. c. 78. directs ſhall be borne by the owner of the improved rent of the adjoining building or ground, and to be paid by the tenant in poſſeſſion to the perſon at whoſe expence a new party-wall ſhall be built, amounted to 60l. 8s. 8d. which ſum was paid by the plaintiff to the perſon by whom the party-wall was built before the time of the diſtreſs, and notice thereof was given to the defendant and Mr. *Blount*. By agreement between the plaintiff and his co-leſſee *Galley*, dated 6th of February, 1796, reciting that they intended to diſſolve their parnerſhip, the plaintiff undertook to convey his ſhare and intereſt in the dwelling-houſe and premiſes to *Galley*,

Beardmore v. Fox, Ea. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 214.

(1) This covenant does not vary the queſtion. See *Sankſter* v. *Birkhead*, *Boſ. & Pul. ante*, 193.

from the 21ſt of April then next, for the ſum of 1000l. On the 6th of March, 1796, *Galley* died. In May, 1796, *Galley's* executors cauſed the entire entereſt in the leaſe and premiſes to be put up to ſale by auction, and the ſame was bought by the plaintiff for 577l. 10s. and the plaintiff ſtill continues to carry on the buſineſs in them. In Auguſt, 1797, *Galley's* executors conveyed back to the plaintiff the intereſt which *Galley* took in the premiſes under the agreement of the 6th of February, 1796, and paid him the ſum of 422l. 10s. being the difference between the ſum of 1000l. mentioned in the agreement, and the ſum of 577l. 10s. In conſequence of the pulling down and rebuilding of the party-wall ſome expence was neceſſarily incurred by the plaintiff, and he took that opportunity to make further repairs and alterations, and upon the whole he expended upon the premiſes at that time about 800l. in addition to the ſum which he and *Galley* had before laid out thereon. *The premiſes would now let for a ſhop at the annual rent of from* 180*l. to* 200*l. and the ground whereon they ſtand, independently of the buildings, would let for buildings at the rent of* 100*l. a-year.* THE QUESTION for the opinion of the Court was, Whether, upon the true conſtruction of the ſtatute of 14 *Geo.* 3. c. 78. ſ. 41. *Blount* was the owner and perſon entitled to the improved rent of the premiſes, and conſequently liable to bear the expence of the party-wall. AND THE COURT were of opinion, that under this act the expence of the party-wall muſt be borne by Mr. *Blount*, the landlord; that if they were to put a different conſtruction on the ſtatute, every leſſee at rack-rent, who happened to improve the houſe demiſed to him, would be liable to ſuch expence in conſequence of his improvements, which was highly unreaſonable. And that, if it were proper to make any alteration in the law in this reſpect, it could only be effected by the legiſlature.

The caſe of the London wharfs, Hil. Ter. 6 Geo. 3. In the Exch. 1 *Bl. Rep.* 581.

London wharfs.]—Wharfs muſt be aſſigned in open places only.—In 1762 the king, upon the application of the principal merchants of London, in number about 800, iſſued a commiſſion to certain perſons therein-named to aſſign and ſet out fit and convenient places, for extending the preſent legal wharfs in the port of London; upon a ſuggeſtion that the preſent wharfs were not ſufficient for the purpoſes of trade and navigation. 24 January, 1763, they returned a large extent of ground, including the Tower Ditch, or ſo much of it as his Majeſty ſhould not think fit to reſerve, for the public ſervice. 11 February, 1763, this return was quaſhed by conſent, in this court, for uncertainty; but the Court were clearly of opinion, that the expedience of an extenſion was wholly in the breaſt of the crown. After many hearings before the lords of the treaſury, and diſputes with the commiſſioners of the cuſtoms, 7th March, 1765, another commiſſion iſſued, which impow-

impowered the commiſſioners to aſſign a certain ſpot, in the pariſh of St. Katherine's, between Irongate Stairs and the king's brew houſe, for this purpoſe; ſuch extenſion being neceſſary and expedient. The commiſſioners, 19th April, 1765, return and aſſign a part of the ſaid ſpot, ſetting forth its ſituation and dimenſions, to be, from thenceforth, legal wharfs, on condition they be cleared in ſuch a time, and make many regulations, for the benefit of trade thereon. In Eaſter term, 1765, application was made to the Court, to ſtop the filing of the ſaid return, till all parties could be heard upon it; and, accordingly, the caſe was argued, on two ſeveral days, in Trinity term, by ſeveral counſel for the city of London, the proprietors of the old legal wharfs, the proprietors of ſufferance wharfs, and the inhabitants of St. Katherine's, *who all deſired the commiſſion and return to be quaſhed*; and by two counſel (1) for the merchants and commiſſioners, *who prayed the ſame to be filed and allowed:* the attorney and ſolicitor general likewiſe attending, to maintain the rights of the crown, if they ſhould be impeached; but they declared themſelves ſatisfied with the defence made by the merchants' counſel.—ON THIS ARGUMENT it was urged, FIRST, that though by the law of nature and the civil law, the ſhores of the ſea and navigable rivers were free and open to every body; yet, in all nations which have built their policy on the feodal laws, ſuch ſhores, and the tolls ariſing from landing thereon, have always belonged to the ſovereign, as a branch of his royal prerogative, *Crag.* 1. c. 15. ſ. 15. *Feud.* l. 2. t. 56. F. N. B. 113. That in England the king had a right of appointing ports; and having ſuch right, the ſtatute of 4 *Hen.* 4. c. 20. was made to ſtrengthen and confirm that right, "all merchandize ſhall be "charged and diſcharged, in the great ports of the ſea, and "not in creeks and ſmall arrivals:" afterwards the ſtatute of 1 *Eliz.* c. 11. was made, which reſtrains the ſhipping and landing of goods, 1ſt, In point of time, between ſun-riſe and ſun-ſet; 2dly, In point of place; *viz.* ſuch open places, as ſhould be appointed by commiſſion, before the 1ſt of September, 1559. A commiſſion iſſued, 14th June, 1559, and a return, the 28th of Auguſt, 1559, appointing "the places "underwritten to be open lading and diſcharging places," and all others to be aboliſhed; and many regulations are therein made, not mentioned in the ſtatute of commiſſion. In the reign of *Car.* 2. theſe reſtrictions were found to be too narrow, but could not be unlooſed, but by the legiſlature; and, therefore, by ſtat. 14 *Car.* 2. c. 11. ſ. 14. power is given to the crown, from time to time, to aſſign by commiſſion, "*all*

(1) Blackſtone and Wallace.

"*ſuch further places, ports, members, and creeks, as ſhall be* "*lawful for landing and diſcharging goods.*" And all perſons are prohibited to land or diſcharge goods, &c. "*but only upon* "*ſuch* OPEN PLACE, KEY, OR WHARF, *as ſhall be ſo aſſigned,*" unleſs by ſpecial ſufferance from the commiſſioners of the cuſtoms. In 1667, the preſent legal wharfs between the Tower and London Bridge were aſſigned by commiſſion, and the return ratified, by *Car.* 2. 31ſt Auguſt, 1667; and by *Jac.* 2. A. D. 1686. As trade increaſed, a further extenſion grew neceſſary; and this gave riſe to the ſufferance wharfs on the Surrey ſhore, allowed by the commiſſioners of the cuſtoms. THE LEGAL OBJECTIONS to the commiſſion were, 1ſt, That no new commiſſion can iſſue, but, in ſuch caſes, where none has iſſued before; or where the old wharfs are become unfit and uſeleſs. 2dly, That the commiſſioners are intereſted or partial; ſome of them having petitioned for the commiſſion. 3dly, That ſome commiſſioners are deſcribed by their offices, not their names; and the Court cannot take judicial notice who thoſe officers are. 4thly, That the commiſſion has determined the expedience of an extenſion, and has not left the commiſſioners to judge of it. 5thly, That the commiſſion is to appoint fit and convenient wharfs; whereas the act of *Car.* 2. ſays, that the appointment ſhall be, of lawful wharfs. 6thly, That the commiſſion has determined the particular ſpot, and left nothing to the diſcretion of the commiſſioners; whereas the word aſſign implies an election; which it was contended was illegal, and contrary to all precedent; particularly that of Dover harbour, 5 *Geo.* 2. 7thly, That the commiſſion hath departed from the powers of the ſtatute, *Car.* 2. in not directing the commiſſioners to aſſign open places. THE OBJECTIONS to the return. 1ſt, That it is uncertain, becauſe it has not ſtated, whether the ground be open, or covered with buildings. 2dly, It has, in fact, aſſigned a ſpot, which is, in part, covered with buildings. 3dly, That the place aſſigned is unfit in its preſent ſtate. Some part of it cannot be rendered of the intended width, without encroaching on the river. And the aſſignment muſt be abſolute at the time, and not on condition, that the place be afterwards rendered fit. 4thly, That a duplicate of the former certificate ſhould have been laid before the commiſſioners according to the uſual practice. 5thly, That part only of the ground mentioned in the commiſſion is returned to be fit: the reſt ſhould have been returned unfit. 6thly, That the commiſſion is exceeded, by making regulations. No ſuch power given in this commiſſion, though there was in that of *Car.* 2. And even in that it was illegal, as not being warranted by the ſtatute; but was overlooked from the emergency of the times, being immediately after the fire of London.

7thly,

7thly, That the commiſſioners have declared all keys unlawful, except thoſe contained in this and the former certificate. That this repeals an act of parliament which eſtabliſhes the wharfs above bridge, which are contained in neither of the certificates.—THE COURT TOOK TIME TO CONSIDER; and now, PARKER, Ch. Bar. delivered the opinion of the Court. We are all of opinion, that this commiſſion is not well founded. The deſignation of ports is part of the king's prerogative. He might make regulations therein by common law in order to ſecure his revenue: yet, without an act of parliament, he could not impoſe new duties. To prevent frauds upon the revenue, the ſtat. 4 *Hen.* 4. c. 20. was made; but this, being found inadequate, produced the 1 *Eliz.* c. 11. which reſtrains the aſſignation of wharfs and keys to open places only. This was followed by 14 *Car.* 2. c. 11. which gives farther powers, but expreſsly prohibits all lading or unlading, except upon open places. The power of the crown to iſſue this commiſſion depends entirely upon theſe ſtatutes: and we think that power not well purſued. Not one of the words, open place, key, or wharf, is uſed in this commiſſion. It is, therefore, materially different from all former precedents. And, as it does not purſue either the power or the precedents, it is not warranted, and muſt be quaſhed. The return itſelf does not find the ſpots aſſigned to be open places; and Lord *Hale* (in a MS. in Lincoln's-Inn library) lays it down, that private houſes cannot be aſſigned for wharfs. — The commiſſion and return were quaſhed.

Cuſtom in actions.]—An action againſt a *feme covert*, as ſole trader, may not be removed by *habeas corpus* from the city courts.—It was moved for a *procedendo*; the action, which was removed from the mayor's court in London by *habeas corpus cum causâ*, being there brought againſt the *feme covert* and her huſband on the cuſtom of London, on a ſuggeſtion that ſhe was a ſole trader, and a rule to ſhew cauſe was granted, which was afterwards made abſolute, no cauſe being ſhewn.

Pope *v.* Vaux and wife, Ea. Ter. 16 Geo. 3. C B. 2 *B. & R. Rep.* 1060.

A cauſe was removed from the Lord Mayor's court by an *habeas corpus cum causâ*, to which a return was made, ſtating a cuſtom under which the defendant was ſued and arreſted: error was ſuggeſted upon the face of the proceedings below; but the Court would not ſtay the *procedendo* merely on that ground, but ſaid they would leave defendant to his writ of error.—A proceeding was inſtituted in the Lord Mayor's court of the city of London by the plaintiffs againſt the defendants to ſecure the payment of two bills of exchange, bearing date the 17th of November, 1795, and accepted by

Horton, *et al.* *v.* Beckman, *et al.* Tr Ter. 36 Geo. 3. K.B. 6 *Ter. Rep.* 760.

the defendants, for the ſum of 393l. 18s. 9d. each payable to the plaintiffs four months after date; on which the defendants were arreſted and obliged to put in bail, who were bound by recognizance to have the bodies of the defendants forthcoming on the day of payment to anſwer the demand of the plaintiff, and in default thereof to pay the debt. The defendants ſued out a writ of *habeas corpus cum cauſâ*, directed to the mayor, aldermen, and ſheriffs of London, returnable into this court, to which a return was made: *(inter alia)* "That there is a "cuſtom within the city, that if any perſon *reſiding* within "the ſaid city or the liberties thereof ſhall become indebted to "any other perſon *reſiding* within the ſame city or liberties for "any contract, traffic, or merchandize, within the ſaid city or the "liberties, by obligation or otherwiſe, payable at a future "day, and that ſuch debtor is ſuſpected and likely to withdraw "himſelf or herſelf out of the ſaid city, and become fugitive "before the day of payment, then ſuch creditor hath been "accuſtomed to affirm and have his bill original in the Lord "Mayor's court againſt any debtor, for better ſecuring the "payment of ſuch debt, and, by virtue of the ſaid bill, may "cauſe ſuch debtor to be arreſted to anſwer the ſaid bill ori-"ginal, or find better ſecurity for the payment of ſuch debt "on the day of payment, which ſaid cuſtom was, by autho-"rity of parliament of 7 *Rich.* 2. &c. confirmed, &c. And "further, that on the 25th of January, 36 *Geo.* 3. *Thomas* "*Horton* and *John Horton* (named in the writ of *habeas corpus)*, "reſiding and carrying on trade and merchandize within the "ſaid city, came, &c. and ſuggeſted and approved that *F. Beck-*"*ham* and *N. Gaumont*, who alſo reſided and carried on trade "in the ſaid city of London, were indebted to them for goods "ſold and delivered in the ſaid city of London, in the ſum of "787l. 17s. 6d. payable at a future day, *and that the ſaid* F. "Beckham *and* N. G. *were likely to withdraw themſelves and* "*their effects from and out of the ſaid city of London and the* "*juriſdiction of the ſaid court, and to become and be fugitive*; "and then and there, according to the cuſtom of the ſaid city, "affirmed a bill original in the ſaid court againſt the ſaid "*F. B.* and *N. G.* in a plea, &c. the tenor of which ſaid "bill followeth in theſe words; viz. Frederick Beckman *and* "Nicholas Gaumont, *defendants, at the ſuit of* Thomas "Horton *and* John Horton, *plaintiffs, in a plea that they* "*render to the ſaid plaintiffs the ſum of* 787*l.* 17*s.* 6*d. or find* "*better ſecurity for the payment of the ſaid ſum at a certain day* "*to come, according to the cuſtom of the city of London, for that* "*the ſaid defendants are ſuſpected before the day of payment to* "*become fugitive.*" And further, that the ſaid *F. B.* and "*N. G.* were taken and arreſted at London aforeſaid on the "ſaid 25th of January, &c. and are detained by virtue of the "ſaid

"ſaid bill original, &c." A rule was obtained, calling on the defendants to ſhew cauſe why a writ of *procedendo* ſhould not iſſue to carry this cauſe back to the Lord Mayor's court: and, on ſhewing cauſe, it was contended, that the cuſtom ſtated on the return to the *habeas corpus* was unreaſonable, and could not be ſupported. 1ſt, Becauſe it is an arreſt by an inferior juriſdiction without any ſummons; and therefore there is no opportunity allowed to the party of ſhewing his privilege, or other legal objection to the arreſt; and that ſuch a cuſtom was bad. 7 *Vin. Abr.* 190. pl. 11. 17 *Vin.* tit. Proceſs, letter (D) pl. 2. p. 538. In *Ward* v. *Ellyn*, *Cro. Jac.* 261. Judgment was reverſed on error, becauſe the firſt proceſs in an inferior court was a *capias*, whereas it ought to have been a ſummons. 2dly, Inaſmuch as the ground for arreſting the party, and compelling him to find ſureties, is not his probable inſolvency, but merely the likelihood of his changing his place of abode and leaving the city. And it is injurious to ſubject the party to an arreſt merely on a ſuppoſition that he is likely to become fugitive, much leſs that he is ſuſpected to become ſo (1). That even if the cuſtom were good in point of law, the return could not be ſupported, becauſe it appeared upon the face of it that the cuſtom had not been purſued. The cuſtom ſtated being to arreſt, &c. if the party "be ſuſpected and likely to become fugitive," whereas the plaintiffs only alleged in their bill that the defendants are ſuſpected to become fugitive, without alleging that they are likely to become ſo.—Lord KENYON, Ch. J. My doubt is upon the point that *the plaintiffs' bill does not ſeem conformable to the cuſtom ſtated in the return*, and I have alſo another doubt upon the form of the plaintiffs' bill as ſet forth; for it does not ſtate that the cauſe of action aroſe within the juriſdiction of the Mayor's court, which is eſſentially neceſſary in every declaration in an inferior court. As to the other objections which have been made, I do not feel myſelf preſſed by them. It is no objection to a cuſtom that it is not conformable to the common law of the land; for it is of the very eſſence of a cuſtom that it ſhould vary from it.—IT WAS THEN SAID, that the ſame doubt was ſuggeſted in the caſe of *Sherborn* v. *Boſtock*, *Fitzg.* 51. which was upon another cuſtom of the city. But it was anſwered by *Raymond*, Ch. J. and aſſented to by the Court, that the cuſtom need not be ſet forth in the declaration: that if ſuch were the uſual manner of declaring in London they could not meddle with the matter as then before

(1) *Vide* the cuſtom as ſtated in *Long. quinto Ed.* 4. 30. referred to in the caſe of the city of London, 8 *Co.* 126. and *Bro. Abr.* tit. London, pl. 24. where it is ſtated to be where a man is fugitive.

them,

them, but muſt proceed to judgment, and then it would properly be examinable on a writ of error.—Lord KENYON, Ch. J. My doubts are not removed: but according to the caſe laſt cited, perhaps the proper way of taking advantage of any defect on the face of the proceedings below will be by writ of error.—Therefore let the *procedendo* go.

Woolley *v.* Cloutman, Mic. Ter. 20 Geo. 3. B.R. 1 *Doug.* 244.

Court of requeſts.]—Actions for uſe and occupation cannot be maintained in the court of Conſcience in London.—After a verdict for the plaintiff, in an action in this court, for uſe and occupation, the damages being only 11. 7s. 6d. A rule was obtained to ſhew cauſe, why the defendant ſhould not have leave to ſuggeſt on the roll, that the damages recovered were under 40s. and that the defendant, at the time when the action was brought, was an inhabitant, &c. in the city of London, and liable to be ſued in the court of Conſcience there, under the ſtatute, 3 *Jac.* 1. c. 15. That the ſtatute (ſ. 4.) enacts, that if it ſhall, in any action of debt or *aſſumpſit* proſecuted any where out of the ſaid court of Requeſts, appear that the debt to be recovered doth not amount to 40s. and the defendant ſhall prove by ſufficient teſtimony, or his own oath, that he was inhabiting and reſiant in London, or the liberties thereof, when the action was commenced, the plaintiff ſhall not have any coſts of ſuit, but ſhall pay the defendant his coſts. But, by ſ. 6. it is provided, that nothing in the act ſhall extend to "any debt for any rent upon any leaſe of lands "or tenements, or any other real contracts, or any other "debt that ſhall ariſe by reaſon of any cauſe concerning a "teſtament or matrimony, or any thing concerning or pro-"perly belonging to the Eccleſiaſtical court." In ſupport of the rule it was ſtated, that ſuch actions had been uſually brought in the city court of Conſcience, and contended, that the words "other real contracts," meant covenants for rent by deed, and that the exception only extended to actions for rent upon ſpecialties. Lord MANSFIELD—It may have been uſual to bring ſuch actions in the city court; if the defendant makes no objection, the cauſe proceeds of courſe; but there is no inſtance where the point has been litigated, and the juriſdiction allowed. The title may come in queſtion in this ſort of action; if brought, for inſtance, by a deviſee or purchaſer. We think this caſe is within the exception. BULLER, J. ſaid, the conſtruction put upon the words "real contracts," was very improbable, becauſe at the time when the act paſſed it was not neceſſary that leaſes ſhould be in writing, much leſs by deed, which even yet is not required. That before this action for uſe and occupation came to be uſed (after 11 *Geo.* 2. c. 19. ſ. 14.) it was common to bring debt for rent on parol leaſes.—The rule diſcharged.

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The ſtat. 14 *Geo.* 2. c. 10. which enables certain perſons to ſue for debts under 40s. in the court of Requeſts in London, does not extend to caſes where the plaintiff recovers leſs than 40s. in a ſpecial action on the caſe for the breach of an agreement.—On the trial of this cauſe, which was a ſpecial action on the caſe for not delivering a certain quantity of lemons according to an agreement, the plaintiff recovered a verdict for 18s. 3d. On a motion on the part of the defendant, to enter a ſuggeſtion on the roll, that the cauſe of action aroſe within the city of London, and that the defendant was liable to be ſummoned to the court of Requeſts in London. Two objections were taken to the rule: 1ſt, That this caſe was not within the act; the plaintiff's demand not being a certain liquidated ſum, but neceſſarily uncertain, becauſe it aroſe out of the breach of an agreement; and that the act only applied to caſes where the demand was certain, the words being "*any plaintiff who ſhall have any debt owing to him, not exceeding 40s.*" 2dly, That the plaintiff was not an inhabitant within the city of London; his place of reſidence being at Whitechapel.—PER CURIAM: The firſt is a deciſive anſwer to this application. This is an action on the caſe for the non-delivery of goods according to the contract, and not an action to recover the value of the goods. And the ſtatute does not apply to ſuch caſes as the preſent, but only to caſes where a certain ſum is due. The other point ſeems alſo to be againſt the defendant, namely, that the plaintiff is not an inhabitant within the city of London. It is not neceſſary, however, to give any judicial opinion upon that point, as the other alone is deciſive againſt this application.—Rule diſcharged.

Jonas *v.* Greening, Hil. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 529.

And a citizen and freemen of London, not reſident therein, having a demand under 40s. for goods ſold againſt another citizen and freeman who is reſident, is not bound to ſue in the court of Requeſts, purſuant to the 14 *Geo.* 2. c. 10.—The plaintiff obtained a verdict for 34s. for goods ſold and delivered; and a motion was made for leave to enter a ſuggeſtion on the roll, that at the time of commencing the ſuit *the plaintiff and defendant were citizens and freemen of London, and that the defendant reſided within the juriſdiction of the court of Requeſts*, and amenable thereto; and that the tranſaction which was the ſubject of the action aroſe within the ſame juriſdiction: but it appeared from the affidavits that the plaintiff did not reſide within the ſame. The 14 *Geo.* 2. c. 10. enacts, "that it may be lawful for every citizen and "freeman of the city of London, and every other perſon in- "habiting within the ſaid city or the liberties thereof, who "ſhall have any debt owing unto him, not exceeding 40s. "by any perſon whatſoever, inhabiting or ſeeking a livelihood "within the ſaid city or liberties thereof, to cauſe ſuch debtor "to

Webb *v.* Brown, Hil. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 535.

" to be warned or ſummoned to appear before the commiſ-
" ſioners of the court of Requeſts, holden in the Guildhall,
" &c." who are thereby ordered to make ſuch order between the parties as they ſhall find to ſtand with equity and good conſcience. Againſt the rule it was urged, that the word inhabiting in the ſtatute of *Geo.* 2. applied as well to the deſcription of citizen and freeman as to all other perſons to whom the act was applicable; for that unleſs both parties were alike amenable to the proceſs of the court of Requeſts, injuſtice might be done, as proceſs could not be executed out of the juriſdiction.—AND PER CURIAM: It is plain, from the words and general ſcope of the act of *Geo.* 2. that it was only intended to extend to perſons *reſiding within* the juriſdiction of the court of Requeſts, and that the word inhabiting muſt be taken to apply as well to citizens and freemen as to every other perſon there deſcribed. If this were otherwiſe there might be a failure of juſtice in many caſes; and that Court could not have enforced payment of coſts in the preſent caſe, if they had adjudged the plaintiff's demand to be unfounded.—Rule diſcharged.

Brooks v. Moravia, Mic. Ter. 34 Geo. 3. B.R. 2 *Hen. Black.* 220.

So alſo in this caſe it was held, that the court of Requeſts for the city of London has no juriſdiction in a ſuit, unleſs both the plaintiff and defendant be reſident within the city.

Lord's Day.

The King v. John Younger, Mic. Ter. 34 Geo. 3. B.R.

THE ſtatute 29 *Car.* 2. c. 7. does not prohibit a baker baking dinners for his cuſtomers on a Sunday (1). This was a conviction on the ſtatute 29 *Car.* 2. c. 7. againſt the defendant, a baker, for having, on Sunday the 17th of November, 1793, baked meat and paſtry. It was objected, that the defendant had not committed any offence within the ſtatute 29 *Car.* 2. c. 7. which enacts that " no tradeſman, artificer, workman, labourer, or other perſon whomſoever, ſhall do or exerciſe any worldly labour, buſineſs, or work of their ordinary callings, upon the Lord's-day (works of neceſſity and

(1) But the buſineſs of a baker on Sunday, in and within 12 miles of London, is now reſtricted by the ſtat. 34 *Geo.* 3. c. 61. to the ſelling of bread only: and to the baking of meat, puddings, or pies only, between nine in the forenoon and one in the afternoon.

charity

charity only excepted)" under the penalty of 5s.; for that this was a work of neceſſity and charity, within the exception of the act. The *King* v. *Cox*, 2 *Burr.* 787, was cited, where Lord *Mansfield* ſaid, "This ſort of baking or dreſſing meat on a Sunday was not an offence within the act;" and *Foſter*, J. thought it "within the exception of works of neceſſity and charity; and alſo within the ſubſequent proviſo, as being a cook's ſhop.—PER CURIAM: The conſtruction put upon this act in *R.* v. *Cox*, is the right one; the caſe of bakers, though not particularly mentioned in the exception of the act, is within the reaſon of it. Though, by this means, ſome few journeymen bakers are kept to work on a Sunday, it is for the general convenience of the public, becauſe it enables the reſt of the community to attend public worſhip, which they could not have an opportunity of doing if they had no means of having their dinners dreſſed from home. But the baking of bread in the ordinary courſe of a baker's buſineſs, ſuch as loaves or rolls, is an offence under the act.

But this offence can be committed but once in the ſame day; and if a juſtice of the peace proceed to convict an offender in more than one penalty for the ſame day, it is an exceſs of juriſdiction, for which an action will lie before the convictions are quaſhed.—This was an action againſt a juſtice of the peace for levying three more penalties, as for three more offences, on a baker for exerciſing his trade on a Sunday, viz. for baking ſmall hot rolls, contrary to 29 *Car.* 2. c. 7. having already convicted him in one penalty for a ſimilar offence on the ſame day.—THE COURT held that this offence could be committed but once in the ſame day. FOR PER Lord MANSFIELD, Ch. J. On the conſtruction of the act of parliament the offence is, exerciſing his ordinary trade upon the Lord's-day; and that without any fraction upon days, hours, or minutes, it is but one entire offence, whether longer or ſhorter, in point of duration: ſo, whether it conſiſt of one, or a number of particular acts, the penalty incurred by the ſtatute is 5s. There is no idea conveyed, by the act itſelf, that if a taylor ſews on the Lord's-day, every ſtitch he takes is a ſeparate offence; or if a ſhoemaker or carpenter work for different cuſtomers at different times on the ſame Sunday, that thoſe are ſo many ſeparate and diſtinct offences. There can be but one entire offence on one and the ſame day; and this is a much ſtronger caſe than that of killing more hares than one on the ſame day. Killing a ſingle hare is an offence; but killing ten more in the ſame day will not multiply the offence, or the penalty impoſed by the ſtatute for killing one: theſe reputed offences are not the object which the legiſlature had in view in making the ſtatute; but ſingly to puniſh a man for exerciſing his ordinary trade and calling on a Sunday.

Crepps v. Durden, Tr. Ter. 17 Geo. 3. B.R. *Cowp.* 640.

Upon

Upon this conviction the juſtice had no juriſdiction with reſpect to the three laſt convictions.

Lottery.

The King *v.* Edward Trelawney, Ea. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 222.

On a conviction under 22 *Geo.* 3. c. 47. for inſuring a ticket in the lottery, authorized by 25 *Geo.* 3. an objection was taken, that it did not appear that the ticket in queſtion was a ticket in the ſtate lottery. And The Court ſaid, that this objection muſt be fatal. That the only mention of the lottery in the information was relative *to the time of drawing* the ticket, without ſtating that the ticket on which the inſurance was made was a ticket in the ſtate lottery.—Conviction quaſhed.

The King *v.* Samuel Hawkſworth, Mic. Ter. 27 Geo. 3. B.R. 1 *Ter. Rep.* 450.

An unſtamped agreement to ſell a ſhare of a ticket in the lottery before the tickets are depoſited with the commiſſioners, is within the penalty inflicted by the 21ſt ſection of the 22 *Geo.* 3. c. 47.—On a conviction on the lottery-act 22 *Geo.* 3. c. 47. for ſelling an unſtamped ſhare of a ticket, the fact appeared to be that the defendant had agreed to ſell a ſixteenth part of a ticket; and on being paid 19s. 6d. for the ſame, gave the following paper-writing: "*Byfield* and *Hawkſworth*, Charing Croſs, received July 11th, 1786, the ſum of nineteen "ſhillings and ſix-pence, being in conſideration for one ſixteenth ſhare of a lottery ticket in the enſuing Engliſh lottery, which I promiſe to deliver to the bearer hereof on the re-delivery of this receipt, before the drawing of the ſaid "lottery. For ſelf and Co. *Samuel Hawkſworth.*" The defendant contended, that agreements for the ſale of ſhares of tickets, before ſuch tickets are iſſued, are not required to be upon *ſtamped* paper.—Ashhurst, J. This act of parliament was paſſed in order to prevent a multiplicity of ſhares being ſold before the tickets were delivered; for, before the iſſuing of the tickets, the lottery-office keepers might have contracted for the ſale of tickets to a large amount, when, in fact, they were worth nothing: this was the very evil which the act intended to remedy. The legiſlature, therefore, directed that the tickets ſhould be depoſited before the office-keeper ſhould ſell at all. And the depoſit of the ticket is a ſecurity to the purchaſer. But if it were permitted to ſell ſhares of any tickets before they were delivered out, a man might practiſe with impunity every fraud which the act was intended to prevent.—Buller, J. No ſhare can be ſold or agreed for but on ſtamped paper. Therefore it is immaterial whether this agreement

agreement was before the delivery out of the tickets or afterwards. By the 15th and 16th ſections two things are required to be done, that the ticket ſhall be depoſited, and that the ſhares ſhall be ſtamped: the defence ſet up is, that becauſe the defendant has offended in both theſe particulars, he ought not to be puniſhed for either. According to the true conſtruction of the ſtatute all tickets are within it. If a party ſell a ſhare without depoſiting the ticket, he is guilty of an offence within the act; and if he ſell a ſhare on unſtamped paper, he is likewiſe guilty. Then the words "ſo to be depoſited," in the latter ſection, muſt mean any tickets which by the act are directed to be depoſited.

The ſale of lottery tickets, by which the purchaſer is to be entitled to all the benefit of them, except the low prizes, is prohibited and made void by 22 *Geo.* 3. c. 47.—PER CURIAM: The legiſlature had two objects in view: the firſt, that the government and the public ſhould not be injured by individuals ſetting up private lotteries of their own, which were to be regulated by the drawing of the public one, and which might injure the ſale of tickets in the public lottery; and the other, to provide for the ſecurity of individuals, and to guard againſt any impoſition upon them. And the regulations for theſe purpoſes are either that the tickets ſhall be ſold abſolutely, or that they ſhall be apportioned out in ſhares of the whole tickets, not leſs than ſixteenths; but ſtill they were to convey the abſolute intereſt in the ticket or ſhare at all events. And the legiſlature had good reaſon for making theſe regulations, becauſe the value of the reſpective ſhares was eaſily calculated: but if it were competent to individuals to make any other calculations than thoſe mentioned by the act of parliament, it would be an inlet to frauds; for the common ſort of people are not able to enter into ſuch ſort of calculations, and it would be eaſy to impoſe on men of common apprehenſions by ſchemes of this kind, as in this inſtance, by ſaying that *they would be entitled to the chance of all, except the* 10*l. prizes*, though theſe conſtitute the greater part of the prizes in the lottery. Now this caſe does not fall within either of the proviſions allowed by the act. *It is neither the abſolute ſale of a whole ticket, nor of the ſhare of one.* And the general clauſe in the act of parliament declares that all ſales not according to the regulations of the act ſhall be void to all intents and purpoſes. The preamble to the thirteenth ſection is very ſtrong: "In order to prevent all adventuring with "lottery tickets, other than ſuch as ſhall neceſſarily ariſe from "the real and actual ſale of ſuch tickets, and of ſuch ſhares "thereof as are hereby permitted." Now there cannot be any real and actual ſale of a ticket, unleſs it be an abſolute ſale. And as to ſhares, it is expreſsly pointed out by the ſtatute

Deey v. Shee, Tr. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 617.

ſtatute what ſhares are meant. So that it appears that the legiſlature intended to prohibit all adventuring, except by the abſolute ſale of a ticket, or the ſale of a ſhare not leſs than a ſixteenth.

King *qui tam v.* Smith, Mic Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 414.

And the printer of a newſpaper, publiſhing an illegal propoſal for gambling in the lottery, incurs a penalty under the 22 *Geo.* 3. c. 47. ſ. 13. which enacts, that no perſon ſhall ſell the chances of tickets, &c. nor *publiſh any propoſal for it*, under a penalty of 50l. — The beforementioned ſtatute, "in order to prevent all adventuring with lottery tickets "other than ſuch as ariſe from the real and actual ſale of "tickets, and of ſuch ſhares as are thereby permitted, ENACTS "that it ſhall not be lawful for any perſon to ſell the chance "of any ticket, &c. or inſure for or againſt the drawing of "any ticket, &c. *or to publiſh any propoſal for any of the purpoſes aforeſaid*," under the penalty of 50l. for every offence: and on the trial of an action of debt againſt the defendant (who was the printer of the newſpaper called "The World") to anſwer to penalties under the above ſtatute, for having publiſhed the propoſals of two illegal offices in his paper, the jury found a verdict for the plaintiff for both the penalties, ſubject to the opinion of the Court whether the defendant was liable for the penalties.—PER CURIAM: It is objected that the words of this act are too general to affect the printer of a public newſpaper, who has no intereſt in the ſchemes; but, if the legiſlature had been anxious to include public printers, what words, beſides thoſe which they have uſed, could they have inſerted in this act; they have ſaid, "if any perſon ſhall "*publiſh*, &c." not cauſe to be publiſhed, which they would have ſaid, had they intended only to inflict the penalty on the makers of the ſchemes. In this caſe it is expreſsly ſtated, that the defendant publiſhed the propoſals in queſtion; and there is nothing in this act of parliament to induce us to narrow the general conſtruction of the word "publiſh." In proſecutions for libels the printer is undoubtedly anſwerable; if he print the libel, and ſend it forth into the world, he is the publiſher. The intention of the legiſlature was to prevent the circulation of ſuch advertiſements in any way; and this is one offence, as well within the meaning as the words of the act of parliament.—AND LORD KENYON added, he wiſhed to have it underſtood, that the diſtributer of handbills of this effect, would be equally criminal within the meaning of the act.

Mandamus.

Where it lies.]—A mandamus may be granted to the truſtees of a meeting-houſe, to *admit* a diſſenting teacher duly elected. —It was moved for a *mandamus* to be directed to the ſurviving truſtees under a deed of releaſe made by one *Charles Vinſen* to *John Enty*, a diſſenting miniſter at Plymouth, and other truſtees, ſettling a then new-built meeting-houſe, garden, &c. upon the ſaid truſtees, in truſt (amongſt other things) "To ſuffer the meeting-houſe to be for the public worſhip of "God by ſuch congregation of proteſtant diſſenters, com- "monly called *preſbyterians*, as ſhould ſit under and attend the "miniſtry of the ſaid Mr. *John Enty*, or ſuch other preſby- "terian miniſter or miniſters as ſhould in his and their room "ſucceſſively, in all times then coming, be, *by the members "in fellowſhip* of the ſaid, or ſuch-like congregation or con- "gregations, regularly and fairly choſen and appointed to be "the miniſter, preacher or paſtor, to preach in the ſaid "meeting;" requiring them to admit *Chriſtopher Mends* to the *uſe of the pulpit* thereof, as paſtor, miniſter, or preacher there; he, the ſaid *Chriſtopher Mends*, being duly elected thereto.—PER CURIAM: A *mandamus* is a prerogative writ; to the aid of which the ſubject is entitled, upon a proper caſe previouſly ſhewn, to the ſatisfaction of the Court. The original nature of the writ, and the end for which it was framed, direct upon what occaſions it ſhould be uſed. It was introduced, to prevent diſorder from a failure of juſtice, and defect of police. Therefore it ought to be uſed upon all occaſions where the law has eſtabliſhed no ſpecific remedy, and where in juſtice and good government there ought to be one. Within the laſt century, it has been liberally interpoſed for the benefit of the ſubject and advancement of juſtice. The value of the matter, or the degree of its importance to the public police, is not ſcrupulouſly weighed. *If there be a right, and no other ſpecific remedy, this ſhould not be denied.* Writs of *mandamus* have been granted, to admit lecturers, clerks, ſextons, and ſcavengers, &c. to reſtore an alderman to precedency, an attorney to practiſe in an inferior court, &c. Since the act of toleration, it ought to be extended to protect an endowed paſtor of proteſtant diſſenters; from analogy and the reaſon of the thing. The right itſelf being recent, there can be no direct ancient precedent: but every caſe of a lecturer, preacher, ſchool-maſter, curate, chaplain, is in point. The *deed* is the foundation or endowment of the paſtorſhip. The form of

Rex *v.* Barker, *et. al.* Hil. Ter. 2 Geo. 3. B.R. 3 *Burr.* 1265. 1 *Black Rep.* 300. 352.

the inſtrument is neceſſarily by way of truſt: for the meeting-houſe, and the land upon which it ſtands, could not be limited to *Enty* and his ſucceſſors. Many lectureſhips and other offices are endowed by truſt-deed. The right to the function is the ſubſtance, and draws after it every thing elſe as appurtenant thereto. The power of the truſtees is merely in the nature of an authority to admit. The uſe of the meeting-houſe and pulpit, in this caſe, follows, by neceſſary conſequence, the right to the function of miniſter, preacher, or paſtor; as much as the *inſignia* do the office of a mayor; or the cuſtody of the books, that of a town-clerk.—THE COURT propoſed an iſſue to try "Whether Mr. *Hanmer* was or was "not duly elected;" as the cheapeſt and beſt way to put it in. It was then adjourned to the firſt day of this preſent Hilary term, in order that the parties might give an anſwer, "Whe-"ther they would agree to this iſſue;" or "Whether they "would agree to proceed to a new election:" and the parties themſelves to be conſulted, and make their election: but his party finding their election not maintainable in point of law, gave it up, and proceeded more regularly to a new election of him; and as the truſtees ſtill refuſed him admiſſion, a new rule for a *mandamus* was applied for and granted in Eaſter term.

The King *v.* Jotham, *et al.* Hil. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 575.

But where the miniſter of an endowed diſſenting meeting-houſe had been expelled by a majority of the congregation, the Court refuſed a *mandamus to reſtore* him applied for to enable him to juſtify his conduct, becauſe, it did not appear he had complied with all the requiſites neceſſary to give him a *primâ facie* title.—On ſhewing cauſe againſt a *mandamus* to theſe perſons, who were truſtees of a diſſenting meeting-houſe at Bradford, in Wilts, called the *Particular Baptiſts*, to reſtore *John Lloyd* to the office of miniſter of the congregation, and to the uſe of the pulpit, founded on affidavit, ſetting forth the appointment; alſo that there was an endowment for the miniſter for the time being of this meeting-houſe, and that theſe defendants were truſtees; and that *Lloyd*, when he took upon him the office of miniſter, *conceived that the congregation could not remove him without his conſent, unleſs he ſhould miſbehave himſelf, but that the appointment was for life.* It was ſtated from affidavits, that *Lloyd* had behaved with great impropriety and profaneneſs, and had made his pulpit the vehicle of perſonal ſlander on many of the congregation; in conſequence of which a ſpecial meeting was held, when fifty-five of the congregation [which in the whole conſiſted of leſs than one hundred members] agreed upon his diſmiſſal, which was ſignified to him accordingly; and they ſtated an inſtance forty-three years ago of a miniſter being diſmiſſed from this meeting-houſe for immoral conduct. And the affidavits further ſtated, that *Lloyd had not obtained a proper licenſe as required*

required by the act of parliament; *and that amongſt that ſect it is held to be abſolutely neceſſary after a miniſter hath been choſen that he ſhould be ordained by the miniſters of the Baptiſt church, who meet once a year for that and other purpoſes, with which form* Lloyd *had never complied after his election.*—PER CURIAM: There is no doubt but that a *mandamus* lies in theſe caſes, *where there is an endowment*, if a proper caſe be made out. But it is neceſſary for a party applying for a *mandamus* to be reſtored to any office to make out a *primâ facie* title to ſuch office, and ſhew, at leaſt, that he has complied with all the forms neceſſary to conſtitute his right. Here it does not appear that the party applying has gone through all thoſe ceremonies which the particular ſect of which he is a member has made neceſſary. The *King* v. *Barker*, 3 *Burr.* 1265. was the caſe of a *mandamus to admit:* and there is a great deal of difference between that and a *mandamus to reſtore.* The former is granted merely to enable the party to try his right, without which he would be left without any legal remedy. But the Court have always looked much more ſtrictly to the right of the party applying for a *mandamus* to be reſtored. In theſe caſes he muſt ſhew a *primâ facie* title; for if he has been before regularly admitted, he may try his right by bringing an action for money had and received for the profits. Therefore, in order to entitle himſelf to this extraordinary remedy, he muſt lay ſuch facts before the Court as will warrant them in preſuming that the right is in him; whereas here no facts have been ſtated to ſhew the ground of his title. Therefore this *mandamus* ought not to be granted.—Lord *Kenyon* thought that he ſhould have ſhewn alſo his compliance with the requiſites of the toleration act.

A *mandamus* lies to the keepers of the common ſeal of the univerſity of Cambridge, commanding them to put it to the inſtrument of appointment of their high ſteward, purſuant to a grace paſſed in ſenate.—In laſt Trinity term, the ſolicitor-general moved for a *mandamus* to the keepers of the ſeal of the univerſity of Cambridge, to ſet the common ſeal of the univerſity, to an appointment of *Philip* Earl of *Hardwicke* to the high-ſtewardſhip, in the room of his father, deceaſed, upon affidavits, that, by the cuſtom of the univerſity, the election muſt be made by a majority of the voters, in both the regent and non-regent houſes; that the Earls of *Sandwich* and *Hardwicke* were competitors, and that the Earl of *Hardwicke* had a clear majority of 103 to 101 in the non-regent houſe, and afterwards was propoſed to the regent houſe, when (after rectifying a ſmall miſtake between the two proctors, who were ſcrutators there) the numbers of placets and non-placets to Lord *Hardwicke*'s grace appeared to be equal, viz. 108 each; that, after ſome altercations, the vice-chancellor diſſolved the congregation; and afterwards it was diſcovered,

Rex v. Vice-Chancellor, &c. of Cambridge, Ea. Ter. 5 Geo. 3. B R. 3 *Burr.* 1645. 1 *Black. Rep.* 547.

that Mr. *Thomas Pitt*, who, by his ſtanding, ought to have voted among the non-regents, voted among the regents as non-placet; which vote being ſubtracted, there was a majority of one in favour of Lord *Hardwicke*. Lord *Mansfield* directed the rule to ſhew cauſe, why a *mandamus* ſhould not iſſue; 1ſt, to the vice-chancellor, to hold a congregation to receive the declaration of the proctors, in reſpect to the majority; 2dly, to the proctors, to declare how the majority ſtood; and, 3dly, to the keepers of the ſeal, to affix it to Lord *Hardwicke*'s nomination; and that notice be given thereof to the univerſity, and Mr. *Thomas Pitt*.—PER CURIAM: The univerſity, *as a body*, have not thought fit to oppoſe this *mandamus*; but it is oppoſed by all the non-placets, and by ſome of thoſe perſons who have the cuſtody of the common ſeal of the univerſity.—There are three queſtions that ariſe upon this caſe; 1ſt, On the validity of Lord *Hardwicke*'s election? 2dly, If his right be clear, then whether a *mandamus* is a proper remedy? 3dly, If it is, then how it ought to be directed?—FIRST, As to Lord *Hardwicke*'s right. The mode of election is traced back to the year 1524 (240 years ago). The affidavits expreſsly ſwear, "that the mode of electing the high-ſteward "has been by a grace, &c. &c." And to this there is no contradiction: no one doubted it on the 30th of March, the day of the election.—But it is now contended, "that the "election of high-ſteward ought to have been in the ſame "mode as the election of a vice-chancellor." And this is reſted on the ſtatutes of Queen *Elizabeth*.—But there is a vaſt deal of difference between a new charter granted to a new corporation (who muſt take it as it is given), and a new charter given to a corporation already in being, and acting either under a former charter, or under preſcriptive uſage. The latter, a corporation already exiſting, are not obliged to accept the new charter in toto, and to receive either all or none of it: they may act partly under it, and partly under their old charter or preſcription.—Whatever might be the notion in former times, it is moſt certain now, "that the "corporations of the univerſities are lay corporations, and "that the crown cannot take away from them any rights "that have been formerly ſubſiſting in them under old char-"ters, or preſcriptive uſage."—The validity of theſe new charters muſt turn upon the acceptance of the univerſity. When Queen *Elizabeth* gave theſe ſtatutes, the univerſity of Cambridge was of ancient eſtabliſhment, and had many preſcriptive rights, as well as former charters, of very old date: and there was no intention to alter and overturn their ancient conſtitution. Theſe ſtatutes undoubtedly meant to leave a vaſt deal upon the ancient conſtitution of the univerſity, without repealing or abrogating their old eſtabliſhed cuſtoms, rights, and privileges, nor could the univerſity mean to accept them

them upon any ſuch terms.—Therefore it is clear, that the ſtatutes of Queen *Elizabeth* cannot be ſet up, to invalidate eſtabliſhments ſubſiſting long before ſhe was born.—The office of high-ſteward was a very high office in the univerſity long before ſhe was born, and was poſſeſſed by very great men; a much higher office than ſtewards of courts leet. She never intended to alter the mode of election to it, nor was the mode of election objected to by any body, at the time of this election.—Therefore it is clear, that the mode and manner of this election was right. SECONDLY, Then as to the right of Lord *Hardwicke* under it? The election was quite fair. The little miſtake in the marking was immediately ſet right; the proctors declared the votes to be equal; no one then thought of the objection to Mr. *Pitt*'s vote; but diſputes ariſing upon another matter, the congregation was diſſolved.—It is now objected by Lord *Hardwicke*, "that Mr. *Pitt*, "being a ſtranger in the regent-houſe, obtruded his bad "vote; which vote being diſallowed, will give Lord *Hard-*"*wicke* a majority of one."—This depends upon the validity of Mr. *Pitt*'s vote, on which there is no contrariety of evidence as to the facts. The whole turns upon the commencement of his inauguration to the degree of maſter of arts: this depends upon the uſage of the univerſity. And it is ſworn, "that the degree begins from the *day of creation*, when it is "conferred under a royal mandate;" and many circumſtances of the preſent caſe confirm this.—1ſt, The leave of abſence given the next day, infers that he was then a maſter complete.—2dly, He appears to be obliged to diſpute, in October, 1758; for he then pays for diſing (a barbarous term for diſputing), the fees for it being accounted for between the beadles, in October, 1758, whereas the fees of thoſe graduates, whoſe right commenced at the next *general* commencement, were not accounted for till 1759.—3dly, What ſhews "that "the degrees of ſuch as take them by royal mandate muſt com-"mence from their inauguration," is the combination-paper, and the *ordo ſenioritatis*. Mr. *Pitt*'s name is not in the former, but it is in the latter, being made after the general commencement in 1758; and the names therein contained are either noblemen, or ſuch as took their degrees by royal mandate. This ſuggeſts ſtrongly, "that the degrees of thoſe who take "them by royal mandate commence from their creation." And there is no evidence to the contrary: and the expiration of the *quinquennium* depends upon the commencement of it. If ſo, there is a majority of one for Lord *Hardwicke*, unleſs the other ſide can diſqualify ſome of thoſe who voted for him. Five of them are objected to. But as to the three reſumed graces, there is no pretence that that tranſaction was done with any improper view or deſign: and in reſpect of eſſential voting, it is quite indifferent; for it is not material, whether

they give their vote in one houſe, or in the other. And it is agreeable to the uſage of the univerſity, "that they ſhould vote where they have voted;" therefore, there is no objection to them. As to the 'ſquire-beadles, the uſage appears to be, "that they do vote in the regent-houſe." And it is quite indifferent in itſelf what houſe they vote in; and, as they are attendant upon the vice-chancellor, who votes in the regent-houſe, it ſeems that there is ſome ſmall reaſon for their doing ſo too.—However, the conſtant uſage is ſufficient to ſhew which houſe they ought to vote in, without aſſigning the particular reaſons upon which ſuch an uſage has been founded. Thus ſtands the *right* to the office; the next queſtion is as to the *remedy*. *There is no other than what is now applied for; and this is the very reaſon of the Court's iſſuing the prerogative writ of a* mandamus, *becauſe there is no other ſpecific remedy?* It is admitted, that a *mandamus* would lie, if it can be conſidered as the caſe of a ſteward of a court-leet. But it is ſaid, "that the franchiſe of the court-leet is in the town of "Cambridge, and not in the univerſity." But the univerſity have enjoyed it long, and they are now in poſſeſſion of it; and they have elected Lord *Hardwicke* under this claim of many ages ſtanding: and the town do not appear, to us, to diſpute it. But if it were not ſo, *as here is no other ſpecific remedy, the Court ought to grant the writ:* and ſo they will do in eccleſiaſtical caſes, where it appears that there is no other ſpecific remedy. The laſt queſtion is, How the *mandamus* ought to be directed? "The rule for a *mandamus* ought "to be founded upon the merits of the election, and not upon "the declaration of the proctors." The declaration of the proctors cannot affect the ſubſtantial right. The right of election appears to be in Lord *Hardwicke*, and the foundation of the rule ſhould be the election. Even if the proctors had declared contrary to the truth of the election, yet the writ ought to have gone: but here was no declaration at all. It now appears that Lord *Hardwicke* was duly elected; and the laſt part of the rule will procure him the proper remedy, without meddling with the two former parts of it.—Therefore, the *mandamus* ought to go to the keepers of the ſeal for the time being, requiring and commanding them to put the ſeal of the univerſity to the inſtrument of his appointment, and the two former parts of the rule ought to be diſcharged.

Rex v. Dr. Windham, Hil. Ter. 16 Geo. 3. B.R. *Cowp.* 377.

A *mandamus* will be granted to compel the warden of a college to affix the common ſeal of the college to an anſwer of the fellows, in chancery, contrary to his own ſeparate anſwer put in.—PER CURIAM: when a bill is brought againſt a corporation, if the corporation is in contempt there is no remedy by way of proceeding for a contempt perſonally againſt the real parties who offend; but the mode of compulſion is by ſequeſtration. In that caſe, the plaintiff is to proceed to take poſſeſſion

poſſeſſion of all the perſonal eſtate of the college; and if that will not make the members agree, he is to take poſſeſſion by ſequeſtrators, of all the rents and profits of their real eſtate: this mode of proceeding would affect the whole body, and puniſh the corporation at large: but the corporation at large is not in fault. Here the majority of the body have obeyed the proceſs of the court of Chancery as far as in their power lies, and are ready to put in their anſwer: but an individual (the warden), whoſe act is neceſſary to render that anſwer complete, lies by, and refuſes to put the ſeal of the college to it: it is the firſt inſtance of the kind; and the court of Chancery has ſtaid its proceſs for the contempt, that the preſent application might be made.—It has been truly ſaid, that where there is no other legal ſpecific remedy to attain the ends of juſtice, the courſe muſt be by *mandamus*, which is a prerogative writ; and the very form of it ſhews its object is to prevent a defect of juſtice: thus it comes recommended by the court of Chancery to have it ſpecifically done: but further, the parties, out of caution, have applied likewiſe to the viſitor: he acquieſces in the application to this Court for a *mandamus*; and very rightly, for this is not a diſpute proper for the viſitor to decide: it is not a private diſpute, but a ſuit by a third perſon, againſt the whole body, for the ſpecific performance of an agreement; an application to the viſitor in ſuch a caſe is nugatory; for he cannot compel a ſpecific performance: but the Court, if they have juriſdiction of the cauſe, will enforce it by their own means. —So, where an eſtate is in the college, that is, in the whole body, and they are to act in a truſt; the viſitor cannot meddle in a matter which is the proper ſubject of ſuch truſt (*Green* v. *Rutherforth*, 1 *Vez.* 462). Nor is it new in principle, to apply for a *mandamus*, to have a corporation ſeal put to an inſtrument; the caſe of the lord high ſteward of the univerſity of Cambridge, 1 *Black. Rep.* 547. and p. 211. *ante*, is an authority upon the ſubject. Here the application is for a *mandamus*, to compel the warden to put the ſeal to an anſwer; if the parties are right, we ſhall ſtop all proceedings by refuſing it, for the court of Chancery cannot proceed without the ſeal being put.—Dr. *Windham* ſeems to have miſconceived the conſequence of his affixing the ſeal to the anſwer of the fellows, and to think it will make his corporate anſwer inconſiſtent with his private ſeparate anſwer; for he is of opinion that the plaintiff's ſuit is juſt, and that the agreement ought to be executed: but his putting the college ſeal does not contradict his private ſeparate anſwer: and by refuſing to put it he defeats the end he wiſhes to obtain.—As to the ſtatute concerning the college ſeal being put, Dr. *Windham* contends for a negative, and that the warden muſt be one: the words of the ſtatute are theſe: "hoc etiam volo, "ut ſolicitudine cautum ſit, ut nihil ſigilletur quod non per

"gardianum et *per eoſdem* comprobetur." Now theſe words clearly *do not* give the warden a negative. Wardens and fellows are a deſcription of the corporation; and the expreſſion *per eoſdem*, without any repetition of the word *gardianum*, muſt mean the major part of the body.—Therefore a *mandamus* ought to go.

The King *v.* The Mayor, &c. of York, Tr. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 699.

A *mandamus* was granted to the mayor to put the corporate ſeal to the certificate of the election of the recorder, on an affidavit that he had the majority of legal votes; though it was ſtated that the other candidate had the majority at the election, and that the corporation had already certified his election.—It was moved for a *mandamus*, to be directed to the defendants, to compel them to put the corporate ſeal to the certificate of the election of Mr. *Withers*, as recorder, on an affidavit that he had the majority of legal votes at the election, in order that he might apply to the king for his approbation; and it was prayed that it might be abſolute in the firſt inſtance. Mr. *Withers* ſtated in his affidavit, that at the election there were only 101 legal voters, 51 of whom voted for him; but that one *Brown*, who had no title, and who has ſince been ouſted by judgment on a *quo warranto* information, was permitted to give his vote for Mr. *Sinclair*, in whoſe favour the mayor then gave the caſting vote. AND THE COURT ſaid, that the preſent application was a matter of courſe, like a motion to ſwear in a corporator. That the granting of a *mandamus* would not be concluſive on Mr. *Sinclair*; for that the writ only required the corporation to do the act, or to ſhew cauſe why they do it not; and that all the arguments which could be urged in favour of *Sinclair* might be preſſed, on the return to the *mandamus*, in a much more ſolemn manner than in the preſent form.—Rule abſolute.

The King *v.* The Mayor and Burgeſſes of Grampond, Ea. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 301.

In this caſe the Court granted a *mandamus* to compel a mayor and the capital burgeſſes of a corporation to fill up two vacancies, occaſioned by the deaths of two capital burgeſſes, though there was a *quo warranto* information depending againſt the mayor, queſtioning his title.—This was an application for a *mandamus*, commanding the defendants to proceed to the election of two capital burgeſſes, in the room of two perſons, one of whom died in the year 1791,—and the other in March laſt. It appeared by the affidavits, that the corporation conſiſts of a mayor, recorder, eight capital burgeſſes, a town clerk, and an indefinite number of freemen or free burgeſſes. That the mayor is elected out of, and by, the capital burgeſſes. That the capital burgeſſes are elected by the mayor and capital burgeſſes, out of the freemen who have been houſe-keepers for forty days. That when a mayor dies in office, the cuſtom is, that the mayor for the preceding year reſumes the office for the remainder of the year. That *Hoyte*, the late mayor, died in March laſt; and that, on his death, *Dillon*, who had been

mayor

mayor the preceding year, resumed the office, and had continued in it ever since. The objection, on shewing cause, was, that a *quo warranto* information (1) was now depending against *Dillon*, as one of the capital burgesses, and it was, therefore, said, that if it should turn out that *Dillon* had no title, and should consequently be ousted, the election under this writ would be invalid, on account of *Dillon*'s presiding at it as mayor; and, perhaps, giving his vote as a capital burgess. —PER CURIAM: This kind of rule is granted of course, unless some special reason be assigned to induce us to refuse it. The only reason assigned here is the pendency of another prosecution respecting the title of the present mayor. But we are now called upon in the usual way to compel the existing corporate officers to fill up two vacancies; and we cannot take it for granted, that the existing body, to whom the writ is to be directed, is not the legal body. If *Dillon* have a good title, then the capital burgesses to be elected under this writ will be good officers; if not, they may be ousted, or they may disclaim. Then is the greater inconvenience likely to arise from our compelling the present mayor and capital burgesses to proceed to the election, on account of the chance of *Dillon* not being a good mayor, or from not filling up the vacancies now, and thereby running the risk of dissolving the corporation, though *Dillon* may have a good title. For we must remember, that by the constitution of this corporation there are only eight capital burgesses, a definite body, who form an integral part of the corporation; and that if they should be reduced to four, according to several late determinations, there will be an end of the corporation. As there is, therefore, a chance of *Dillon*'s having a legal title, we ought now to grant the *mandamus* to fill up the vacancies.

The Court will grant a *mandamus* after an election which is colourable and clearly void.—On shewing cause against a *mandamus* to be directed to the corporation of Cambridge, commanding them to proceed to the election of a mayor, under the stat. 11 *Geo.* 1. c. 4. s. 2.—The case was, that "they had, "in fact, chosen one upon the 6th of August, which was the "charter day; namely, Mr. *James Gifford*, jun. who was an "officer in the army, just going to North America; and "without the least probability of returning till long after the "year would be expired.—The electors were sufficiently ap- "prised of the fact at the time of election; and soon after it, "had express notice given them of it; but they refused to go "to a new election." THE COURT were very clear that a

Rex v. Mayor, Bailiffs, and Burgesses of Cambridge, Hil. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2008.

(1) This fact did not appear in the affidavits filed in this motion; neither did it appear that the persons who prosecuted the quo warranto information were the prosecutors in this cause.

mandamus

mandamus ought to go. The acts of 9 *Ann.* c. 20. and 11 *Geo.* 1. c. 4. were made to obviate the misbehaviour of mayors. The corporation has a right to a new annual officer, every year; and he ought to be duly chosen. The Court are to judge whether such an officer be duly chosen or not. If an officer is actually sworn in, they may, perhaps, think it proper that his right should be tried first: or if the election be doubtful or questionable: but if they see clear that there is only a colourable election, it is void; he has no estate in the office; and the Court will not keep the corporation without a head, but will grant a *mandamus* to go to election. The ground of the present application is, that here has been no election. This pretended election is a mere colour, to avoid any election at all. The electors knew the circumstances of this person: they were apprised of the whole, before the election was concluded. They chose him, because it was impossible for him to execute the office. This is no election at all: it is a mere colour, a playing upon words. "An election" means a *due* election. They were morally certain that he could not execute the office to which they chose him. The corporation have a right to an officer: and the Court ought to grant this *mandamus*. The person now pretended to be elected is incapable; and chosen because he was so: nor can he be obliged to accept the office and act. It is a void election. And as they knew of the incapacity, their votes were as no votes: they were thrown away.—Rule absolute: to be directed "to the *late* mayor" (without specifying his name).

The King *v.* Bankes, *et al.* Mic. Ter. 4 Geo. 3. B.R. 3 *Burr.* 1452. 1 *Black. Rep.* 445. 452.

In rules for a *mandamus* to elect a mayor, a subsisting mayor *de facto* must always be a party.—On a rule to shew cause why a *mandamus* should not go to the lord of the manor of Corfe-castle, to hold a court leet, and to certain jurors (who had been summoned to attend at a court, appointed to be held on the 25th of October last) to appear, and form a jury, in order to elect a mayor. It appeared, on the prosecutor's affidavits, that one *John Price* had been *de facto* elected mayor on the 29th of October, and had acted as such; but his name was not in the rule: and it was objected, that the rule could not proceed till *Price* was inserted therein, and had been served, he being materially interested in the event of the question; and for this were cited the *King* and *Scawen*, mayor of Mitchel, in Cornwall, coram *Rider*, chief justice, Mich. 1753, where the omission of the subsisting mayor (in a rule to shew cause against a *mandamus* to elect another) was allowed to be sufficient cause, why the *mandamus* should not go. And upon this precedent, as well as upon the reason of the thing, the Court enlarged the rule till next term, and ordered *Price*'s name to be inserted therein. The name of *John Price*, the mayor *de facto*, being now inserted in the rule,

rule, the principal queſtion came on to be argued; when it appeared, that Mr. *Bankes* was lord of the manor of Corfe-caſtle, and Mr. *Henry Bankes* (his brother) was ſteward or bailiff of the manor; who had appointed a deputy-bailiff, who uſually held the courts in his ſtead, and had warned a jury for a court on the 25th of October, 1763, when a mayor was to be elected for the year enſuing. But he, ſuſpecting that the deputy-bailiff had been tampered with, to warn a jury who would chooſe a mayor in the intereſt, not of the lord of the manor, but of Mr. *Calcraft* his opponent, ſuddenly revoked his deputation, after the jury were warned; ſo that no court was held, and of conſequence no mayor choſen on the regular preſcriptive day. AND NOW *the motion was for a* mandamus *to the lord of the manor, to hold a court leet; and to the jurors by name, who were ſummoned for the 25th of October, to appear and form a jury*, in order to proceed to the election of a mayor: it being argued that *Price*'s election, being not on the preſcriptive day, was invalid. But by the whole Court. We are all of opinion, that a ſpecial *mandamus*, to the ſame jury, is new and unprecedented; and cannot be granted. Nor, upon this rule, can any general *mandamus* iſſue; more eſpecially as there is already a mayor *de facto* ſubſiſting. So diſcharge the rule; but, as the ſteward has behaved illegally, in the revocation of the deputy-bailiff's power, after the jury were ſummoned, no coſts ſhall be allowed.

A *mandamus* iſſued, directed to the late mayor, the common clerk, capital burgeſſes, and counſellors, of Bodmin, in Cornwall, commanding them, in due manner, to aſſemble at the Guildhall in that borough on the 16th of February, and to proceed to the election of a mayor, according to the ſtatute 11 *Geo.* I. *c.* 4. It was alſo ordered by a rule of the Court, that public notice, in writing, of the time appointed by the writ, ſhould be affixed in the market-place, or ſome other public place within the borough, by *Hext*, the town-clerk, ſix days before the election. And a rule was obtained to ſhew cauſe why an attachment ſhould not go againſt the defendants, who were capital burgeſſes, for their contempt in not obeying the *mandamus*, on an affidavit of the town-clerk, which ſtated, that ſix days previous to the time appointed he affixed a notice on a ſtone poſt of the Guildhall of the intended election; and alſo ſerved the two defendants, and moſt of the other members of the corporation, *with a copy of the rule*, which had been iſſued reſpecting the notice: that though 16 members attended the meeting, the defendants and three others did not: in conſequence of which, no election could be had, the charter requiring a majority of the capital burgeſſes (conſiſting of 36) to be preſent at the election of a mayor.—PER CURIAM: Although, in general, perſonal notice

The King *v.* Joſeph Edyvean and Samuel Spiller, Tr. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 352.

notice is neceſſary before a party can be brought into contempt, yet, in this caſe, the act of parliament ſeems to have diſpenſed with it. That ſtatute, which was paſſed to prevent diſſolutions of the corporations which neglect to chooſe the mayor on the charter-day, enables the Court to grant a *mandamus* to compel them to proceed to an election, and it directs that public notice, in writing, ſhall be affixed in ſome public part of the borough. It would be a ſufficient anſwer to ſuch an application as this, to ſay that the party did not live within the limits of the borough, and had received no notice whatever of the writ. But the public notice directed by the act is *primâ facie* ſufficient to call upon the members of the corporation; and if they can make ſuch an excuſe, they ſhould ſhew it in anſwer; but there ſeems to be no foundation, in fact, for any ſuch excuſe in this caſe; becauſe the defendants were ſerved perſonally with the rule.—Rule abſolute.

The King *v.* the Commiſſioner of the Land-tax for the pariſh of St. Martin-in the-Fields, Hil. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 146.

A *mandamus* will lie to the commiſſioners of the land-tax *to elect* a clerk to them in the departments for the rates and duties on houſes and windows.—The commiſſioners of the land-tax are, as ſuch, commiſſioners for the window and houſe tax. And by the land-tax act the receiver-general is allowed 2d. in the pound; the collectors 3d. in the pound; and the 16th ſection enacts, "*That the ſaid receiver-general,* "upon the receipt of the whole aſſeſſments of the county, "&c. *ſhall allow and pay,* according to ſuch warrant as ſhall "be given in that behalf by the ſaid commiſſioners, or any "two or more of them, *three halfpence in the pound,* and no "more, *to the commiſſioners' clerks,* for their pains in fair "writing the aſſeſſments, duplicates, and copies, hereinbe-"fore directed; and all warrants, orders, and inſtructions "relating thereto; *and which ſaid clerks ſhall be appointed* "*by a majority of the acting commiſſioners preſent at each re-*"*ſpective meeting within every ſuch hundred,* lathe, wapen-"take, rape, ward, or other diviſion." A diſpute having ariſen with reſpect to the validity of an election of a clerk to the ſaid commiſſioners acting for the pariſh of St. Martin-in-the-Fields, in Weſtminſter, on account of the reſpective claims of two candidates, an action was tried at the laſt ſittings at Weſtminſter, to determine which of the two was duly elected, when the election of both was ſet aſide. After this deciſion, the commiſſioners, at a meeting which was convened for the purpoſe of putting the land-tax act into execution, proceeded to an election of a clerk in the department for the rates and duties on houſes, windows, and lights; when one of the former candidates was elected, without notice to the friends of the other candidate that the election was to be made on that day, or that even the commiſſioners were to meet for any other purpoſe than that of carrying the land-tax act

act into effect. It was, therefore, moved for a *mandamus*, under the idea that the election, thus had by surprize, was invalid.—PER CURIAM: This writ of *mandamus* is a very beneficial writ; it is grantable where there is no other specific legal remedy. And it is of peculiar use in those cases, where, if they have not this remedy, the contest must be productive of endless mischief and inconvenience to the litigating parties.—If clerks were appointed under this act each time of meeting, there would be no end to the elections: but they receive their allowance under an annual warrant; and their appointment is at least for a year.—Then as to the election which has been set up, it was taking the other party by surprize, and the election, made by the commissioners, when acting in another capacity, was illegal.—Rule absolute.

A *mandamus* will lie to a rector *to appoint* a parish clerk.—On shewing cause against a *mandamus* prayed to be directed to the rector of St. Anne's, within the liberty of Westminster, requiring him to nominate and appoint a parish-clerk for the said parish, according to the form of a private act of parliament, temp. *Car.* 2. in such case made and provided; in the room of —— *Pynyot*, deceased. The fact appeared to be thus:—Notice was given to the parish, "To meet on "the 5th of December, to receive the rector's nomination." The clause in the act was read at that meeting; which clause impowers the rector to nominate. Then his nomination (under hand and seal) was read. Eighty-nine of the principal inhabitants signed their approbation. None dissented, expressly; but some of the parishioners demanded a poll, on behalf of one Mr. *Moore*. The church-wardens refused to take any poll: alleging that there was no election; and, therefore, could be no poll for him as a candidate. THE COURT held this to be *no dissent* to the rector's nomination of Dr. *Jackson*. It was an attempt to put up another for election; supposing "that they had a right to elect;" which, in fact, they had not. This was a mistake: and this demand of a poll was all nugatory and void. It was no dissent to the nomination of Dr. *Jackson*. If a poll had been taken, it does not appear that Dr. *Jackson*'s nomination would have been dissented to. If the majority were really dissentient, they should have declared their dissent. But what was here done, was all lost and thrown away: it had no more effect, than if they had gone away without giving either assent or dissent. Therefore there is in the present case no right that is worth trying: and, consequently, it would answer no purpose "to put the parish to any further charge."—Rule discharged.

Rex *v.* the rector of St. Anne's, Soho, Ea. Ter. 6 Geo. 3. B.R. 3 *Burr.* 1878.

A *mandamus* will lie to register and certify a dissenting meeting-house (1).—On shewing cause, on behalf of the defendants,

Rex *v.* Justices and Clerk of the Peace for the county of Derby, Mic. Ter. 7 Geo. 3. B.R. 4 *Burr.* 1991. 1 *Black. Rep.* 606.

(1) See the Toleration-act, 1 *W.* & *M.* St. 1. c. 18. s. 1 and s. 19.

defendants, againſt a *mandamus* to oblige them to regiſter and certify a diſſenting meeting-houſe at Melbourn, in that county. 1ſt, It was objected, *non conſtat* what ſpecies of proteſtant diſſenters they are of; nor in what points they diſſent. 2dly, *Non conſtat* that it is a houſe proper to be regiſtered. 3dly, They have not brought themſelves within the qualifications of the act.—SED PER CURIAM: No inconvenience can attend the regiſtering this meeting-houſe. The regiſtery and certificate do not prove "that they are "within the act:" they will ſtill be obliged to ſhew that they are within the requiſite qualifications, if called upon; notwithſtanding the regiſter and certificate. And if, in fact, they are not within the qualifications, the juſtices may return "that they are not," if they think proper to do ſo.—Rule abſolute.

The King *v.* the Corporation of Grantham, Tr. Ter. 10 Geo. 3. B.R. 2 *Black. Rep.* 716.

It was moved for a *mandamus* to the corporation of *Grantham*, to permit Lord *William Manners* to hold a court leet, and court baron, in the town-hall, on two preſcriptive days; as he was entitled to do, by immemorial uſage, and preſcription, as lord of the manor of A. but had been obſtructed, laſt Michaelmas and Eaſter, by the corporation. On ſhewing cauſe, it was ſtated; that it was alſo immemorially uſed, that the firſt and ſecond company of the corporation, conſiſting of twelve each, uſed to form the grand jury, till Lord *William Manners*'s time, who refuſed to ſummon them. BUT PER CUR. That is no reaſon againſt this *mandamus*. The companies may apply for a *mandamus* to be ſummoned.

The King *v.* Dr. Hay, Mic. Ter. 8 Geo. 3. B.R. 4 *Burr.* 2295. 1 *Black.* 640.

A *mandamus* for adminiſtration to the next of kin may be granted, notwithſtanding a ſuit depending his conſanguinity be not denied.—It was moved for a *mandamus*, to the judge of the Prerogative court, to grant adminiſtration of the effects of the late General *Stanwix*, to *Charles Connor*, eſq. his nephew, and next of kin; on a ſuggeſtion, ſupported by affidavits, of the general's death; that there were then living no children, wife, or other relation, in the ſame, or any nearer degree; that he had applied for letters of adminiſtration, but was refuſed, on pretence of two caveats, one entered by Mr. *Holmes*, and another by Mr. *Stillingfleet*: that *Stillingfleet* was only firſt-couſin to the general; and, therefore, one degree more remote than Mr. *Connor*; but that Mr. *Holmes*'s claim (who was brother to the general's firſt wife) aroſe upon this extraordinary accident: that, in October, 1766, General *Stanwix*, his ſecond wife, and his daughter by the former wife, ſet ſail, in the ſame veſſel, from Dublin for England; that the veſſel was loſt at ſea; and no account of the manner of her periſhing had ever yet arrived. Whereupon Mr. *Holmes*, as maternal uncle and next of kin to Miſs *Stanwix*, claimed the effects; under a notion of the civil law, that, where parent and child periſh together, and the

the manner of their death is unknown, the child ſhall be ſuppoſed always to ſurvive the parent. But it was inſiſted, that ſuppoſing this to be the rule univerſally, and that the rule of the civil law ought to govern in this caſe, both which were much to be doubted; yet ſtill, that could be only a queſtion upon the ſtatute of diſtributions; whereas the preſent motion was founded upon the ſtatute of adminiſtrations: and as Mr. *Connor* was now the indiſputable next of kin to the general, he was entitled to letters of adminiſtration, being already in poſſeſſion of the real eſtate. The Court granted a rule to ſhew cauſe, with notice to *Holmes* and *Stillingfleet*.—*Stillingfleet* and *Holmes* ſhewed; 1ſt, That *Stillingfleet* was in equal degree with *Connor*, by the canon and common laws; and, therefore, no *mandamus* could go, to take away the election of the ordinary.—BUT PER CUR. The computation of degrees in theſe caſes, muſt be according to the civil law. 2dly, That there was a *lis pendens* in the ſpiritual court, which had competent juriſdiction of the queſtion, wherein the intereſt of Mr. *Connor* was denied, and now in a courſe of trial. This was allowed, if true, to be a ſufficient cauſe; but the Court refuſed to hear affidavits concerning it, but required a tranſcript of the proceedings; in which nothing more appeared, but a general denial of the plaintiff's intereſt, as is uſual in every ſtage of their proceedings, and not of his conſanguinity, as ſtated in his own affidavit. And therefore the Court, without hearing counſel in ſupport of the rule, made it abſolute for the *mandamus*; upon the ground of its being for the adminiſtration only (and not the diſtribution), to which Mr. *Connor* was clearly entitled, under the ſtatute; but had been kept out of it a twelvemonth, without any apparent reaſon.

But a *mandamus* for adminiſtration to the next of kin will not be granted if a ſuit be depending concerning the validity of a will.—On ſhewing cauſe againſt a *mandamus*, to be directed to the judge of the Prerogative court of Canterbury, commanding him to grant probate of the will of *Joſeph Bidleſon*, eſq. deceaſed, to *Lovegrove*. It was objected, "that a ſuit "is now depending in the Spiritual court concerning the va- "lidity of this will." AND THE COURT were unanimous, that where a ſuit is depending in the Spiritual court concerning the validity of a will, that court has juriſdiction in the matter. And Mr. Juſtice ASTON mentioned a caſe in this court, in Hil. 1738. 12 *Geo.* 2. *Rex* v. *Dr. Betteſworth*, at the inſtance of *Plunkett*, in which it was unanimouſly agreed by all the four judges (*Lee*, *Page*, *Probyn*, and *Chapple*), "that "the pendency of a ſuit in the Eccleſiaſtical court concern- "ing the validity of a will is a ſufficient anſwer to a *man-* "*damus* commanding the judge to grant probate of it:" and accordingly the return in that caſe, "that there was a "ſuit

Rex v. Dr. Hay, on the application of Lovegrove, Hil. Ter. 9 Geo. 3. B.R. 4 *Burr.* 2295. 1 *Black. Rep.* 668.

" ſuit depending before him, and undetermined, concerning " the validity of the will," was allowed to be a good return to the *mandamus*.

Rex *v.* the Corporation of Wells, Hil. Ter. 7 Geo. 3. B.R. 4 *Burr.* 1999.

A *mandamus* will lie *to reſtore* a recorder.—On ſhewing cauſe againſt a *mandamus* to be directed to them, commanding to reſtore *John Burland*, eſq. one of his majeſty's ſerjeants at law, to the recorderſhip, from whence they had removed him. The facts appeared, in ſubſtance, to be as follows: his tenure was, " *quam diu ſe benè geſſerit.*" It was a corporation by preſcription. The times of holding their ſeſſions were ſufficiently aſcertained. The cauſes or grounds of amotion were two: 1ſt, *An improper conduct at the election of members of parliament on* the 17th of December, 1765, *viz.* Adminiſtering the oath to one Mr. *Keate*, as returning officer, as well as to the mayor, who, they ſaid, was the proper returning officer; and alſo refuſing to ſuffer the mayor to adjourn the poll to the aſſize-hall; but continuing it himſelf, together with *Keate*. 2dly, *Repeated non-attendance.* Firſt, Refuſing to attend at the laſt January ſeſſions, to be holden upon Monday the 13th, though notice was given him " to " do ſo;" and likewiſe, " that the ſeſſions could not be holden " without him; the mayor being under a neceſſity of being " in London, and there being only one other corporation " juſtice." And alſo neglecting to attend at the quarter-ſeſſions on the 7th of April: at which he had, indeed, no particular perſonal notice " to attend," but, nevertheleſs, was obliged (as they inſiſted) by his duty to have attended, as it was well aſcertained to be the uſual day of holding this ſeſſion. It appeared, upon the affidavits, that the name of the corporation is, " mayor, maſters, and burgeſſes;" and that Mr. *Keate* was the ſenior maſter, and claimed to preſide at the election of members of parliament. It appeared that the ſerjeant's general reſidence was, and had for ſix or ſeven years been, in London; that he came down to Wells upon occaſion of this election, in December; that the January ſeſſions happened whilſt he continued there; that he did receive the notice before mentioned; and that, in fact, he did not attend at it; that he was ſummoned to appear and ſhew cauſe why he ſhould not be removed from his office of recorder; and that at a corporate meeting, holden at the day therein appointed, he was removed. His defence was, that whilſt he was reſident at Wells, he was uſed to attend the ſeſſions: and ſince his reſiding in London, he has generally attended them about once a year. *That he now came to the place as a voter at the election, and not as a juſtice of peace, or recorder.* That, as to the ſeſſions on Monday the 13th of January, he (being then in the town) received notice, " that no " ſeſſions could be holden on that day, by reaſon of the illneſs " of Mr. *Miller*, another juſtice, without whoſe preſence

" the

" the ſaid ſeſſions could not be holden, the mayor being gone " to London." That he, nevertheleſs, ſtayed in town in order to attend: but Mr. *Miller* could not attend, ſtill continuing ill. That, as to the ſeſſions of the 7th of April, he was not then in town, nor had notice of it: and that his preſence was not eſſentially neceſſary; there being a ſufficient number of juſtices without him, and their juriſdiction confined to contempts, &c. and not extending to felonies; and there being no particular buſineſs ordinarily expected to come before them. It appeared that Mr. *Robert Tudway* was mayor of Wells; Mr. *Keate*, the ſenior maſter; and Mr. *Paris Taylor*, ſheriff of Somerſetſhire. Mr. *Taylor*, the ſheriff, delivered the precept to Mr. *Keate:* Mr. *Tudway*, the mayor, demanded it; but Mr. *Keate* refuſed to deliver it. Mr. *Tudway*, the mayor, then ordered Serjeant *Burland*, as recorder, to adminiſter the oath to him *(Tudway)* as returning-officer, and *not* to *Keate*. Serjeant *Burland* ſaid he would *diſobey* that order; and, upon his own motion and propoſal (as was alleged), adminiſtered the oath to *Keate*, as well as to the mayor. The mayor thereupon adjourned the poll to the aſſize-hall: but the ſerjeant oppoſed ſuch adjournment; and adviſed and aſſiſted in continuing it where it was. In conſequence of which, two diſtinct polls were taken. It was ſworn that Mr. Serjeant *Burland* acted there as recorder; and many proofs, or ſuppoſed proofs, of it were ſpecified. PER CURIAM: The queſtion before us is, " Whether he " was *properly amoved*; and whether he ought to be reſtored " to his office?" The two general articles charged upon him are, his behaviour at the election; and his non-attendance at the April-ſeſſions. (For the want of attendance at the January-ſeſſions is given up.) The charge of miſbehaviour at the election is, ſhortly, his adminiſtering the oath both to *Keate* and the mayor; though the mayor commanded him to adminiſter it only to himſelf. That the mayor having adjourned the poll, the ſerjeant declared his opinion, " that the mayor could not adjourn without the " conſent of the candidates;" and that he continued with *Keate*, taking the poll at the former place. His conduct at the election was the principal ground of their amoving him. There is no charge at all of any *corrupt* motive for his giving this advice, or doubting of the legality of the mayor's preſiding. And it is plain, that it was a ſincere opinion; becauſe the candidate whom he eſpouſed, riſqued the fate of his election upon it; and thoſe who voted for that candidate, did not vote before the mayor and *Keate* both, but only polled before *Keate*. Therefore, how erroneous ſoever his advice might be, it was plainly his *real* opinion. He had nothing to do at that meeting as recorder; nor was this a corporate meeting. It was a borough by preſcription. The mayor has

the return: he might have made it without the recorder. But, as recorder, he is a juſtice of peace. Has he then miſbehaved as a juſtice of peace? Two perſons claim the return: and both demand to have the oath adminiſtered. He adminiſtered it to both: *Valeat quantum velere poteſt.* This, ſurely, was no breach of duty of his office. The mayor adjourns the poll. The ſerjeant had nothing to do with the adjournment, but as a voter. He gives his opinion. His opinion was wrong. They, who were his friends, ſuffer by it. This is no breach of his corporate duty. As to his abſenting himſelf from the April-ſeſſions, all the charge is, "that he was *not preſent* at it." He ſays, that whilſt he was reſident there, he did attend: and ſince his reſiding in London, he has generally attended about once a year. That in April, two juſtices were upon the ſpot. That no particular notice was given him, to induce him to go down: and that little or no buſineſs occurred when he has attended. And there is no charge that there was any buſineſs then to come before them. There is no caſe that the barely being once abſent is a forfeiture; and abſence may be excuſeable. Indeed, a general neglect, or refuſal to attend the duty of ſuch an office, is a reaſon of forfeiture; a determined neglect, a wilful refuſal. But a ſingle inſtance of omitting to attend, when no particular buſineſs was expected, nor, in fact, happened, is a very different caſe. The law is well laid down by Serjeant *Hawkins*, in treating of offences by officers, by neglect or breach of duty. He ſays, "It is certain that an "officer is liable to a forfeiture of his office, not only for "doing a thing directly contrary to the deſign of it; but alſo "for neglecting to attend his duty at all uſual, proper, and "convenient times and places, whereby any damage ſhall "accrue to thoſe by or for whom he was made an officer. "And ſome have gone ſo far as to hold, that an office con-"cerning the adminiſtration of juſtice or the common wealth, "ſhall be forfeited for a *bare non-uſer*, whether any ſpecial "damage be occaſioned thereby or not. But this opinion "doth not appear to be warranted by any reſolution in point; "and the authorities which are cited to maintain it, do not "ſeem to come up to it (1)." He refers to ſeveral books and caſes in his margin; and agrees with thoſe authorities that ſay, "that he who ſo far neglects a public office, as "plainly to appear to take *no manner of care* of it, ſhould "rather be immediately diſplaced, than the public be in "danger of ſuffering that damage, which cannot but be ex-"pected, ſome time or other, from his negligence." But nobody can ſay, or even imagine, that one ſingle abſence

(1) See *Hawkins's* P. C. vol. I. c. 66. ſ. 1. p. 167, 168.

from

from a ſeſſion, at which nothing of importance was likely to happen, can amount to ſuch a neglect of a recorder's office, as to make him plainly to appear to take no manner of care of it. It is perfectly conſiſtent with the caſe of Serjeant *Whitaker*, as reported, 2 Lord *Raym.* 1237, to ſay, "that "the bare being abſent is not a cauſe of forfeiture." That caſe was an amotion of Serjeant *Whitaker*, from his recorderſhip of Ipſwich, for non-attendance (amongſt other cauſes of amotion) at two diſtinct ſeſſions of the peace, both appointed by himſelf, and at a time too when he was (as it appears) preſent within the borough. The corporation there ſtate (not a ſingle abſence, but two different neglects, at two diſtinct ſeſſions), "that he and another juſtice appointed a "ſeſſion to be holden on the 14th of January, 1702, and "iſſued a precept to return a grand jury, &c.; and that the "ſeſſion was proclaimed accordingly; and that he had notice "of all the premiſes; and all were ready; and that he, *licet* "*ſolemniter exactus*, voluntarily, and without any reaſonable "cauſe, abſented himſelf." And they ſtate another like default on the 1ſt of April following; only *mutatis mutandis*. Then they ſtate, in *hæc verba*, the notice they gave him to appear and anſwer why he did not attend and aſſiſt: "You "knowing, that by the charters of this town, no ſeſſions of "the peace could be holden for this town, without the actual "preſence of the bailiffs and recorder thereof." Then when he attends, all the reaſon he gives is, "that he expected to "have been ſent for, when they were ready." Plainly, therefore, he was in the town: and it is as plain that he wilfully and voluntarily neglected to attend. The exceptions there taken to the cauſe of forfeiture ſo aſſigned in not attending to hold a ſeſſion of the peace, were only two: 1ſt, "That a ſeſſion of the peace might be holden without "him, he not appearing to be of the *quorum*; and two "juſtices of the peace may hold a ſeſſion of the peace. "2dly, Admitting it could not, yet, firſt, they ought to "have ſent for him; and, ſecondly, they ought to have "ſhewn ſome ſpecial damage to the corporation by the not "holding the ſeſſions." It is to theſe two exceptions only, that the opinion of the Court is applied: and, therefore, it muſt be underſtood as qualified and reſtrained to the ſubject then in debate before them. The queſtion was not "how "many non-attendances of a non-reſident recorder ſhould "amount to a forfeiture;" but "whether his wilful abſenting himſelf when in the town, was ſo." It is not argued, "whether his preſence was neceſſary to the holding of the "ſeſſion;" (though it appears upon the return that it was). But it was urged, on the part of Serjeant *Whitaker*, "that "admitting it to be ſo, yet they ought to have ſent for him;

" and alſo they ought to have ſhewn ſome ſpecial damage " to the corporation, by the not holding the ſeſſions." The corporation ſay, " that no particular notice was neceſſary ;" and " that he ought to have attended this ſeſſion of his own " appointment, being in the town." The opinion of the Court is, " that, admitting the preſence of the recorder was " not neceſſary, by the charter, to the holding a ſeſſions of " the peace, yet he muſt attend ; for it was the intent of the " charter, in making ſuch an officer, that he ſhould aſſiſt the " corporation in matters of law : and the juſtices of peace, " though they had power, yet they might be afraid to pro- " ceed to the holding of a ſeſſions without their recorder. " And, ſecondly, this office being a public office concerning " the adminiſtration of juſtice, the officer is bound to attend at " his peril : and non-attendance is a cauſe of forfeiture of his " office, though no inconvenience enſue by his non-attend- " ance. And the difference is between public and private " offices. And ſo is *Co. Litt.* 233. *a.* 9 *Co.* 50. Though, " as the chief juſtice ſaid, in this caſe the corporation might " be diſfranchiſed for neglecting to hold ſeſſions of the peace; " and ſo his non-attendance was a damage to them." There is no doubt that non-attendance is a cauſe of forfeiture: but the queſtion is, " *what ſort* of non-attendance." The queſtion, in that caſe of Ipſwich, was not, " *what ſort* of non- " attendance." Serjeant *Whitaker* appointed the ſeſſion himſelf; was then actually upon the ſpot; and voluntarily and wilfully abſented himſelf. A mere being abſent once from attending a ſeſſion, without any particular circumſtance, is no cauſe of forfeiture. In the caſe now before us, the recorder reſided in London, and had no particular notice to come down to hold it. The corporation have been ſatisfied with his former abſence: and he had no particular reaſon to attend at this particular time; and there was a ſufficient *quorum* upon the ſpot. Therefore this was not a *craſſa negligentia*, ſufficient to forfeit his office. This opinion is warranted by the caſe in 2 *Roll. Abr.* 155. letter N. pl. 2, 3. " A negligent eſcape is no cauſe of forfeiture of the office of " marſhal: but if he ſuffers *ſeveral* ſuch eſcapes, it lies in the " diſcretion of the Court to ouſt him." As in that caſe of the office of marſhal, one inſtance is not enough to amount to a forfeiture of the office; ſo here, a ſingle inſtance, under the circumſtances appearing upon the preſent return, ought not, in point of law, or common ſenſe, to render this officer of the corporation liable to the forfeiture of his franchiſe. Therefore the *mandamus* ought to go (1).

(1) See 2 *Salkeld*, 467. pl. 5. where the Court refuſed to grant a rule againſt the clerk of a county-court for granting a replevin without taking

A *mandamus* will lie to reſtore a pariſh clerk, removed without ſufficient cauſe: for a pariſh-clerk is a temporal officer: he holds his office *quamdiu bene ſe geſſerit*: and though the miniſter may have a power of removing him on a good and ſufficient cauſe, he can never be the ſole judge, and remove him *ad libitum*. He muſt ſtate to the Court a juſt cauſe of amotion.—In this caſe, the cauſes aſſigned were, that the clerk had become bankrupt, and had not obtained his certificate: that he had been guilty of many omiſſions in the regiſter, was actually in priſon at the time of his removal, and had appointed a deputy who was totally unfit for the office: but the Court ſaid, that there was no ſufficient reaſon aſſigned in the affidavits upon which they could exerciſe their judgment; nor any inſtance of any miſbehaviour of conſequence.—Rule abſolute for a *mandamus*.

Rex *v.* Eraſmus Warren, Hil. Ter. 16 Geo. 3. B.R. *Cowp.* 370.

Where it does not lie.]—A *mandamus* will not lie to the treaſurer of a county to reimburſe conſtables monies expended for conveying rogues, vagabonds, and diſorderly perſons.—On ſhewing cauſe againſt a rule for a *mandamus* in this caſe, it was inſiſted, that the ſeſſions have a juriſdiction to examine into the account of the conſtables, whereas theſe were only allowed by a ſingle juſtice.—On the other hand it was contended, that the ſeſſions had not any juriſdiction to overhale the conſtables' accounts.—SED PER CUR. They are obliged by the act to apply to the quarter-ſeſſions; and the ſurplus only, is to be paid over; which ſhews that the ſeſſions have a juriſdiction to make deductions.—Rule diſcharged.

Rex *v.* Walter Erle, Tr. Ter. 1 Geo. 3. B.R. 2 *Burr.* 1197.

The Court will not grant a *mandamus* to a miniſterial officer to pay over money already paid by him under a proper authority.—The guardians of the poor, in the ſeveral pariſhes in Southampton, were incorporated by an act, 13 *Geo.* 3. c. 30. which enables them to raiſe rates for certain purpoſes therein mentioned. In 1792 they applied to parliament for another act to give them greater powers, but the bill was thrown out by the Houſe of Commons; and on that occaſion they expended 465*l*. At a meeting of the guardians, held in December, 1792, they made an order on Mr. *Shaw*, the then treaſurer, to pay that ſum out of the money raiſed by them under the former act. An appeal was entered againſt this order at the quarter-ſeſſions for Southampton, when, no defence being made, the ſeſſions diſ-

The King *v.* Chriſtopher Shaw, Ea. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 549.

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ing a ſurety of the plaintiff to proſecute; as it was a ſingle inſtance. They ſaid that when it grew into practice, they would interpoſe: as if a ſheriff conſtantly or frequently uſed to let perſons at large without bail, then it is an abuſe of his office.

allowed the treaſurer's account with reſpect to this charge, and ordered *Shaw*, the late treaſurer, to pay over that ſum to *Biſhop*, his ſucceſſor. And a rule was then obtained, calling on *Shaw* to ſhew cauſe why a *mandamus* ſhould not iſſue, commanding him to pay over that ſum to *Biſhop*, to be by the latter received and accounted for as ſuch treaſurer. It was ſtated in the affidavits, in anſwer to the rule, that after the bill was thrown out by the Houſe of Commons, a majority of the guardians, at a meeting, ordered *Shaw* to pay this ſum out of the balance then in his hands; that he was bound to obey their orders; that he accordingly paid it before notice of the appeal; and that he charged it in his account, which was afterwards allowed by the guardians of the poor before he went out of office.—PER CURIAM: Perhaps there may be ſome ground for a criminal charge againſt this perſon; if that can be ſufficiently eſtabliſhed, he may be puniſhed for it in another mode of proceeding. But this rule cannot be made abſolute. The foundation of this rule is, that this treaſurer, who is only a miniſterial officer, having a certain ſum of money in his hands belonging to this ſociety, refuſes to pay it over according to the order of ſeſſions. But the foundation itſelf fails; for it appears by the affidavits, that the money does not remain in his hands, but has been paid over by him, under the direction of the guardians of the poor, whoſe order he was bound to obey.

The King *v.* W. Briſtow, Hil. Ter. 35 Geo. 3. B.R. *6 Ter. Rep.* 168.

So in this caſe, the Court refuſed to grant a *mandamus* to a miniſterial officer, viz. the treaſurer of a county, to obey an order of the court of quarter-ſeſſions; the proper remedy, in caſe of his refuſal to obey ſuch order being by indictment.—A rule was obtained to ſhew cauſe why a *mandamus* ſhould not iſſue to the defendant, as treaſurer for the public ſtock of the eaſtern part of the county of Kent, commanding him to pay to *T. Watſon*, keeper of the common gaol for the ſaid county, the ſum of 25l. being part of one quarter's allowance granted to the ſaid keeper by the court of general quarter-ſeſſions for the ſaid county, by an order of ſeſſions made at Maidſtone on the 29th of April laſt.—PER CURIAM: It has been often ſaid by Lord *Mansfield*, that a *mandamus* was a very beneficial writ; and that the beſt method of preſerving it was to be ſparing in the uſe of it. That caution cannot be more properly applied to any caſe than the preſent; though there does not appear to be any great difficulty in it. This Court have no difficulty, upon a proper caſe laid before them, in granting a *mandamus* to juſtices to make an order, when they refuſe to do their duty. But it would be deſcending too low to grant a *mandamus* to inferior officers to obey that order; we might as well iſſue ſuch a writ to a conſtable, or other miniſterial officer, to compel him to execute a warrant directed to him, as to grant this application to the treaſurer

treaſurer to obey the order in queſtion. It was, indeed, once made a queſtion, whether the diſobedience of an order of juſtices was an indictable offence; but, ſince the caſe of the *K.* v. *Robinſon*, 2 *Burr.* 799. that point has not been doubted.—The proſecutors muſt purſue their ordinary remedy by indictment.

The Court will not grant a *mandamus* to reſtore a perſon to an office where it is confeſſed by the perſon that he was rightly removed, though he has been removed without notice to appear and defend himſelf; for, ſhould he be reſtored on that ground, he might undoubtedly be removed again the next inſtant.

Rex *v.* Mayor, Aldermen, and capital Burgeſſes of Uxbridge, Hil. Ter. 17 Geo. 3. B.R. *Cowp.* 523.

So alſo in this caſe, a *mandamus* was refuſed to reſtore to the office of clerk of the Bridge-houſe eſtates in London, though the party was irregularly ſuſpended; it appearing on his own ſhewing that there was good ground for the ſuſpenſion, if the proceedings had been regular.—This was a rule calling on the defendants to ſhew cauſe why a *mandamus* ſhould not iſſue, directed to them, commanding them to reſtore *P. Roberts* to the office of clerk or comptroller of the Bridge-houſe eſtates. It appeared from the affidavits on which the rule was obtained, that the office is an ancient office for life, *quamdiu ſe bene geſſerit*, in the diſpoſal of the court of common-council. The duty of it is to ſuperintend and take care of certain eſtates which are appropriated by the corporation to the ſupport and repair of London Bridge; ſome of the eſtates having been granted to them for that expreſs purpoſe. *Roberts* was admitted and ſworn into this office in 1749, on paying 4000l. to the predeceſſor, and 600l. for an alienation fine. In January, 1785, the auditors of the city accounts reported that *Roberts* was a defaulter in his accounts for five years preceding, and that there appeared to be a very large balance in his hands; on which the corporation made an order that his accounts ſhould be laid before a committee appointed for that purpoſe in two months, and that the balance ſhould be paid to the chamberlain. On the ſame day the committee of the city lands reported that *Roberts* was a defaulter in his accounts as city remembrancer, and that there was a conſiderable balance in his hands in reſpect of that office. It likewiſe appeared, upon his own ſhewing, that repeated applications were made to him to deliver in his accounts, and frequent indulgences granted to him by the committee, till the 19th of May, 1786, when he delivered in a brief account, without producing the proper vouchers, by which it appeared that he had a balance of about 2000l. in his hands in reſpect of the firſtmentioned office. But he claimed to deduct 1500l. out of that ſum in reſpect of certain demands which he made as city remembrancer, which were not allowed upon this account. That after a peremptory

The King *v.* the Mayor, Aldermen, and Common Council, of London, Mic. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 177.

order to produce the vouchers and pay the balance, which he acknowledges to be due, and to explain ſeveral parts of his accounts, he neglected to pay the balance, and wrote the following letter to the committee: "Having, by your di-"rections, received a copy of the report to the court of "common-council, bearing date 13th February laſt, with "the order made thereon, and having fully conſidered the "ſame, *I muſt decline anſwering any queſtion upon that ſub-"ject.*" This refuſal was communicated to the court of common council, who thereupon ſuſpended *Roberts* generally from the *functions, exerciſe, and profits*, of his office, without ſummoning him to attend, or giving him an opportunity of making any defence.

The Court at firſt doubted whether the office in queſtion were of ſuch a nature for which a *mandamus* would lie. But upon further conſideration, and being apprized that a *mandamus* had been granted in the caſe of a ſcavenger, 1 *Stra.* 59, they were of opinion that it would lie in the preſent caſe. But on this matter's coming on again the next day, ASHHURST, J. ſaid, Notwithſtanding we were convinced of the impropriety of *Roberts*'s conduct, which would have been a reaſonable and proper ground for ſuſpending him from his office, we entertained ſome doubt whether we were not bound to grant a *mandamus* to reſtore him, as the proceedings of the court of common-council were not ſtrictly regular in ſuſpending him. But on looking into the caſes, we have found one exactly ſimilar to the preſent; that is the caſe of the *King* v. *the Mayor*, &c. of Axbridge, which warrants us to refuſe this writ, though *Roberts* were irregularly ſuſpended. We ought not in our diſcretion to grant it in this caſe; it appearing by the affidavits, on which the application is made, that *Roberts*'s conduct was extremely reprehenſible. For after the court of common-council as well as the committee had granted him the greateſt indulgence by allowing him further time to make up his accounts and to pay the balance, he wrote this extraordinary letter to the committee, that he would not anſwer any of their queſtions reſpecting his accounts. This behaviour was culpable in the higheſt degree; for *Roberts* was not to dictate to his employers. Nor is it any excuſe to ſay that this refuſal was made to the committee; they were authoriſed to examine his accounts by the common-council; and ſhall *Roberts* dictate to his maſters to whom they ſhall refer the matter? Therefore, till he has made a proper ſubmiſſion and explained his accounts, we think we ought not to interfere. What operates very ſtrongly with us is, that this is not a total diſmiſſion, but only a *ſuſpenſion* from the office, which may be reſcinded by *Roberts*'s making a proper ſubmiſſion. If indeed the committee will not accept his ſubmiſſion, and the court

court of common-council will not reſtore him on his explaining his accounts in a ſatisfactory manner, and paying the balance, that may be a ſufficient foundation for a further application. I do not agree with the counſel, who have argued in ſupport of the rule, that *Roberts* has no other remedy; I am not ſatisfied that he has not two remedies: no caſe has been cited to ſhew that an aſſize will not lie for ſuch an office as the preſent; or that he could not maintain an action for money had and received during his ſuſpenſion. —PER CURIAM.—Rule diſcharged (1).

A *mandamus* to a biſhop to licenſe a curate of an augmented curacy, where there was a croſs nomination, was refuſed; becauſe the party had another *ſpecific legal remedy* by *quare impedit*.—A rule had been obtained, calling on the defendant to ſhew cauſe why a *mandamus* ſhould not iſſue, commanding him to licenſe *William Finch* to preach in the chapel of St. Helen's, which is ſituated in the hamlet of Hardſhaw, in the pariſh of Preſcot, in the county of Lancaſter. It appeared that this chapel had been conſecrated from time immemorial, and that the uſual offices of the church had been conſtantly performed therein. It alſo appeared to have been twice augmented by *Queen Anne*'s bounty. The right of appointing to the curacy was claimed by two ſeveral parties. One of theſe were certain feoffees or truſtees, in whom the chapel, chapel-yard, and other grounds belonging to the ſame, were ſtated to have been veſted for many ages paſt, and who have been elected from time to time by each other. It was alſo ſtated that a majority of ſuch feoffees have conſtantly appointed a curate to officiate in the chapel, who has always received the profits thereof without any inſtitution or induction from the ordinary; the truſtees having held it as a donative before the augmentation. That ſince that time the curate ſo appointed by them has always applied for and had a licenſe from the ordinary to preach and officiate in the ſaid chapel. That on the 26th of December 1785, *W. Finch* was nominated curate to the ſaid chapel by a deed under the hands and ſeals of a majority

The King *v.* the Biſhop of Cheſter, Mic. Ter. 27. *Geo.* 3. B. R. 1 *Ter. Rep.* 396.

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(1) The *King* v. *the Mayor, &c. of London*, Hil. 6 *Geo.* 2. B.R. On a rule to ſhew cauſe why a *mandamus* ſhould not be directed to the defendants, commanding them to reſtore *Smith* to the office of *clerk or ſurveyor of the city works*. The affidavits in ſupport of the rule ſtated, that *this was an ancient and public office*; that there were fees and profits belonging to it; that *Smith* had purchaſed the office for 600l. and had been appointed *quam diu bene ſe geſſerit*. The Court after cauſe ſhewn were of opinion, that though from ſome of the circumſtances it appeared to be like a private office, yet as the affidavits, which ſhewed it to be a public one, were not denied, a *mandamus* ought to be granted that they might be the better able to judge on the return, 2 Ter. Rep. 182. n. *b*. But it appeared, likewiſe, that the party on his appointment takes a particular oath of office, and likewiſe the oaths to government.

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of the feoffees, which was preſented on the 6th of May following to the chancellor of the dioceſe of *Cheſter*, who was appointed in the abſence of the biſhop to grant licenſes; but that the chancellor, and the biſhop, to whom a ſimilar application was afterwards made, ſeverally refuſed to grant ſuch licenſe. The other claimant was *Samuel Sewel*, vicar of the pariſh of Preſcot, who, by a deed under his hand and ſeal, dated the 31ſt of March 1786, appointed *John Barnes* to the ſaid chapel, who, on the firſt of April in the ſame year, requeſted the chancellor of the dioceſe and the biſhop to grant him a licenſe, who ſeverally declined it. The feoffees and the vicar ſeverally entered caveats in the biſhop's Court againſt each other's claims. In anſwer to the preſent application, it was ſworn by the chancellor of the dioceſe of *Cheſter* that the ſaid chapel had always been deemed and conſidered as ſubject to the eccleſiaſtical juriſdiction of the ordinary or biſhop of the dioceſe. And as a ground for the court to refuſe this application, it was ſtated that the ſaid chapel, having been twice augmented by Queen *Anne's* bounty, is now conſidered by virtue of the ſtatute 1 *Geo.* 1. ſt. 2. c. 10. (1) as a perpetual cure and benefice, ſubject to lapſe as a preſentative living; and that the right of nomination thereunto is become grantable and recoverable, and the incumbency thereof liable to be determined by the like methods as the preſentation to or incumbency in any vicarage preſentative. And that, in conſequence of the two above-mentioned claims, the chapel having become litigious, the biſhop had declined granting a licenſe. That, at the time when the above nominations were tendered to him as chancellor of the dioceſe, he informed the reſpective candidates, that in caſe due ſteps were not taken within the uſual time to prevent it, the ſaid curacy would lapſe to the biſhop or ordinary of the dioceſe.—Per Curiam: It is not neceſſary for us to decide the point, whether a lapſe can incur in this caſe; neither is there any queſtion whether this Court is bound in point of law to grant a *mandamus:* but the only queſtion is, whether we will in our diſcretion grant it: and it ſeems that we are not bound to grant the writ. Then if we are not bound to do ſo, what reaſons have been urged to induce us to grant it? We will not, unleſs we think the biſhop has acted wrong. As there were croſs nominations, the biſhop was not bound to decide which of the contending parties had the

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* By 1 *Geo.* 1. c. 10. ſ. 6. it is enacted that in caſe ſuch augmented cures be ſuffered to remain void for the ſpace of ſix months, without any nomination of a fit perſon to ſerve the ſame, by the perſon having the right of nomination thereto, to the biſhop or ordinary, to be licenſed for that purpoſe, the ſame ſhall lapſe to the biſhop, &c. according to the courſe of law uſed in preſentative benefices.

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better title: and if he did not take upon himſelf to decide that queſtion, he might equally be bound to grant a licenſe to both; in which caſe the parties would be conteſting for the poſſeſſion of the pulpit. Therefore it was more fit and proper that he ſhould withhold his licenſe till the right was determined. Now, in the caſe of the *King* v. *the Biſhop of Carliſle* (1), there was no croſs nomination: the dean only claimed a negative. There is a diſtinction therefore between that and the preſent caſe. *And it is not contended here but that either party has another remedy to enforce his right.* In the caſe of a donative, the party is in full poſſeſſion immediately on the nomination; and, if any other perſon takes the rents and profits, he may maintain an action for money had and received. *And beſides each of them has a ſpecific remedy by* quare impedit; *and this licenſe would not forward him, to whom it is given, in the proſecution of ſuch right.* Therefore we are not bound to grant this *mandamus*, but it is a matter of diſcretion; and there is no difference between this caſe and that of the *King* v. *the Biſhop of Cheſter* (2). In ancient caſes the grounds on which this Court has granted or refuſed a *mandamus* are not explicitly ſtated: but during the time Lord *Mansfield* has preſided here, he has taken great pains to ſtate particularly the grounds on which this Court will either grant or refuſe ſuch writs. He has always ſaid, this Court will not interpoſe by granting a *mandamus*, *unleſs the party making the application has no other ſpecific legal remedy.* It muſt be a legal and a ſpecific remedy. Some caſes have been mentioned at the bar, where the Court granted a *mandamus* even though the party had another ſpecial legal remedy, ſuch as an *aſſize* for office. But thoſe offices have generally been ſuch as are created by letters patent; and it is peculiarly the duty of this Court to ſee that the powers created by the king's charters are properly exerciſed. Beſides the Court have ſaid, in anſwer to thoſe particular caſes, that though the party had a remedy by aſſize, yet it is now obſolete, and therefore they have made an exception in thoſe

(1) 2 *Burn*'s Ecc. Law. 103. In the year 1752 and 1753, a diſpute happened in the cathedral church of *Carliſle* about the dean's negative power in conferring benefices. Mr. *Richardſon* was nominated by the chapter to the perpetual curacy of St. Cuthbert's, Carliſle. The dean entered a *caveat*, and the biſhop refuſed to admit and licenſe him. But the court of B.R. granted a *mandamus* to the biſhop to admit and licenſe the curate.

(2) In *the King* and *Biſhop of Cheſter* a ſimilar motion was made on the part of the inhabitants of Troutbeck for a *mandamus* to compel the biſhop to licenſe a curate, which he had refuſed, becauſe there was a contrary claim ſet up by the rector of the pariſh. But the Court refuſed the writ, becauſe the parties had another remedy, namely by *quare impedit*, 1 Ter. Rep. 398.

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inſtances. It is true, as the counſel for the rule have ſaid, that if the biſhop were compelled to grant his licenſe, it would enable the party licenſed to maintain an action for money had and received, to recover the profits of the curacy, which he would not perhaps otherwiſe do: but even if that were doubtful, it is no ground for the Court to grant a *mandamus*, becauſe the party has another remedy by *quare impedit*. — Rule diſcharged. And the Court deſired it to be underſtood that, as two different applications had been made for a *mandamus* to a biſhop without a good foundation, if a ſimilar one were made in future on the ſame ground, they would diſcharge the rule *with coſts*.

The King *v.* the Biſhop of London, Tr. Ter. 26 Geo. 3. B. R. 1. *Ter. Rep.* 331.

The Court will not grant a *mandamus* to a biſhop to licenſe a lecturer, *without the conſent of the rector*, where ſuch lecturer is ſupported by voluntary contributions, unleſs an immemorial cuſtom to elect without ſuch conſent be ſhewn.—For Per Curiam: Nothing is ſo clear as that no perſon can uſe the pulpit of a rector *unleſs he conſent*; or, in others words, no man *can be a lecturer* without ſuch conſent. But if there has been an immemorial uſage, the law ſuppoſes that there was a good foundation for it. If the lectureſhip be endowed, that affords a ſtrong argument to ſupport the cuſtom, and to ſhew that it had a legal commencement. When an application is made for a *mandamus*, and the queſtion turns upon a cuſtom which the parties litigating deſire to have tried, the Court will grant the writ for that purpoſe, or they will direct an iſſue to be tried. But, in ſuch caſes, a foundation muſt be laid before them, and they muſt ſee that there is ſome ground for the application. It will not be granted merely for aſking. In the preſent caſe there is not a colour for it; *the lectureſhip is not endowed, it depends upon a voluntary contribution*. All the evidence tends to prove that the conſent of the rector has always been obtained. The only entry produced is in 1708; and, even in that inſtance, it appears from the biſhop's books, that the rector had given his previous conſent to the candidate's ſtanding for the lectureſhip. And no inſtance has been produced, in which a licenſe has been granted without the rector's conſent.

The King *v.* Field (the rector) *et al.* the Churchwardens of the United Pariſhes of St. Ann, St. Agnes, and Zachary, Hil. Ter. 31 Geo. 3. B. R. 4 *Ter. Rep.* 125.

So alſo in this caſe, a *mandamus* to the rector to certify to the biſhop the election of a lecturer was refuſed; there being no immemorial cuſtom in the pariſh for the lecturer to uſe the pulpit without the rector's conſent, and the lecturer being paid out of the poor-rates.—On a rule calling on the defendants to ſhew cauſe why a *mandamus* ſhould not iſſue, commanding them to grant their certificate to the biſhop of the election of Mr. *Love* to the lectureſhip of this pariſh, in order that the biſhop might licenſe him. There

was

was no endowment for the lecturer, but he received a certain ſum from the pariſh-officers out of the money raiſed by the poor rates. And it was objected on the authority of *R.* v. *the Biſhop of London* that the rector could not be compelled to conſent to the election, the lecturer being ſupported by voluntary contributions, and there being no immemorial cuſtom to elect without his conſent.—PER CURIAM: This is an application for a writ of *mandamus* in order to enable the party applying to eſtabliſh his right to *ſome permanent intereſt:* but it now appears that the object of contention is not an intereſt of that nature. No perſon can uſe the pulpit without the rector's conſent, unleſs there be an immemorial cuſtom for it: where there is ſuch a cuſtom, it is binding on the rector, as it ſuppoſes a conſideration to him. In ſuch a caſe the right of the lecturer partially ſuperſedes the right of the rector. But in the preſent caſe there is no ſuch cuſtom; and the emoluments are not permanent; they depend on voluntary contributions, being taken out of the poor-rates, and have commenced within the time of legal memory: there is therefore no right ſtated in the party which can be the ſubject of legal contention.

In this caſe a *mandamus* to admit a veſtry clerk was refuſed.—On ſhewing cauſe againſt a *mandamus*, commanding the defendants to admit one *Penfold* to the office of veſtry clerk of their pariſh, on an affidavit of his election, it was objected that this was not the ſubject of a *mandamus*, becauſe this was not an office known to the law. —AND PER CURIAM: This is not a fixed permanent office, for which a *mandamus* will lie. It depends altogether on the will of the inhabitants, who may elect a different clerk at each veſtry. Neither is any ſalary annexed to this ſituation: if the fees are to be paid out of the poor-rates, there is an end of all preſcriptive right to it. With regard to the ſuppoſed agreement made by the pariſhioners that this ſhould be an annual office, it could not be obligatory longer than the parties choſe to fulfil it; for it might be revoked at the next veſtry. This is an office merely of a private nature; and if a mandamus were to be granted to reſtore to the office of veſtry clerk, we ſhould ſoon expect to hear of an application for a *mandamus* to reſtore to the office of a toll-gate keeper of a turnpike road.

The King *v.* the Churchwardens of Croydon, Tr. Ter. 34 Geo. B.R. 5 *Ter. Rep.* 713

In this caſe a *mandamus* to the churchwardens to make a church rate was refuſed, it being a ſubject purely of eccleſiaſtical juriſdiction.

The King *v.* the Churchwardens of St. Peter's, Thetford, Tr. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 364.

The Court will not grant a *mandamus* to the Bank to transfer ſtock, becauſe there is a remedy by an action on the caſe, if they refuſe.—This was an application for a *mandamus* to be directed to the defendants, commanding them to permit the proſecutors to transfer 10001. Bank ſtock, as having

The King, on the proſecution of Parbury and another, executors of Dawes *v.*

the Governor and Company of the Bank of England, Mic. Ter. 21 Geo. 3. B.R. 2 *Doug.* 253.

ing been the property of their teſtator. The teſtator had by his will bequeathed to his kinſwoman "*Lydia Fennymore, if* "*living at the time of* his deceaſe, 1000l. bank ſtock." Upon the teſtator's death, the proſecutors proved his will, and applied to the bank for leave to transfer the 1000l. which was refuſed, unleſs they ſhould produce a certificate of the death of *Lydia Fennymore*, who had been placed in the Foundling Hoſpital, and where they found, by the books, and regiſters, ſtrong evidence of her death, and that ſhe died before the teſtator; which certificate the governors of the Hoſpital refuſed to grant. For the Foundling Hoſpital, it was ſaid, that, as the legacy to *Lydia Fennymore* was lapſed, and there was reaſon to believe the teſtator was a baſtard (which however was not ſworn to), or at leaſt, that no next of kin could be found, and as the executors, having legacies, could take no beneficial intereſt, and it was not pretended there would be any debts to be paid, they were adviſed that the money belonged to the crown; that, upon this, they had applied to the Treaſury for a grant of it, for the benefit of the Hoſpital, which application they had reaſon to think would be ſucceſsful; that, under theſe circumſtances, they had not choſen to facilitate the transfer of the ſtock, thinking it ſafeſt in the hands, and under the protection of the Bank. —PER CURIAM: When there is no ſpecific remedy, the Court will grant a *mandamus* that juſtice may be done. But where (as in this caſe) an action will lie for complete ſatisfaction equivalent to a ſpecific relief, and the right of the party applying is not clear, the Court will not interpoſe the extraordinary remedy of a *mandamus*. This is not a clear caſe. It appears, on the face of the will, that the executors have no beneficial intereſt. If the teſtator was a baſtard, the King is the next of kin. Here neither any perſon claiming as next of kin, nor the crown, are before the Court. Notice has been given to the Bank not to permit the transfer. The Bank is therefore in the nature of a ſtake-holder only. The real queſtion is between the crown (or the Foundling Hoſpital as ſtanding in the place of the crown) and the executors of *Dawes*, the proſecutors of this rule.—Rule diſcharged (1).

A *man-*

(1) A ſpecial action of *aſſumpſit* was afterwards brought by the executors, againſt the Governor and Company of the Bank, which was tried before LORD MANSFIELD, at Guildhall, at the Sittings after Hilary Term, 21 *Geo.* 3. Upon the trial, it was admitted that *Lydia Fennymore* died in the Foundling Hoſpital, in the teſtator's life-time; and it was proved that *Dawes* was reputed to be a natural ſon, and that he had no next of kin. It alſo appeared, that the Foundling Hoſpital had ſucceeded in obtaining a grant from the crown of the ſtock in queſtion. A verdict was found for the plaintiffs, but with leave to move the Court,

A *mandamus* will not lie to compel admiſſion to the degree of barriſter. The only mode of relief is by appeal to the twelve judges, who have a domeſtic juriſdiction over the inns of court.—PER CURIAM: The original inſtitution of the inns of court no-where preciſely appears, but it is certain that they are not corporations, and have no conſtitution by charters from the crown. They are voluntary ſocieties, which, for ages, have ſubmitted to government analogous to that of other ſeminaries of learning. But all the power they have concerning the admiſſion to the bar, is delegated to them from the judges, and, in every inſtance, their conduct is ſubject to their control as viſitors (ſee *Dugdale's Origines Juridiciales*). From the firſt traces of their exiſtence to this day, no example can be found of an interpoſition by the courts of Weſtminſter-hall proceeding according to the general law of the land; but the judges have acted as in a domeſtic *forum*. The only caſe in which an attempt was made to proceed in this court is reported in March (1). One *Booreman*, a barriſter of one of the Temples, having been expelled, he applied for his writ of reſtitution, but it was denied, "becauſe there is none in the inn of court to "whom the writ can be directed, for it is no body corpo-"rate, but only a voluntary ſociety, and ſubmitting to go-"vernment; and the ancient and uſual way of redreſs for "any grievance in the inns of court, was by appealing to "the judges." In Townſend's caſe, reported by Sir Thomas Raymond (2), it is aſſumed, *arguendo*, that no *mandamus* will lie to the inns of court (3). The firſt reaſon ſtated in March is not the true one. The ſecond is the true reaſon. The true ground is, that they are voluntary ſocieties ſubmitting to government, and the ancient and uſual way of redreſs is by appeal to the judges. There has been a very late inſtance where this method of appeal had the ſanction of all the judges. "The firſt day of Hilary Term, an appeal of one *Maurice Savage* againſt an order of the benchers of Lincoln's-Inn, which reſcinded an order for his call to the bar, made about four or five days before, on the ground of miſrepreſentation or ſurpriſe, was heard by all the judges in Serjeant's-Inn-Hall. The judges, being attended by the treaſurers of the two ſocieties of Lincoln's-Inn and the Middle-Temple, and examining the under-trea-

The King v. the Benchers of Gray's Inn, on the proſecution of William Hart, Ea. Ter. 20 Geo. 3 B.R. 1 *Doug.* 353.

Court, that a nonſuit, or verdict for the defendants, might be entered. Accordingly, in Eaſter Term, 21 Geo. 3. the Attorney-General obtained a rule for that purpoſe. But pending the rule a compromiſe took place.

(1) *Booreman's* caſe.

(2) B.R. H. 14 & 15 *Car.* 2. *Raym.* 69.

(3) S.P. recognized by *Pemberton*, chief juſtice, in the caſe of *Rex* v. *the College of Phyſicians*, B.R. H. 33 & 34 *Car.* 2. 2 *Show.* 178.

ſurers

ſurers of each (not upon oath, for they proceeded as viſitors), and the circumſtances of the charge fully appearing, and, after hearing *Savage* in ſupport of his appeal, who did not examine any one to vary the facts, declared their opinion that the call to the bar appearing to have been obtained by ſurpriſe, and the bench of Lincoln's-Inn having proceeded immediately to annul it, the appeal ſhould be diſmiſſed (1)." The conſequence of all this is, that we are all of opinion, that no rule ſhould be made for a *mandamus*; but, if there is a ground for it, the party muſt take the ancient courſe of applying to the twelve judges (2).

The King *v.* the Mayor of Colcheſter, 28 Geo. 3. B.R. 2 Ter. Rep. 259.

But a *mandamus* to admit a recorder was refuſed in this caſe, becauſe there was a recorder *de facto*, and the party had another remedy by *quo warranto*; though both of them claimed under the ſame election.—A *mandamus* having been moved for to be directed to the defendant, commanding him to admit Mr. *Grimwood* to the office of Recorder of Colcheſter. It appeared that the preſent application was made for the purpoſe of trying the merits of an election, on the ground that the mayor had refuſed ſeveral legal votes given for *Grimwood*, and improperly admitted others given for

(1) A year or two afterwards, *Savage* having appeared as a witneſs in a cauſe at Glouceſter, one of the counſel obſerving upon his evidence, mentioned the circumſtance of his having been called to the bar, and the ignominy with which he had afterwards been diſbarred. For this *Savage* brought an action, declaring as a barriſter, and ſtating the words to have been, "*This is the Mr.* Savage *who was called to the bar* "*in* 1776, *and was afterwards ſcandalouſly ſtripped of his gown*," and that they were ſpoken with an intent to injure him in his profeſſion. The defendant pleaded not guilty, and alſo three ſpecial pleas of juſtification, wherein were ſet forth, the conſtitution and regulations of the inns of court, reſpecting the call of barriſters, and the different proceeding and orders of the Middle-Temple and Lincoln's-Inn referred to in the above report. And on trial of the cauſe the plaintiff proved the words, and produced a book of the ſociety of Lincoln's-Inn containing the order of his call, which, from the neglect of the officer of the ſociety, had not been expunged; and the defendant produced another book containing the order annulling the former, and the jury found a verdict for the defendant.

(2) *Hart*, afterwards, applied by petition of appeal to the twelve judges, and on the 15th of November, M. 21 *Geo.* 3. he was heard by counſel, and it appeared that he had been diſcharged by an inſolvent act, but a certificate was laid before the judges from the treaſurer and benchers of Gray's-Inn, in which they ſet forth, that they had not refuſed to call him to the bar merely becauſe he had been diſcharged by an inſolvent act (although they ſtated that the ſociety of Lincoln's-Inn had been of opinion that *that* was a ſufficient cauſe), but, becauſe it appeared to them from a memorial of his own (which he had alſo laid before the judges), that he had knowingly become ſecurity for money borrowed by others, to a much greater amount than he was able to anſwer, and for other circumſtances of his life mentioned or alluded to in the certificate.—The judges were unanimous in diſmiſſing the petition.

Smithies,

Smithies, the other candidate, who was afterwards admitted and ſworn into the office. The rule was oppoſed in the firſt inſtance, on the ground that the Court ought not to grant a *mandamus* to admit *Grimwood* to an office which was not vacant before the validity of *Smithies*'s election was queſtioned in a *quo warranto* information.—AND THE COURT were clearly of opinion, that it was a deciſive anſwer to this application for a *mandamus*, that there was another remedy by an information in nature of a *quo warranto*, by which the title of the officer in poſſeſſion could be tried as well as on a *mandamus*. And the conſequence of granting the rule would be, that a ſecond perſon would be admitted to an office which is already filled by another, both claiming to be duly elected. Therefore the rule for a *mandamus* was refuſed; and a rule was granted to ſhew cauſe why an information, in nature of a *quo warranto*, ſhould not be filed againſt *Smithies*.

Return of a mandamus.]—A return to a *mandamus* filed after death of party who made it ought to be taken off the file.—It was moved to take off the file the *return* to a *mandamus* directed to the defendant *Holmes*, commanding him to reſtore *Edward Leatherbarrow* (1) to the office of an inn-burgeſs of Wigan, on an affidavit "that *Holmes* was DEAD *at the time of the return being filed.*" PER CURIAM: It turns upon this, "Whether the Court could have admitted the return to have been filed, *if* the fact had been *diſcloſed to* them." It is a return of an act really done; and the perſons commanded to be reſtored ought not to loſe their right, merely becauſe the mayor did not file the return; therefore, it would have been a mere matter of form, *if* the mayor had been *alive*. The queſtion is, "Whether his *death* makes any difference?" Convictions are never drawn up, till ſome occaſion calls upon the proſecutor to draw them up (2). —CURIA ADVISARE VULT. The opinion of the Court was now moved for. Mr. Juſtice WILMOT—I think this return ought not to ſtand upon the record. The *mandamus* was moved for, as of courſe, and was directed "to the mayor" *alone*. I think it ought to have been directed to thoſe who had power to return it; if ſo, the writ and return ſeem to be a nullity: but I do not go upon *that*. The writs were delivered to the mayor in 1759; he called a common-hall; the common-hall reſtored the perſons named in the writs; the mayor then ſigned a return, "that he had reſtored them;" in July, 1760, he delivered this return to *Holt Lee*,

Rex v. Holmes, mayor of Wigan, Hil. Ter. 5 Geo. 3. B.R. 3 *Burr.* 1641.

(1) The *mandamus* iſſued in 1759, and *Holmes* died about three years ago.

(2) But this practice is erroneous; for it is the duty of magiſtrates to draw up convictions, and return them to the ſeſſions.

their agent: the mayor died in 1762; in Trinity term, 1764, the writs were filed.—The queſtion is, "Whether they ought to have been filed *after the mayor's death*, under theſe particular circumſtances?"—If the return ought not to have been *received*, it ought to be *taken off* the file.—In general, every return is ambulatory, and in the breaſt of the perſon to whom the writ is directed, *till it is filed*. *Signing* is not neceſſary, nor material.—The only way of getting off of a return is by an action or an information againſt the perſon who returns it. There was a caſe in M. 7 *Geo.* 2. *Rex* v. *Wilkes*, in *Calne*, which went upon this principle, "that it can only be controverted by action or information, *if* it be once received." But this man was *dead* before it was received.—Though this *mandamus* is directed to the mayor *only*, yet he himſelf underſtood the return to be made with the *conſent of the corporation or common-hall*. This return, if it ſhould ſtand, may be urged as a *concluſive evidence*, not only "that it was made by him," but alſo "that it was made *with the conſent* of the corporation." So that, if it is permitted to ſtand, it will preclude the entering into the queſtion, "Whether it was *with* or *without* the conſent of the corporation?" for, this can never be diſproved by any evidence: the queſtion cannot be inquired into, either directly or collaterally. It cannot be examined in any action or information againſt him, being *dead* before it was received. As long, therefore, as this return ſtands, the queſtion, "Whether the reſtoration was or was not *with the conſent* of the corporation?" is bound down, and can never be entered into: for no evidence can *now* be received to controvert this fact of the corporation's conſent. And as it *may* be applied to this purpoſe, I therefore think the return ought to be taken off the file.—If ſuch intention be *waived*, and that queſtion lies *open*, it may anſwer my difficulty.—If that queſtion is left open, I am entirely ſatisfied. [*The attorney-general offered to come into any rule for leaving that queſtion open. Mr. Serjeant* Aſpinall—*But, nevertheleſs, other people hereafter may make that uſe of it.*] Lord MANSFIELD—Undoubtedly, that queſtion ought to be *left open*.—Mr. *Dunning* continued to inſiſt on the return being *taken off the file*, and offered to admit the fact "that the mayor *himſelf did* make ſuch a return." Lord MANSFIELD and Mr. Juſtice WILMOT—If a returning officer was to die immediately after ſigning a return and before the filing it, the Court might direct an iſſue to try the validity of it. Mr. Juſtice WILMOT—The reaſon of the caſe which has been cited about the biſhop's certificate is, "that the ſucceeding biſhop may have *abſolved* the man; and, *therefore*, the certificate muſt be ſigned by the ſucceſſor." I conſider this return, *now*, as ſtanding upon the admiſſion of the proſecutors of the writ, "that no other uſe ſhall be made of it than barely

that

that the mayor *did* reſtore him *in fact*," without prejudice to the queſtion concerning the *legality* of this reſtoration, or entering into the queſtion about the corporation's concurring with him or not. Lord MANSFIELD—Let this be taken down, as by the conſent of counſel on both ſides, in all the cauſes.

A return to a *mandamus* to admit, or ſhew cauſe to the contrary, may ſhew one or more or any number of cauſes, provided they be conſiſtent.—On a return to a *mandamus* directed to the defendant, ſteward of the court-leet of the borough of Morpeth, commanding him to admit and ſwear *Joſeph Wright* a freeman of Morpeth. It ſet forth two cauſes, and it was objected, on behalf of the proſecutor, "that it was DOUBLE, and therefore bad." Lord MANSFIELD, Ch. J.—I ſee no doubt upon this caſe; here is a duplicity in the writ, which requires a duplicity in the return. The writ ſtates "that he was duly elected, and that he thereby became entitled to be ſworn." The anſwer is, "that he was *not duly elected*;" and further, "that he was not entitled to be *ſworn* in, becauſe he has not been previouſly approved of by the lord of the manor, which is eſſentially neceſſary, according to a cuſtom which the ſteward ſets forth, to be done before he can be admitted and ſworn."—The proſecutor's argument would ſtrip him of one half of his caſe: he has *two* deciſive anſwers, and why ſhould he be obliged to give up *one* of them? He is commanded to admit and ſwear him, or ſhew cauſe to the contrary. And he ſhews a good reaſon for not admitting and ſwearing him; he ſays, this perſon was *neither elected nor approved*; both which qualifications were eſſentially neceſſary. Where a man has two concluſive anſwers, it is contrary to every principle of juſtice to confine him to one of them alone: 'tis a rule which never ſhould have been received; and the legiſlature have ſet it right, by opening the defence, and admitting the defendant to plead ſeveral pleas (ſee 4 & 5 *Ann.* c. 16. § 4). The proſecutor cannot be ſurpriſed, for both cauſes are ſpecified to him in the return: and as to the diſtraction of the attention of the court or jury, this is as much an objection to taking ſeveral iſſues on *mandamuſes*. And the authorities, as well as the reaſon of the thing, are on this ſide of the queſtion. Mr. Juſtice YATES—Several conſiſtent cauſes may be returned to a *mandamus*: the number of them makes no difference.—*Mandamuſes* are diſtinguiſhable from the caſe of civil actions.—Civil actions concern private rights between party and party: in civil actions nothing is in queſtion wherein the public is concerned: and the defendant muſt, in theſe private caſes, know his own defence, and upon what foot he is to put it. But in a *mandamus* relating to a public office, the queſtion is, "Whether the perſon ought or ought not to be admitted to the office?" And

Wright *v.* —— Fawcett, eſq. Ca. Ter. 7 Geo 3. B.R. 4 *Burr.* 2041.

if he can be ſhewn to be an uſurper, the Court will not admit him, for they ought not to admit an uſurper: but if he has a right, he ought to be admitted. The queſtion here is, "Whether, upon the whole matter, he ought to be admitted?" The ſteward is, by this writ, commanded either to admit, or to ſhew cauſe why he does not; and he may ſhew one or more cauſes, provided they be conſiſtent: therefore this is diſtinguiſhable from pleas to civil actions. Mr. Juſtice ASTON—The return is good, where it anſwers the ſuppoſal of the writ. This writ charges the ſteward *criminally*; it charges him with refuſing to admit and ſwear this Mr. *Wright*, well knowing the premiſes, but having *no regard for the duty of his office* in that behalf; ſo that the ſteward is charged as *criminal* in that he did not admit and ſwear him: and being ſo charged with a breach of his duty, he may return as many conſiſtent anſwers as he will: and this anſwer is conſiſtent, for it directly follows the ſuppoſal of the writ. Mr. Juſtice HEWITT — This being a matter of a *public* nature, differs from *private* civil cauſes. If the ſteward might not return ſeveral cauſes, where there really are ſeveral good objections to the proſecutor of the *mandamus*, an uſurper might be admitted into a public office, which he has no right to. There is no authority to warrant the objection: the authorities are on the other ſide. Therefore he concurred in holding the return to be ſufficient. *Per Cur.* unanimouſly.—Return allowed.

Rex v. The Churchwardens of Taunton St. James, Hil. Ter. 16 Geo. 3. B R. *Cowp.* 413.

A return to a *mandamus* to reſtore *Lewis Cogan* into the place and office of ſexton was, that "*L. C.* was not, according to the ancient cuſtom of the ſaid pariſh, duly elected;" and further, that there was "an ancient cuſtom in the pariſh to remove their ſexton at pleaſure, and that, in purſuance of ſuch a cuſtom, and agreeably thereto, they had actually removed him." PER CURIAM: The return muſt be allowed; there is no repugnancy in it: if he was not duly elected; he has no right to be reſtored: but whether duly elected or not, they ſhew a right by cuſtom to remove him at pleaſure, and that they have done ſo: there is no repugnancy in ſaying that he was not *duly* elected; but that being *in fact elected*, they had, according to an ancient cuſtom, removed him from the office.

The King v. The Mayor, &c. of Cambridge, Ea. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 456.

So in this caſe it was held that, if a return to a *mandamus* conſiſt of ſeveral independent matters not inconſiſtent with each other, but part of them good in law, and part bad, the Court may quaſh the return as to ſuch part only as is bad, and put the proſecutor to plead to or traverſe the reſt: but where two cauſes returned are inconſiſtent, the whole is bad. —To a *mandamus* to the mayor, bailiffs, and burgeſſes, of Cambridge, to admit *Patrick Beales* into the office of common-councilman, they returned, 1. "that the borough of Cambridge

Cambridge was a borough by preſcription, and under a charter of king *James* the Firſt; and that the mayor, bailiffs, and burgeſſes have been uſed to admit to the freedom of the ſaid borough ſuch perſons, upon payment (to the uſe of the borough) of ſuch ſums of money as the mayor, bailiffs, and burgeſſes, or the major part thereof, have agreed and fixed upon in common-hall; and upon payment of ſuch ſums of money, and being ſworn into the office of burgeſs, ſuch perſon hath been entitled to all the privileges, rights, and profits, belonging to the office of burgeſs of the ſaid borough. And further, that from time immemorial there have been, within the ſaid borough, certain officers, called bailiffs, and other certain officers, called treaſurers; and that within the ſaid borough there is a certain ancient cuſtom, that no burgeſs hath been eligible to the office of a common-councilman, who hath not actually ſerved the office of treaſurer and bailiff, or paid ſuch a ſum to be excuſed ſerving ſuch offices as has been fixed by the mayor, bailiffs, and burgeſſes, or the major part thereof, in common-hall, upon the application of the burgeſs deſiring to be excuſed. And further, that on the 11th day of January, 1785, it was agreed by the mayor, bailiffs, and burgeſſes, in common-hall, that *Patrick Beales*, named in the ſaid writ of *mandamus*, might be admitted to the freedom of the ſaid borough, upon payment of thirty guineas: and the ſaid *Patrick Beales* then and there claimed to be ſworn a burgeſs of the ſaid borough, upon payment of the ſaid thirty guineas. And the mayor, bailiffs, and burgeſſes, then aſſembled in common-hall, on the ſaid 11th day of January, 1785, believing that the ſaid *Patrick Beales* had then and there paid the ſaid ſum of thirty guineas to the treaſurer, the mayor then and there directed the ſaid *Patrick Beales* to be ſworn into the office of burgeſs; but the ſaid *Patrick Beales* did not, on the ſaid 11th of January, 1785, or any other time, pay the ſaid thirty guineas.—2. And further, that afterwards, on the 12th of April, 1785, it was agreed by the mayor, bailiffs, and burgeſſes in common-hall, that the ſaid *Patrick Beales* ſhould have leave to paſs all offices under the bench, on payment of ten guineas; but the ſaid *Patrick Beales* did not pay the ſaid ſum. And further, that on the 16th of Auguſt, 1787, being a grand common day holden in and for the ſaid borough, a certain by-law or order was propounded in the following words, that is to ſay, "Ordered by the mayor, bailiffs, and burgeſſes, in common-hall aſſembled, that no perſon ſhall be eligible to be elected into the office of common councilman, but ſuch as have ſerved the offices of treaſurer and bailiff; and that no perſon, having been diſpenſed from ſerving ſuch offices of treaſurer and bailiff, ſhall be eligible to be elected into the office of common-councilman, until he has actually ſerved ſuch offices of treaſurer and bailiff;" which ſaid by-

law or order, on the 24th of Auguſt, 1787, being a grand common day, was confirmed by the mayor, bailiffs, and burgeſſes, in common-hall; and by reaſon of the premiſes, the ſaid *Patrick Beales* is ineligible into the office of common councilman.—3. And further, that the ſaid *Patrick Beales* was not duly elected into the ſaid office of one of the common-councilmen, &c.—IT WAS OBJECTED to the validity of the return, that a return requires as much certainty as an indictment; that nothing therein is to be taken by intendment or inference; and that throughout this return none of the material facts are poſitively alleged, but the whole muſt be underſtood by intendment only. And even then, if the Court can take notice of them at all in the manner they are ſtated, the return profeſſes to ſtate two cauſes which are inconſiſtent, and therefore bad; for, firſt, it is meant to be inferred that *Beales* was not a burgeſs; and then, ſecondly, he is admitted to be a burgeſs; and it is urged, that he has not qualified himſelf to be admitted to the office of common-councilman, by having ſerved the office of treaſurer and bailiff.—ON THE OTHER HAND it was argued, that the latter part of the return, namely, that *Beales* was not duly elected, was a good return in itſelf to the *mandamus*. That theſe returns are by no means inconſiſtent: *firſt*, it is ſtated that *Beales* was not a burgeſs; *ſecondly*, that he was not eligible to the office of common-councilman; and, *thirdly*, that he was not duly elected. ASHHURST, J.—The Court has a diſcretionary power of diſallowing ſome parts of a return, where it is complicated. Now, in the preſent caſe, we may diſallow the two firſt parts of the return, and ſend down the third to be tried. BULLER, J.—The Court may undoubtedly quaſh the whole return if they chooſe; then it follows that we may quaſh a part if we think it right. Then if we quaſh the two firſt parts, it will go to trial on the laſt, "Whether *Beales* were duly elected?" And if that be negatived by the jury, it will be ſufficient to prevent a peremptory *mandamus*. *Where two cauſes returned to a mandamus are inconſiſtent, the whole muſt be quaſhed, becauſe the Court cannot know which to believe, and it is an objection to the whole return.* It is like a declaration in which two inconſiſtent counts are joined; there the plaintiff cannot have judgment. But I do not think that theſe returns are inconſiſtent. The firſt ſtates, that *Beales* was not eligible; and, ſecondly, if eligible, that he was not elected. This is ſomething like the caſe of *The King* v. *The Churchwardens of Taunton St. James*. GROSE, J. of the ſame opinion. PER CURIAM: Return quaſhed as to all but the laſt cauſe, namely, that *Beales* was not duly elected.

The King v. The Mayor, &c. of York,

So in this caſe it was held that, if ſeveral inconſiſtent cauſes be returned to a *mandamus*, the Court will quaſh the whole return.—On this *mandamus* (ſee p. 216 *ante*) to the defendants

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to certify the election of *Withers* as the recorder of York, the defendants returned, "that the mayor and sheriffs of the said city, and the major part of the aldermen, those who had been sheriffs, and of the common council, were not duly assembled in the common-hall of the said city, to proceed to the election of a recorder for the said city, as by the writ was supposed." They further returned, that before, and at the time of, the charter of the 16th of *Charles* the Second, there were, and still are, in the city, a mayor, twelve aldermen, two sheriffs, a common-council, consisting of seventy-two persons, and four wards within the city; that the charter confirmed the number of common councilmen, and prescribed the mode of their election as follows: that within fifteen days after a vacancy the common council should assemble in the Guild-hall before the mayor, aldermen, and sheriffs, and should nominate three citizens living in the ward where the vacancy happened, and present their names to the mayor, aldermen, sheriffs, and those who had been sheriffs, who should elect one of the three persons so presented, &c.; that that charter was duly accepted by the mayor and commonalty; that before the assembling of the common-council as after mentioned, &c. a vacancy happened in Bootham ward by the death of *J. Fleming*, a common-councilman, on the 3d of January, 1789. That before the proceeding to the supposed election of a recorder for the city as in the writ was mentioned, to wit, on the 15th of January, 1789, the common-council assembled themselves within the Guild-hall of the said city before the then mayor, aldermen, and sheriffs, and the major part of the then common-council, and nominated *James Brown* in the said writ named, and two other persons, citizens of the same city, and inhabiting within Bootham ward, and then and there and before the proceeding to the supposed election of a recorder, &c. presented the names of the said *James Brown*, *J. C.* and *R. P.* to the mayor, aldermen, and sheriffs, and those who had been sheriffs, who then and there, and before the proceeding to the supposed election of a recorder, &c. elected and nominated *Brown* to be of the common-council, in lieu of *Fleming*; whereupon *Brown* was then and there, and before the proceeding to the supposed election of a recorder, &c. duly admitted into the place and office of one of the common-councilmen, and from thence until and at the time of proceeding to the same supposed election, and giving of his vote as in the writ mentioned, continued in and to hold and enjoy the same office, and during all that time continued to be and was one of the common-councilmen of the said city, to wit, at the city of York aforesaid, in the county of the same city; and that *Brown*, at the time of giving his vote for *Sinclair* in the writ named to be recorder, *did not usurp the office of one of the common-council* of

Mic. Ter. 33 Geo. 3 B. R. 5 *Ter. Rep.* 66.

the ſaid city, as in the ſaid writ alleged, *but duly and rightfully exerciſed the ſame.* They alſo returned that *Withers* was not elected into the ſaid office of recorder, &c. as by the ſaid writ was alleged. And they further returned that before the coming of the ſaid writ, to wit, on the 15th day of January, 1789, they certified to the king that *Sinclair* in the writ mentioned was elected recorder, &c. and requeſted that the king would approve and confirm the ſame election, but that the king had not yet approved or diſapproved of the ſame election ſo certified to him, but that the certificate of ſuch election ſtill remained before him for his approbation, &c.—SIX OBJECTIONS were taken to theſe returns: two on the ground of inconſiſtency in the ſeveral cauſes returned, and four to the four ſeveral returns; firſt, that the cauſes returned were inconſiſtent, becauſe the firſt return ſtates that the mayor, ſheriffs, aldermen, thoſe who had been ſheriffs, and the common council, were not duly aſſembled to proceed to the election of a recorder, as by the writ is ſuppoſed, and yet in the ſecond return it is ſtated that (on the ſame day) the 15th of January, 1789, there was an aſſembly of the corporation, at which *Brown* was elected a common-councilman, and, conſequently, they were then duly aſſembled; and in the laſt return it appears that the corporation on that day certified the election of *Sinclair*, which alſo implies a due aſſembly. Secondly, the firſt return ſays that the mayor, &c. were not duly aſſembled to proceed to the election of a recorder, and the ſecond that *Brown duly and rightfully exerciſed his office* in voting for *Sinclair* at that meeting, which is impoſſible, if the corporation were not then duly aſſembled: and then, if the returns be inconſiſtent, the whole muſt be quaſhed. Thirdly, there it was only ſtated in the firſt return, that the mayor, &c. "were not duly aſſembled," without ſhewing in what particular the aſſembly was not a due one. Fourthly, that the ſecond return ſtates that *Brown* did not uſurp when he voted for *Sinclair*; and yet it admits the record of judgment of *ouſter* againſt him for this very uſurpation. Fifthly, that the third return is a traverſe of matter of law, reſulting from the premiſes ſtated in the writ, "By reaſon of which premiſes *Withers* was duly elected, &c." And being matter of law, it is not traverſable. Sixthly, that the laſt return was evaſive, and did not deny the allegations in the writ. The writ commanding the defendants to certify the election of *Withers*, which they ſay they cannot do, becauſe they have certified the election of *Sinclair*; which was relying upon their own act, which is the very act queſtioned, for their juſtification. The counſel on the other ſide, after endeavouring to anſwer theſe objections, obſerved alſo, that whatever judgment the Court might form on the return, ſeveral objections aroſe upon the face of the writ itſelf. Lord KENYON, Ch. J.—It is now too late

late to make any objection to the writ itself (1). The corporation, by making a return to it, have precluded themselves from objecting. It is for the convenience of suitors and of the public that such objections should be made at the proper season: it ought not to be permitted to any party to increase the expences of litigation by proceeding in the suit, when he himself thinks that there is an objection *in limine* to the proceedings altogether. Then with regard to the return: it is admitted that if there be any inconsistency in the return, the return must be quashed *in toto*; and on the ground of inconsistency I am of opinion that the return must be quashed. The writ states the election to have taken place on the 15th of January; and it is admitted in the return, that on that 15th of January a meeting of the corporation was had. The return contains an account of various occurrences at that meeting, and sets forth various acts, on which the corporation rely as legal and valid acts: but it is now argued that this was not a legal assembly for the purpose of electing a recorder. It is true, there may have been two different meetings of the corporation on the same day; or that a meeting of some of the corporation may be a legal assembly for one purpose, though not for another: but to this I answer that we are not to infer that, when no facts are stated from whence that inference is to be made. The defendants should have shewn in what particular they were not assembled for the purpose of electing a recorder, when they admitted that they were assembled for some other purpose. On this short ground, without discussing the other points, I am of opinion that the return should be quashed *in toto*, and that a peremptory *mandamus* should be awarded. And I have the less reluctance in deciding at present, without hearing the case argued a second time, because this decision need not necessarily be conclusive, since the title of this gentleman may be questioned hereafter in a *quo warranto* information, which may be immediately filed against him, if his title be defective. BULLER, J.—The return assigns four causes why the corporation cannot certify the election of *Withers*. The three last are glaringly bad. On the first I have had some doubts in my mind; but I am now perfectly satisfied that that is bad also, on two grounds; 1st, because it is inconsistent with what is stated on the other parts of the record; and, 2dly, because it contains a negative pregnant. First, it has been contended that the Court are to suppose that the meeting, which is stated to have been legally assembled for the purpose of electing a common councilman was at another

(1) *Sed vid.* 5 *Burr.* 2742. 5 *Mod.* 420. 1 Lord *Raym.* 559. *Carth.* 499. *Salk.* 700. 5 *Mod.* 10. 2 *Str.* 893. *Rep. Temp. Hardw.* 362. *Salk.* 434. 8 *Mod.* 111. 1 *Rol. Rep.* 409.

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time: but we cannot infer that. The date is ſtated on the record; it is material; and the Court muſt take it to be the true date, as it is not denied. All the tranſactions ſtated on the record are ſtated to have happened on the 15th of January; in another part of the record it appears that there was a legal meeting of the mayor, aldermen, &c. on that day; and it is therefore inconſiſtent to ſay that they were not duly aſſembled to elect a recorder, as by the writ is ſuppoſed. In the next place this return is a negative pregnant. The writ ſays that the corporation, being duly aſſembled, proceeded to the election of a recorder; and the return is, that they were not duly aſſembled to proceed to the election of a recorder. This means that they were duly aſſembled for ſome purpoſe, but not for the purpoſe of electing a recorder; but that mode of pleading cannot be ſupported. The ſecond cauſe returned is, that *Brown* did not uſurp, &c.; but this cannot be traverſed. The judgment of *ouſter* is concluſive; but even if it could be attacked on the ground of fraud, or on any other ground, that ground ſhould have been ſtated; inſtead of which the defendants have admitted all the facts in the writ, by which and by the records of the court it appears that *Brown*'s election was bad. The next cauſe is that *Withers* was not elected, &c.; that is alſo ſtated as a conſequence, and is bad, for the ſame reaſon as the preceding cauſe. As to the laſt cauſe, it is not for the credit of the city of York that it ſhould remain on the records of the court. If *Sinclair* had been duly elected, that ſhould have been returned; if not, then they have certified a falſehood. I am, therefore, of opinion, that the whole return muſt be quaſhed. GROSE, J. of the ſame opinion.—Return quaſhed, and a peremptory *mandamus* awarded.

The King *v.* the Mayor and Burgeſſes of Lyme Regis, on the proſecution of Arthur Raymond, Ea. Ter. 19 Geo. 3. B.R. 2 *Doug.* 177.

On a *mandamus* to reſtore to the office of a capital burgeſs, if the return ſtate the ground of the diſfranchiſement to have been the non-attendance of the proſecutor at a meeting to which he was ſummoned for the election of a capital burgeſs, an averment that the right of ſuch election is in the capital burgeſſes being the common-council, does not aſſert, with ſufficient certainty, that he had a right to concur in the election, and ought to have obeyed the ſummons, becauſe, conſiſtently with ſuch an averment, he might not have that right, it not appearing thereby that all the capital burgeſſes are members of the common-council.—The return ſtated, that *Lyme Regis* was a borough by preſcription; that the mayor and burgeſſes had been immemorially accuſtomed to have, and ſtill ought to have, within the borough, a certain guild-houſe, called the *Moot-hall*, or *Guild-hall*; that Queen *Elizabeth*, by letters patent of the 26th of June, in the 33d year of her reign, granted *(inter alia* in the return ſtated), that there ſhould be in the ſaid borough a mayor and eleven burgeſſes in number, only, out of the burgeſſes of the borough or town aforeſaid

ſaid [&c. as ſtated *infra*, p. 254, in the caſe of *Francis Fane* and *John Luther*]; that the letters patent, in the particulars in the return ſet forth, had been accepted, and acted under to the preſent time; that, from the time of granting the letters patent, every capital burgeſs, upon his admiſſion into the office, had been accuſtomed to take [the ſame oath, and in the ſame manner, and ſet forth in *hæc verba*, as in the caſe of *Fane* and *Luther*, *infra*, p. 254]; that the proſecutor was elected a capital burgeſs on the 27th of Auguſt, 1759, and ſworn in on the ſame day; that on the 10th of Auguſt, 1778, the mayor duly appointed a meeting or convocation of the mayor and capital burgeſſes, to be holden at the council-chamber within the *Moot-hall* or *Guild-hall*, on the 15th of Auguſt, at eleven o'clock in the forenoon, to elect one of the burgeſſes into the office of a capital burgeſs, in the room of *Henry Fane* deceaſed; that, before the 15th of Auguſt, he cauſed due notice to be given to all the capital burgeſſes, within the reach of the ſummons, of his having appointed ſuch meeting, and cauſed ſuch due notice to be given, on the 11th of Auguſt, to the proſecutor in perſon, whereby he ſummoned him to attend at the council chamber, within the *Moot-hall*, at the ſaid meeting; that on the 15th of Auguſt, the mayor, and *George Kirby*, and *Robert Clarke*, two of the capital burgeſſes, met at the council-chamber for the purpoſe of holding a meeting of the mayor and capital burgeſſes according to the notice, for the election of a capital burgeſs in the room of the ſaid *Henry Fane*, deceaſed, but that they not being a ſufficient number for that purpoſe, and becauſe a ſufficient number did not then and there appear, to hold ſuch meeting, none could be or was then held, and that the proſecutor did not attend or appear at the hour of eleven, nor at any time on that day, according to the appointment and notice, but contriving and deſigning *wilfully* to prevent the mayor and capital burgeſſes from holding ſuch meeting for the purpoſe aforeſaid, did *wilfully* abſent himſelf from the council-chamber during the whole day, and did, on the ſaid day mentioned, combine with the Hon. *Henry Fane* (and ſix others, by name), being, or claiming to be, capital burgeſſes, and having alſo before received notice (1) of the ſaid meeting, to prevent ſuch meeting from being held, and that, in proſecution of ſuch combination, they wilfully abſented themſelves from the council-chamber during the whole of the ſaid 15th of Auguſt; and that, by reaſon of the abſence of the proſecutor, and of a number of other capital burgeſſes ſufficient to proceed to the election, no meeting for

(1) There was no allegation that they had been ſummoned.

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the ſaid purpoſe could be or was held on the 15th of Auguſt, according to the appointment and notice. That the mayor, on the ſaid 15th of Auguſt, duly appointed another meeting to be held at the council-chamber on the 21ſt of Auguſt, for the ſame purpoſe [then the ſame allegations with regard to the meeting appointed for the 21ſt of Auguſt, as thoſe above ſtated, excepting that the charge of combination was not repeated]. And that the proſecutor, by his ſaid wilfully abſenting himſelf from the ſaid ſeveral meetings ſo appointed for the 15th and 21ſt of Auguſt, and by his ſaid combination, did *wilfully* neglect and violate the duty and execution of his office, contrary to the duty thereof, and the obligation of his oath. That, at the meeting of the mayor and burgeſſes, held *according to the immemorial cuſtom of the borough*, at the *Moot-hall* or *Guild-hall*, on the 31ſt of Auguſt, 1788, *John Coade*, one of the capital burgeſſes, exhibited certain articles of complaint againſt the proſecutor, and, *by the ſecond* (1) of the ſaid articles, charged him with having received previous and due notice, and with having been duly ſummoned to appear at a meeting of the mayor and capital burgeſſes [&c. ſtating the circumſtances relative to the meeting of the 15th of Auguſt, in the manner before alleged in his return, *with the omiſſion of the charge of combination*]. And that the ſaid *Coade*, by *the third* of the ſaid articles [&c. ſtating in like manner the circumſtances relative to the meeting of the 21ſt of Auguſt]. And that, thereupon, at the ſaid meeting of the 31ſt of Auguſt, it was ordered, that a copy [&c. ſtating preciſely the ſame proceedings as in the caſes of *Francis Fane* and *John Luther*]. That the mayor and burgeſſes had adjudged that *Raymond* was guilty of the abſences, contempts, neglects, breaches of duty, miſbehaviours, and other matters and things objected and charged againſt him, by the ſecond and third articles of the ſaid complaint. That he had not ſhewn any juſt cauſe, &c.; that the mayor and burgeſſes had thereupon reſolved, that for, &c. he ought to be removed, and did then and there remove him, and that he had not ſince, &c. and that for theſe reaſons, &c. The proſecutor inſiſted, that, in order to ſupport the diſfranchiſement, for *wilfully* diſobeying the ſummons of the mayor to attend an election of a capital burgeſs, it was incumbent on the defendants to ſhew; 1ſt, that *Raymond*'s attendance was neceſſary; 2dly, that he knew it to be ſo; and, 3dly, that the charges againſt him were ſufficiently clear for him to be able to prepare and make his defence. PER CURIAM: Lord *Mansfield*, Ch. J.—Returns

(1) This was one of the returns which had been amended. *Rex* v. *Lynne Regis* on the proſecution of the Hon. *Henry Fane*.

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muſt be certain, and not argumentative. I doubted for ſome time on the queſtion, Whether, in the preſent caſe, it is ſufficiently ſhewn in the return, that *Raymond* was of the common-council? That he ſhould be of it, is of the eſſence of the crime for which he is ſtated to have been amoved. There are three parts of the charter which go to ſhew, that the council conſiſts of *all* the capital burgeſſes, and that the expreſſions "common-council" and "capital burgeſſes" are ſynonymous, viz. 1ſt, "capital burgeſſes being the common-council;" it is not "capital burgeſſes being of the common-council." 2dly, If a capital burgeſs die, or is removed, a new one is to be choſen, "by the reſt of the council, or the greater part of them." 3. The paſſage relative to the meeting or convocation. But ſtill all thoſe paſſages and expreſſions are ambiguous. They afford a ſtrong inference in point of language; but are they ſufficient in this charter to conſtitute a common-council compoſed of *all* the capital burgeſſes? I think not, becauſe the charter refers to a previous known conſtitution. The council might be created by preſcription, or a former charter, to which this charter refers. If ſo, the conſtitution of the council by ſuch preſcription, or previous charter, ſhould have been ſet forth. It would be difficult to maintain an action on this, as a falſe return, if the council, by the charter, conſiſts of a *part* only, for the return does not ſay that the council is conſtituted by the charter.—As to the cauſe ſtated for the amotion, there is a great difference between a *charge* as the ground of disfranchiſement, and an *indictment*. In criminal proſecutions, technical forms are eſtabliſhed, and ought to be followed. If, in an indictment, you ſay that *A.* forged, and cauſed to be forged, the proof of either fact will ſupport the indictment; but to ſay that he forged, or cauſed to be forged, would be bad. This, being determined, muſt be adhered to. But ſuch nicety is not required in accuſations againſt a corporator in a corporate court. *There* ſubſtantial certainty is all that is neceſſary; and, in the preſent caſe, there is no doubt but the intent is charged as part of the crime, and ſufficient notice is alleged to have been given to *Raymond* to prepare to anſwer it.—Judgment, that the return be quaſhed, and a peremptory *mandamus* iſſue (1).

In

(1) The returns in the caſes of *Francis Fane*, *John Luther*, and ſeveral others (*infra*, 254). were quaſhed, on a motion made for that purpoſe, immediately after the deciſion of the preſent caſe. It was ſtated, on the part of the proſecutors, that, by the returns in thoſe caſes where the disfranchiſement had been for non-reſidence, the preſcriptive neceſſity of reſidence only applied to the council, and, as it was not directly averred that the proſecutors were of the council, the non-reſidence might be no offence in them.—Lord *Mansfield* ſaid, there was no getting over the objection,

The King *v.* the Mayor and Burgeſſes of Lyme Regis, on the proſecution of Francis Fane; and the ſame *v.* the ſame, on the proſecution of John Luther, Ea. Ter. 19 Geo. 3 B.R. 1 *Doug.* 148.

In a return to a *mandamus* to reſtore, if it is ſtated, that the party was removed *by the corporate body at large*, it is unneceſſary to *aver* that the power of removal is veſted in them, becauſe it is *incidental* to them, unleſs given by charter, by-law, &c. to a ſelect party. And an action will lie for a *ſuppreſſio veri* in a return, as well as for an *allegatio falſi*. Alſo when non-reſidence is a ground for removing a corporator, it is unneceſſary to ſummon him previouſly to come and reſide.—The writs, in theſe caſes, were exactly the ſame as in that of *Mitchell*, *infra*, p. 260. The return, in the caſe of *Francis Fane*, ſet forth; that Lyme Regis was a borough by preſcription. That the mayor and burgeſſes (the corporate name), had been immemorially accuſtomed to have a guild-houſe, called the Moot-hall, or Guild-hall. That, from time whereof, &c. till the granting the letters patent therein after mentioned, and alſo ever ſince, there had been, and ſtill was, a council of the mayor and burgeſſes, conſiſting of the mayor and certain other perſons, who, immemorially, until granting the letters patent, were called *counſellors*, and, from the time of the granting the letters patent, *capital burgeſſes*, and that immemorially, till the letters patent, the council conſiſted of *eleven* burgeſſes, inhabiting and reſiding within the borough or the liberties thereof, of whom the mayor was one. That, till the letters patent, every counſellor, on his admiſſion into that office, took an oath for the due execution thereof; and, from the time of the granting the letters patent, hitherto, every capital burgeſs, upon his admiſſion into that office, had taken an oath for the due execution thereof; which oath, ſo reſpectively taken, was ſtated *in hæc verba* in the return, the material part being as follows: "You ſhall ſwear, that you ſhall be obedient to the "mayor and his ſucceſſors, when, and as often, as the "mayor ſhall have occaſion to ſend for you, either for the "affairs of the town, or elſe for to be aiding and aſſiſting "of him in the court, upon the pleading or hearing of any "matter or cauſe depending before him, or for or concern-"ing any other cauſe for the which the ſaid mayor ſhall, "or may, in reſpect of the office of the mayoralty, have "occaſion to hear, or uſe your opinion or counſel. His "counſel and his brethrens' you ſhall obſerve and keep, of "and concerning all matters that ſhall be communed of *in* "*the council-houſe*, or elſewhere, for the affairs of the com-"mon-wealth of this town, and ſhall not diſcloſe, diſcover, "or report abroad, what ſhall be treated of in the ſaid

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jection, and that the averment, that, ſince the charter, the council had conſiſted of the mayor and capital burgeſſes, was not ſufficient, as it did not appear that all the ſixteen came to be of the council, which before the charter was ſtated to conſiſt only of eleven.

"council-

" council-houſe, or any particular man's opinion there de-
" livered, touching any thing that ſhall there be treated, or
" communed of, touching any the affairs of the ſaid town."
That, till the letters patent, every counſellor, and ſince, every capital burgeſs, was accuſtomed to reſide and inhabit, and of right ought to have reſided and inhabited within the borough, or the liberties thereof, to adviſe and aſſiſt the mayor, touching the ſtate, good rule, and government of the borough, and the adminiſtration of juſtice within the ſame. That Queen Elizabeth, by letters patent of the 26th of June, in the 33d year of her reign, did (*inter alia* ſtated in the return), grant (1): [That there ſhould be for ever in the borough, a mayor, and eleven other burgeſſes in number only, out of the burgeſſes of the borough or town aforeſaid, to be choſen and conſtituted according to the form in the ſaid letters patent thereunder ſpecified, who ſhould be called capital burgeſſes (then nominating as uſual in charters, the firſt mayor and eleven capital burgeſſes). The capital burgeſſes to continue for life, unleſs, in the mean time, for their own bad government in that behalf, they ſhould be removed. That the ſaid mayor, and eleven burgeſſes thereby appointed by name, or the greater part of them, the mayor for the time being one, whenever to them, or the greater part of them, it ſhould ſeem fit, in their ſound prudence and diſcretions, ſhould chooſe, not exceeding the number of four other perſons of the inhabitants of the borough or town, to be other capital burgeſſes, ſo that the other capital burgeſſes, ſo to be choſen, together with the mayor, and the other eleven capital burgeſſes, ſhould not exceed the number of *ſixteen*, to be continued in the office for their lives, unleſs, &c. That, as often as the capital burgeſſes, ſo nominated, or thereafter to be choſen (*i. e.* the eleven and four), or any of them, ſhould die, or be removed for, &c. then it ſhould be lawful *to the other capital burgeſſes, being the common-council*, or the greater part of them, to chooſe one or more of the other burgeſſes, in the place or places of ſuch capital burgeſs or burgeſſes ſo happening to die, or to be removed; and that he or they ſo choſen ſhould be a capital burgeſs, or capital burgeſſes, in like manner as the capital burgeſſes, by the letters patent before conſtituted, were and ſhould be. That, whenever a vacancy or vacancies ſhould happen, by the death or removal of any of the ſaid capital burgeſſes, another or others of the burgeſſes ſhould be elected a capital burgeſs, or capital burgeſſes, *by the reſt of the council*, or the greater part of them, in the place of ſuch capital burgeſſes ſo happening to die or to be removed. That the capital burgeſſes, ſo

(1) Vide the following page, note (1).

from

from time to time to be choſen, ſhould take their oaths before the mayor and the reſt of the capital burgeſſes, or the greater part of them, well and faithfully to execute their office. That by the ſaid letters patent, the queen granted to the mayor, and capital burgeſſes, and their ſucceſſors, that it ſhould be lawful for them to keep or appoint a guild or council-houſe, within the borough or town, commonly called the *Moot-hall*, and *that the ſaid mayor and capital burgeſſes, the common-council of the borough or town aforeſaid*, or the greater part of them for the time being, as often as to them it ſhould ſeem neceſſary, ſhould and might convoke, and hold, in the ſaid houſe, a certain convocation of the ſame mayor and capital burgeſſes, or the greater part of them, and in the ſame convocation ſhould and might treat, &c. of the ſtatutes, acts, articles, and ordinances, touching the borough or town, and the good rule, ſtate, and government thereof, according to the tenor of the ſaid letters patent, as by the ſaid letters patent, remaining on record, might more fully appear (1).] That the mayor and burgeſſes accepted the letters patent, in the ſeveral matters in the return ſpecified, and from that time, had acted under, and conformed thereto; [and that, ever ſince, the council had conſiſted, and of right ought to conſiſt, of the mayor and the capital burgeſſes of the borough for the time being] (2). That *Fane*, on the 29th of Auguſt, 1774, was elected a capital burgeſs, and afterwards, on the ſame day, took the oath above ſpecified. That he had not, at any time ſince his election, inhabited or reſided within the borough, or the liberties thereof, but, on the contrary, had, ever ſince, inhabited and reſided with his family, in places out of, and at a great diſtance from the ſaid borough; and the liberties thereof, and had, during all that time, *voluntarily, without good occaſion*, abſented himſelf from the borough, and from the duty of the office of a capital burgeſs; and that by his non-reſidence, and his voluntary abſence from the borough, and the duty of his office, he did, during all the time of his being a capital burgeſs, wilfully neglect and omit the duty and execution of his office, and deprive the mayor and burgeſſes of that counſel, and aſſiſtance, and advice, which by the duty of his office, and according to the ſaid oath, he ought to have given. That, at a meeting or convocation of the mayor and burgeſſes, held, according to the immemorial cuſtom and uſage of the borough, at the *Moot-hall*, or *Guild-hall*, on the 31ſt

1) There was the ſame recital with that included in this parentheſis in the return to the *mandamus* to reſtore *Arthur Raymond*, *ſupra*, p. 250.

(2) This ſentence (printed between crochets), was not in the return in the caſe of *Arthur Raymond*.

of

of Auguſt, 1778, *John Coade*, one of the capital burgeſſes, exhibited certain articles of complaint, &c. againſt *Fane* (in the ſame form, and with the ſame omiſſion, but which was now taken as amended, as in the return to the *mandamus* of the Hon. *Henry Fane*, except that here the only charge was *non-reſidence and conſequent neglect of duty*, and the conviction was ſtated to be only on the *fourth* article of the complaint). That a copy of the articles, and a ſummons to appear at the next meeting or convocation of the mayor and burgeſſes, then appointed to be held at the Guild-hall, on the 14th of September next, and anſwer the ſaid articles, and ſhew cauſe why he ſhould not be removed and diſplaced, were ordered to be, and afterwards, on the 31ſt of Auguſt, 1778, were ſerved on *Fane*. That, in purſuance of an order made at the ſaid meeting or convocation, held on the 31ſt of Auguſt, 1778, all the burgeſſes of the borough, within the reach of ſummons, were, afterwards, and before the holding of the next meeting, duly ſummoned, to appear at the ſaid next meeting or convocation, to treat, adviſe, conſult, and determine, touching the removal and diſcharging of *Fane* from the office of a capital burgeſs, for the cauſes and miſdemeanors mentioned and contained in the ſaid articles. That on the 14th of September a meeting of the mayor and burgeſſes was, according to the ſaid laſt-mentioned ſummons and notice, held at the Guild-hall aforeſaid, for the purpoſe aforeſaid, amongſt other buſineſs, and that *Fane* appeared. That, by his conſent, the meeting was adjourned to the next day. That, on the next day, a meeting or convocation of the mayor and burgeſſes aforeſaid was, according to and in purſuance of the ſaid adjournment, held at the Guild-hall. That *Fane* alſo appeared at the adjourned meeting, and it was there adjudged, that he was guilty of the non-reſidence, abſences, contempts, neglects, breaches of duty, miſbehaviour, and other miſdemeanors, and things, objected, and charged againſt him, in and by the *fourth* of the ſaid articles of complaint. That he had not ſhewn any juſt cauſe why he ſhould not be removed from his office. That the mayor and the reſt of the burgeſſes holding the meeting, had reſolved, that, for the *non-reſidence*, abſences, &c. whereof he had been adjudged guilty, he ought to be removed, and did then and there remove him. That he had not afterwards been elected, admitted, ſworn in, or reſtored; and that, for theſe reaſons, they could not reſtore him, or cauſe him to be reſtored. Againſt the ſufficiency of the return three objections were taken. 1ſt. Becauſe it does not ſtate that the meeting which diſfranchiſed *Fane*, was held by any right or cuſtom. 2dly. It does not aver that the corporation at large had an authority to diſfranchiſe. 3dly. It

does not ſtate that they had a right to diſfranchiſe for the reaſons for which they have removed the proſecutor. Lord MANSFIELD—The only queſtion is, Whether, taking the law as clearly eſtabliſhed, that the power of amotion is incident to a corporation? this would have been a ſufficient return before the ſtatute of Queen *Anne*; for I take it to be ſettled, that the ſame certainty is required now, as before that ſtatute, though I think at firſt it might have been otherwiſe determined, becauſe the reaſon was not the ſame. The great objection made to this return is, that the defendants have not ſet out, that the body at large has the power. They have ſet out the charter, and we muſt take it to be as ſtated, and there is no ſpecial power thereby given either to the whole body, or any ſelect part. In ſuch a caſe, the charter making them a corporation, the law implies the right to remove to be in the whole body. The charter leaves it to the rule of law. It is ſaid, there may be ſome other charter or by-law to the contrary. But is it neceſſary to ſtate every poſſible negative, as, that there is no other charter, no by-law, &c.? I think it is not. If there were another charter or by-law reſtraining the power, and that were not ſet out, can there be a doubt but an action would lie? *That* would be miſleading the Court. Wherever there is a ſuppreſſion of truth, and the party is thereby injured, he may maintain an action. As to the cauſe of removal, it is ſet out in expreſs words, *viz.* a general non-reſidence. But, if the corporation has the power to remove, they muſt have power to hold a meeting for that purpoſe, and *that*, being incident to the other, need not be ſet out. It is not true that you are to preſume every thing againſt a return. You are not to preſume for or againſt it.—WILLES and ASHHURST, *Juſtices*, of the ſame opinion.—BULLER, *Juſtice*: I will take the firſt and third objections together; and, with regard to them, I think that a general non-reſidence being expreſsly ſtated as the ground of amotion, it was not neceſſary to give notice to come and reſide; for, if a member of a corporation ought, by his office, to reſide, he is bound to know the law; and, where there is a right to remove, there muſt be a right to aſſemble for that purpoſe. As to the great queſtion, Whether it was neceſſary to ſtate that the power of amotion was in the body at large? it has been admitted, that it is, by law, incident to the whole body, if not reſtrained, by an expreſs grant, to a ſelect part. It is alſo admitted, that, if it had been ſtated, it would not have been neceſſary to prove it. But it is inſiſted, that this return may be true in every thing, and yet the party be entitled to be reſtored, and that he has no opportunity of traverſing the right, or bringing an action for a falſe return.

I agree

I agree that, in theſe returns the ſame certainty is required as in indictments, or returns to writs of *habeas corpus*. Lord *Coke* has diſtinguiſhed certainty in pleading into three ſorts, *Co. Littl.* 303. *a.* (1). Certainty to a common intent, which is ſufficient in a plea in bar. 2. Certainty to a certain intent in general, as in counts, replications, &c. and ſo in in lictments. 3. To a certain intent in every particular, which is neceſſary in eſtoppels. The ſecond of thoſe ſorts is all that is requiſite here, and I take it to mean, what upon a fair and reaſonable conſtruction may be called certain, without recurring to *poſſible* facts, which do not appear. Before the caſes of Lord *Bruce*, 2 *Str.* 819, and *Richardſon*, 1 *Burr.* 539, it was thought neceſſary to ſtate the power to be in the corporation at large, becauſe it was then conſidered as incident to them. It is one of the firſt principles of pleading, that you have only occaſion to ſtate facts; which muſt be done for the purpoſe of informing the Court, whoſe duty it is to declare the law ariſing upon thoſe facts, and to apprize the oppoſite party of what is meant to be proved, in order to give him an opportunity to anſwer or traverſe it. It is now ſettled to be matter of law, that *primâ facie*, the power of amotion is in the body at large. Being matter of law, it is not traverſable. But the preſent proſecutor may now *reply*, that the power is not according to the general law in this caſe, but in a ſelect body, which may then be tried by a jury. If the return be certain on the face of it, *that* is ſufficient, and the Court cannot intend facts inconſiſtent with it, for the purpoſe of making it bad. We muſt conſider the charter as truly ſtated, becauſe nothing appears to contradict it; and, if ſo, the law ſays, that, by ſuch a charter, the corporation at large have the power of amotion. If preſumptions were to be allowed, certainty in every particular would be neceſſary, and no man could draw a valid and ſufficient return. If the power of amotion is, in this place, in a ſelect part, and the preſent return is bad on that account, I am clear that an action will lie. I ſay, if it is bad on that account, becauſe it does not neceſſarily follow that it is bad. The contrary was held in *Braithwaite*'s Caſe, 1 *Ventr.* 19, which was recognized to be law by this Court not many years ago, in a caſe from the borough of Leiceſter. *Braithwaite*'s caſe alſo proves: 1. That, although a return be true in words, yet, if it is falſe in ſubſtance, an action will lie, and; 2. That preſumption and intendment, as far as

(1) For an explanation of the different ſorts of certainty, *vide* the judgment delivered by *De Grey*, chief juſtice, in the caſe of *Rex* v. *Horne* in *Dom. Proc.* 11 *May*, 18 *Geo.* 3. *Cowp.* 672. 682.

they go, must be in favour of returns, not against them. If, in this borough, the power is given to a select part by the charter, or otherwise, the Court is imposed upon, and the prosecutor injured; and it would be a very proper subject for an action.—THE COURT pronounced judgment in favour of the return.

The King *v.* the Mayor and Burgesses of Lyme Regis, on the prosecution of David Robert Mitchell, Hil. Ter. 19 Geo. 3. B.R. 1 *Doug.* 79.

On a *mandamus* to restore *David Robert Mitchell* to the office of a capital burgess of Lyme Regis, the defendants returned, "that *Mitchell* was not *duly elected, admitted, and* "*sworn*, a capital burgess of the said borough, and therefore "they could not restore him, or cause him to be restored." PER CURIAM: The question is, Whether this is a sufficient return? The grievance complained of, by the person applying for the writ, is, that, having been duly elected, admitted, and sworn, he has been removed by the corporation; and *they* are to shew a just cause of removal. It is admitted, that they could not remove for want of an original title; but it is contended, that they have sufficiently answered the suggestions of the writ, and that issue may be taken, or an action brought, on the return. Upon full consideration, we are all of opinion, that the return must answer, not the words, but the materiality of the writ, and nothing shews this more than the nicety in the cases as to *elected* and *duly elected*. A return which seems to be guarded, and not to deny the substance, is bad, although I rather think nothing is an election but a *due* election. Here the material suggestion is the removal. They were not to judge of the title. The return is in the conjunctive, not duly elected, admitted, and sworn, and, therefore, fallacious. If the truth would have warranted it, and they had returned not duly elected, *or* admitted, *or* sworn, it might have been good. We are all of opinion, that the return is insufficient, and therefore a peremptory *mandamus* must issue.

Rex *v.* Mayor and Aldermen of Leicester, Ea. Ter. 7 Geo. 3. 4 *Burr.* 2087.

A return to a *mandamus to restore an alderman* was in this case disallowed, because it did not set forth a total desertion from the place of which the party was alderman.—The defendants returned for cause of removal: That the said *James Sismey*, after he was elected, placed, and sworn in to the said office, and before amotion of him from it, that is to say, on the 1st of May, 1766, *departed* with his family, from the borough of Leicester aforesaid, and the liberties thereof, and *entirely* left the same, with an *intent* to reside, inhabit, and dwell, with his family, for the future, elsewhere; and from thence, and until and at the time of the amotion of him, did continually abide, reside, inhabit, and dwell, with his family, out of the said borough and the liberties thereof, contrary to the duty of his office aforesaid, to the great injury and damage of the mayor, bailiffs, and burgesses of the said borough.

rough. They then returned, that on the 10th of September, 1766, *Joſeph Chambers*, the mayor of the ſaid borough, and the major part of the aldermen of the ſaid borough for the time being, in *due* manner met and aſſembled at the Guild-hall of and within the ſaid borough, concerning divers matters and buſineſſes relating to the ſaid borough and the good regulation and government thereof: of and to which ſaid meeting or aſſembly, due and reaſonable notice and ſummons was previouſly ſent to *all* the aldermen of the ſaid borough for the time being, reſident or being within the ſaid borough and the liberties thereof, in order that they might attend at the ſaid meeting or aſſembly. They further returned, that at the ſaid meeting or aſſembly, a charge and information was made and given to the ſaid mayor and aldermen ſo aſſembled, againſt the ſaid *James Siſmey* "of "his having departed from and left the ſaid borough and "the liberties thereof as aforeſaid, and of his abiding, re- "ſiding, and dwelling *out of* the ſaid borough and the liber- "ties thereof as aforeſaid, contrary to the duty of his ſaid "office, and to the great damage of the ſaid mayor, bailiffs, "and burgeſſes, of the ſaid borough," as a reaſonable cauſe for the removal of the ſaid *James Siſmey* from his ſaid office. Whereupon the mayor, and major part of the aldermen of the ſaid borough, ſo then and there aſſembled as aforeſaid, did then and there *duly diſcharge and remove* him the ſaid *James Siſmey* from the ſaid place or office of one of the aldermen of the ſaid borough, *for the cauſe aforeſaid.* The proſecutor objected that this return was inſufficient, becauſe 1ſt, The corporate meeting is only returned to be aſſembled "upon *due* notice:" whereas there ought to have been *particular* notice, as it was not upon a charter-day. 2d, No notice was given to the *perſon removed* of any charge upon him. 3dly, *Non conſtat* that the corporate body *heard* the charge, or determined upon it; or that it was determined at all. 4thly, Conſequently, the amotion of this gentleman was irregular. 5thly, *No neglect of duty* is charged; only that he abſented himſelf from the borough.—AND PER Lord MANSFIELD: This man had *not totally* left the borough. There is no pretence to ſupport this return: he was only abſent about *four months.*—Mr. Juſtice YATES concurred. The caſe juſt now cited out of Lord *Raymond* is in point *againſt* the return (1). How can the corporation know his *intention?* How did they *know* "that he did not intend to re- "turn?" He might have *altered* his intention.—Lord MANSFIELD: But they have *never aſked* him; they have given him *no notice* of the charge. There is no pretence

(1) 2 Ld Raym. 1275.

for amoving him.—PER CURIAM: *Return* disallowed; and a *peremptory mandamus* ordered.

The King v. G. Gaskin, D.D. Ea. Ter. 30 Geo 3. B.R. 8 *Ter. Rep.* 209.

A return (to a *mandamus* to restore) was held insufficient, because it did not state that the party had been summoned to answer to the charge before he was removed.—The defendant, rector of the united parishes of Saint Bennet, otherwise Benedict Gracechurch, and Saint Leonard Eastcheap, in London, having been called upon by a *mandamus* to restore *John Fulbrook to the office of parish-clerk* of the said united parishes, made a return to the *mandamus*, in which he assigned several causes for the removal of the clerk. After enumerating the different causes which shewed the indecent and indecorous conduct of the clerk on several occasions, and among others that the clerk was on a certain day intoxicated during divine service and incapable of performing his office, and that he officiated in an improper part of the church, the return concluded thus, that "for and on account thereof *in the presence of the said J. Fulbrook*, and also in the presence of the churchwardens of the said united parishes, I did, as such rector as aforesaid, remove and dismiss the said *J. Fulbrook* from his place and office of parish-clerk, &c." —Lord KENYON, Ch. J. If we were to hold this return to be sufficient, we should decide contrary to one of the first principles of justice, *audi alteram partem.* The cases of *Rex* v. *Mayor of London*, and *Rex* v. *Mayor of Uxbridge*, cited in support of this return by no means warrant the position for which they were cited; there the application was for a *mandamus* to restore; and on hearing the whole case this Court refused to grant the writ *because it appeared on the party's own shewing* that he ought to have been removed. It is to be found at the head of our criminal law that every man ought to have an opportunity of being heard before he is condemned: and I should tremble at the consequences of giving way to this principle. I have no doubt but that Doctor *Gaskin* has acted on this occasion from the best motives: and, notwithstanding our decision, he will be perfectly justified in renewing his accusation against this person, and in removing him from his office in a more formal manner if the charge be true. GROSE J.—The offences charged on the clerk are abundantly sufficient to warrant Doctor *Gaskin* in removing him: but the present proceeding is informal, and the return to the *mandamus* is insufficient. LAWRENCE J.—This was one of the grounds on which the return in *Bagg*'s case, 11 *Co.* 99. *a.* was holden to be insufficient. *The Court* therefore awarded a peremptory *mandamus* to restore *Fulbrook.*

The King v. the Justices of the West Riding of Yorkshire,

The Court will not quash a return to a *mandamus* (which directed an inferior Court to give judgment on an indictment) merely because it states an erroneous judgment given below;

below: but a writ of error must be brought to reverse that judgment.—To a writ of mandamus, which (after reciting that an indictment had been preferred and found at the quarter-sessions of the West Riding of Yorkshire, holden, &c. against *William Stead* and *J. Stead*, for certain trespasses and nuisances, in unlawfully and injuriously *erecting, building, and setting up* a certain wall, &c. upon and across a certain common and ancient pack and prime-way leading, &c. to which *W.* and *J. Stead* had pleaded not guilty, and on which indictment they had been duly convicted, &c.) commanded the defendants to give judgment on the said indictment against the said *W.* and *J. Stead*, the defendants made a return, stating, that at the quarter-sessions holden, &c. "they gave judgment against the said *W.* and *J. Stead*, on the said indictment for the offence aforesaid, which said judgment was, that the said *W.* and *J. Stead* should be fined the sum of 6d. each, and be discharged, &c." To this return it was objected that it did not state that the defendants had given a full judgment on the indictment against *W.* and *J. Stead*. This being an indictment for a nuisance, it should have been part of the judgment that the nuisance be abated. *R.* v. *Pappineau*, 2 *Str.* 686. But THE COURT said, that it did not appear to them that the justices at the quarter-sessions ought to have adjudged that the nuisance should be abated, the indictment not charging the defendants with *continuing*, but merely with *erecting* the wall, so that for any thing that appeared on the record the nuisance did not in fact exist at the time when the indictment was preferred. *But that it was not necessary to determine this point in the present case, because even if the judgment given below were erroneous, this was not the proper mode of correcting the error, but that the prosecutor must bring a writ of error, as was done in the case cited from* Strange.—Return allowed.

Hil. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 467.

Marine Insurances.

What Persons may be Insurers.

A COMPANY of ship-owners engaged to insure each other's ships, and covenanted *severally*, and not jointly, to pay a certain sum in case of loss in proportion to their respective shares, but in case of the insolvency of any one of the members all the others were to be responsible: ruled that this contract was void by the stat. 6 *Geo.* 1. c. 18. s. 12. —This was an action of covenant. The declaration stated, that by certain articles of agreement, dated the 11th of April, 1787, between the defendant and certain other persons therein

Lees *v.* Smith, Tr. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 338.

therein named and deſcribed as ſeveral owners and part-owners of ſhips, and the ſeveral other perſons owners or part-owners of ſhips who ſhould then or at any time thereafter be admitted and become parties to the ſaid articles, &c. of the firſt part, and the plaintiff of the other part, it was covenanted and agreed, and the ſaid ſeveral parties to thoſe preſents for themſelves *ſeverally*, and not jointly (amongſt other things), covenanted with the plaintiff that they would ſeverally engage and bind themſelves for the aſſurance of ſhips and parts of ſhips belonging to the ſeveral and reſpective parties of the firſt part along with his or their own ſeveral and reſpective parts of any ſhips from the 1ſt of June then next for twenty-one years, ſubject to certain conditions and regulations, &c. that in caſe of a total loſs of any ſuch ſhip, the ſeveral parties to the ſaid articles of agreement of the firſt part *ſeverally* covenanted to pay his or their proportionable part or ſhare of the ſum of 1000l. to the perſon who ſhould have entered and enſured ſuch ſhip. It then ſtated, that *W. Wealands*, who was intereſted in a ſhip called *The Wealands* to the value of 1200l. became a party to and ſealed, &c. the articles of agreement, and entered the ſaid ſhip for inſurance; that that ſhip was on the 1ſt of June, 1795, taken as prize; and that the defendant, though requeſted, refuſed to pay to *Wealands* his proportionable part of the ſaid ſum of 1000l. to wit 100l. according to the meaning and effect of the ſaid agreement. The defendant after oyer of the articles pleaded the ſtat. 6 *Geo.* 1. c. 18. by which the Royal Exchange Aſſurance Company and the London Aſſurance Company were incorporated.—To this plea there was a general demurrer.—PER CURIAM: It is ſaid, that if this caſe depended entirely on the parts of the deed ſet forth in the declaration, the plaintiff would have been entitled to judgment: but we cannot poſſibly get rid of the other part of the deed diſcloſed in the plea which forms an eſſential ingredient in the contract on which the action is brought. This is not like the caſe of independant covenants, where one may be ſtruck out; for this is of the very eſſence of the contract. The meaning of the legiſlature in paſſing the ſtat. 6 *Geo.* 1. c. 18. (1), was, that, as the two great inſurance companies were to have a monopoly up to a certain extent in conſideration of certain

(1) The ſtat. 6 *Geo.* 1. c. 18. ſ. 1. enables the king to grant charters to the two bodies then about to be incorporated; and ſect. 12. prohibits any other corporations aſſuring ſhips, &c. and enacts that all ſuch contracts of aſſurance ſhall be *ipſo facto* void; providing that any private or particular perſon or perſons may underwrite, &c. as fully and beneficially as if the act had never been made, "ſo as the ſame be not upon the account or riſk of a corporation, or upon the account or riſk of perſons acting in a ſociety or partnerſhip for that purpoſe."

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ſums of money paid by them to the public, there ſhould be no competition between them and any other public body; but that private individuals might ſtill continue to inſure on their own account. The caſe of *Harriſon* v. *Millar* (1) ſeems to have been properly decided; there each perſon undertook for himſelf only according to the value of his own ſhare: but here in caſe of the inſolvency of any one of the members all the others are liable to make good his ſhare of the loſs. This is adding the credit of the reſt of the members of the ſociety, which is the very thing that the act of parliament intended to prevent, namely, that in no event ſhould the joint credit of any company be pledged in a contract of inſurance. Therefore the plaintiff cannot recover.

Mitchell, *et al.* aſſignees of Robertſon, a bankrupt, v. Cockburne, ſurviving aſſignee of Elizabeth Tyler, a bankrupt, Mic. Ter. 35 Geo. 3. B.R. 2 *Hen. Black.* 379.

And where two perſons are engaged in *a partnerſhip* in inſuring ſhips, &c. which is carried on in the name of one of them only, and that one pays the whole of the loſſes; ſuch a partnerſhip being illegal by ſtat 6 *Geo.* 1. c. 18. he cannot maintain an action againſt the other to recover a ſhare of the money that has been ſo paid. Lord Ch. J. EYRE.—By the ſtatute 6 *Geo.* 1. c. 18. the two corporations became the purchaſers of the excluſive privilege of inſuring on a joint ſtock, and to give effect to that privilege all other perſons are prohibited from inſuring on a joint ſtock. Now it appears clearly on the firſt view, that the proviſions of the act are at an end, if a perſon, by merely inſuring in his own name, can have the advantage of a joint capital, which the act meant to prohibit. This partnerſhip, therefore, is contrary to the ſpirit of the act, and it is alſo contrary to the letter of it. The 12th ſection directs, that all ſocieties and partnerſhips (except the two corporations) ſhall be reſtrained from underwriting any policy, or making any contract of aſſurance, and if any perſon acting in ſuch ſociety, or partnerſhip, ſhall preſume to

(1) It was an action on two policies of inſurance effected on the *Ann* and *Elizabeth* from Dantzic to London. The plaintiff and the defendants were members of "The Whitby Aſſociation," conſiſting of a number of perſons owners of ſhips, each of whom in proportion to his ſhipping paid a certain ſum, which formed the ſtock of the ſociety. The policies were ſigned by all the members. All inſured for each other according to the reſpective values of their ſhips, and when any loſs happened, the treaſurer paid it out of the joint ſtock. The defendant's ſhare was 14l. Each individual was only liable for the ſum he had undertaken. For the defendant it was objected, that the policies were void in law: but Lord *Kenyon* over-ruled the objection; his lordſhip ſaid, "This does not infringe on the act of parliament, as the members of this aſſociation have only underwritten in their individual characters: but they cannot underwrite for themſelves and partners. If all of them were liable up to the extent of their whole ſtock, it would be illegal. At preſent the members of this aſſociation only ſtand as individual underwriters for ſmall ſums." And the cauſe was at laſt referred, to inquire whether the money paid into court was inſufficient to cover the loſs.

under-

underwrite any ſuch policy, or make any contract of aſſurance, every ſuch policy ſhall be void, and the ſum underwritten ſhall be forfeited. This does not at all go to confine the meaning of the legiſlature to an avowed partnerſhip, inſuring publicly in their own names; but the object is to prevent any other joint ſtock being embarked in inſuring. This being ſo, the conſequence unavoidably is, that no contract can ariſe directly out of ſuch a proceeding, ſo as to be the foundation of an action. The caſes of *Faikney* v. *Reynous*, 4 *Burr.* 2069, *vide* vol. I. p. 325, and *Petrie* v. *Hannay*, 3 *Ter. Rep.* B. R. 318. *vide* vol. I. p. 275, 590, were one ſtep removed from the illegal contract itſelf, and did not ariſe immediately out of it. Thus in *Faikney* v. *Reynous*, the bond was given to ſecure the re payment by a third perſon, of his proportion of the money paid by the plaintiff in ſtock-jobbing. So in *Petrie* v. *Hannay* the money had been paid to the broker by *Keeble*, and the action was brought to reimburſe his executors for the defendant's ſhare. In that caſe, indeed, Lord *Kenyon* ſeemed to be of opinion that the action could not be maintained; and it was decided expreſsly on the authority of *Faikney* v. *Reynous*. But perhaps it would have been better, if it had been decided otherwiſe, for when the principle of a caſe is doubtful, I think it better to over-rule it at once, than build upon it at all. But be that as it may, it is ſufficient now to ſay, that thoſe caſes go one ſtep ſhort of the direct illegal tranſaction, but that the preſent caſe ariſes immediately out of it. HEATH, J.—I am of the ſame opinion. It ſeems to me that the object of the ſtatute would be totally defeated, if it were to extend only to thoſe policies, in which the names of all the partners were inſerted. It expreſsly declares, that every policy ſubſcribed by any perſon acting in a partnerſhip ſhall be abſolutely null and void, though it may be true that the party ſubſcribing ſhall be eſtopped from ſetting up a ſecret partnerſhip, to defeat a *bonâ fide* inſurance. And the reaſon is obvious; trade is carried on according to the capital employed. Now the inſurances would run to the extent of the capital, in whatever name the policy might be ſubſcribed. The object therefore of the ſtatute was to prevent the employment of a joint capital, which would afford the greateſt competition with the eſtabliſhed corporations. With reſpect to the caſe of *Petrie* v. *Hannay*, one judge there hinted that his opinion might have been different, if the queſtion had been *res integra*. But it is ſufficient to reſt on the opinions of the two other judges, that in the caſe of partners in illegal contracts, if one pays the whole partnerſhip debt without the expreſs conſent and direction of the other, he cannot acquire a right of action againſt the other. So in the preſent caſe, as it does not appear that the payments were made by one partner at the requeſt or by the expreſs direction or conſent of the other,

other, this action cannot be maintained.—ROOKE, J. concurred.—Rule diſcharged.

If a party in an agreement for inſurances has a loſs, and is contributory to the loſſes of the other parties therein, they muſt be contributory to his.—This was an action on the caſe, upon articles of agreement conſtituting a ſociety for the mutual aſſurance of each other's ſhips: whereby they engaged that when and ſo often as any of the ſhips wherein any of the members of this ſociety had property ſhould be loſt, the reſt ſhould contribute to ſuch loſs. But every member was obliged to prove a property of 500l. in a ſhip: and if he would ceaſe to be a member, he was obliged to give *ſix months' notice*. The plaintiff ſhewed that he had the requiſite property in a ſhip, and became a member; and that the ſhip was loſt. Plea—that the plaintiff had *parted with* his intereſt in the ſhip before the loſs happened. Replication—that by articles of agreement with the purchaſer of the ſhip, the plaintiff had agreed to pay 500l. *if a loſs happened within three months:* and therefore he was *intereſted during the voyage*. Demurrer to this replication: and joinder in demurrer.—THE COURT were of opinion, that as the plaintiff continued *contributory* to the loſſes of the others, at the very *time* when this loſs happened, it was but juſt and equitable, and within the words and meaning of the agreement, that *they* ſhould contribute to *his*. He ſtill had an intereſt in the ſafety of the ſhip: he had not parted with *all* his intereſt in it; but continued intereſted *quoad* this loſs (1).—*Per Cur.* Judgment for the plaintiff.

Reed *v.* Cole, Tr. Ter. 4 Geo. 3. B.R. 3 *Burr.* 1512.

What Intereſt may be aſſured.

A perſon having a *reſpondentia* intereſt cannot inſure it as an intereſt on goods.—This was an action on the caſe upon a policy of inſurance, made on *goods* and *merchandizes* loaden or to be loaden on board the good ſhip or veſſel called the Denham, whereof was maſter captain *William Tryon*, "*at* "*and from* Bengal to any ports or places whatſoever in the "Eaſt Indies, until her ſafe arrival in London:" which policy was underwritten by the defendant for 200l. for a premium of 10l. *per cent.*—The plaintiff declared for a *total* loſs.—The caſe was as follows: Before the underwriting of the policy, the plaintiff had lent to Captain *Tryon*, the maſter of the ſhip, *upon the goods* then loaden and to be loaden on board the ſaid ſhip on account of the ſaid *William Tryon*, the ſum of 764l. at *reſpondentia:* for which a *reſpondentia-bond*

Glover *v.* Black, Tr. Ter. 3 Geo. 3. B. R. 3 *Burr.* 1394. 1 *Black. Rep.* 396, 399, 405, 422.

(1) See alſo *Ayres* v. *Douglas*, ante, vol. I. p. 540.

was

was executed by Captain *Tryon* and one *Joſeph Buſtoll* to the plaintiff in the common form. On the 31ſt of March, 1760, the ſhip was within the limits inſured; and had then and at the time of the loſs, divers goods and merchandizes on board her, which were the property of the ſaid Captain *Tryon*, and of greater value than all the money he had borrowed. On the ſaid 31ſt of March, 1760, the ſaid ſhip, with her lading on board her, was *burnt*, and thereby *all* the goods and merchandizes aforeſaid of the ſaid *William Tryon* were *totally* conſumed and loſt. On *this* proof the jury found a verdict for the plaintiff, ſubject to the opinion of the Court, "Whether, on *this* evidence, the plaintiff was entitled to re-"cover on this policy?" The ſtat. 19 *G.* 2. c. 37. § 5. enacts, "That the lender of money on *bottomree or at* "*reſpondentia*, his agents or aſſigns, ſhall have right to make "aſſurance on the *money* ſo lent." And the counſel for the plaintiff inſiſted that the lender of this money had an *intereſt* in the goods, though they were the property of the borrower. And that as *reſpondentia* was an intereſt that might be inſured under the ſtat. it was not neceſſary to *ſpecify* in the policy, "That it was a *reſpondentia intereſt only*, which was in-"ſured." THE COURT took ſome time to think of this caſe. And afterward LORD MANSFIELD, Ch. J. delivered their reſolution; (which, he ſaid, they had very fully conſidered). He owned, that at the trial, and alſo ſince, upon the argument here, he did lean to ſupport this inſurance: and his reaſon for ſo doing was, that he was ſatisfied of its being a fair inſurance; and that the doubt which had ariſen upon it was only occaſioned by a ſlip in omitting to ſpecify (as it was intended to have been done) "That this was a *reſpon-*"*dentia* intereſt." The ground of ſupporting this inſurance, if it could have been ſupported, was a clauſe of the act of 19 *G.* 2. c. 37. *viz.* the 5th ſection; which runs in theſe words—"That all ſums of money lent on bottomree or at "*reſpondentia* upon any ſhip bound to or from the Eaſt "Indies, ſhall be lent only on the ſhip, or on the merchan-"dize or effects laden on board ſuch ſhip; and ſhall be ſo "expreſſed in the condition of the bond; and the benefit of "ſalvage ſhall be allowed to the lender, who alone ſhall have "a right to make aſſurance on the money ſo lent. And no "borrower of money on bottomree or at *reſpondentia* ſhall "recover more, on any aſſurance, than the value of his in-"tereſt on the ſhip or in the merchandizes or effects laden "on board; excluſive of the money borrowed: and in caſe "it ſhall appear that the value of his ſhare in the ſhip or in "the merchandizes or effects laden on board doth not "amount to the full ſum he hath borrowed, ſuch borrower "ſhall be reſponſible to the lender for ſo much of the money "borrowed as he hath not laid out on the ſhip or merchan-

"dizes

" dizes laden thereon, with lawful interest for the same, " together with the assurances and all other charges thereon, " in the proportion the money not laid out shall bear to the " whole money lent, notwithstanding the ship and merchan- " dizes be totally lost." Now this act, to the purpose of insurance, considers the borrower as having a right to insure only for the *surplus* value, over and above the money he has borrowed on bottomree or at *respondentia*. And lenders at *respondentia* or on bottomree may, to many purposes, be said to have a *lien*. Yet we are *all* very well satisfied, after a more particular consideration, that this act of parliament never meant or intended to make any alteration in the manner of insurances. Its view was to prevent gaming or wagering policies, where the insurer had no interest at all. And if the lender of money at *respondentia* was to be at liberty to insure for more than his whole interest, it would be a gaming policy: for, it is obvious, that if he could insure all the goods, and insure his *respondentia* interest besides, this would amount to an insurance beyond his whole interest. The act considers the form of the policies just as they stood before the making of it; and provides, § 6. that on all actions brought on policies of assurance, the plaintiff, or his attorney or agent, shall, within 15 days after he shall be required by the defendant, or his attorney or agent, declare in writing, " What sum or sums he hath assured or caused to " be assured in the whole, and what sum he hath borrowed " at *respondentia* or bottomree for the voyage or any part " of the voyage in question in such suit or action." And in describing *respondentia* interest, it gives the lender alone a right to make insurance on the money lent. So that this act left it upon the *practice*. His lordship said, he had looked into the practice; and he found that *bottomree* and *respondentia* are a particular species of insurance in themselves, and have taken a particular denomination: and he could not find even a *dictum*, in any writer, foreign or domestic, " That the " *respondentia*-creditor may insure upon the goods *as* goods." And in this very case, the *respondentia*-interest was intended to have been specified; but was omitted to be so, by mistake. He declared, that he found, by talking with intelligent persons very conversant in the knowledge and practice of insurances, " That they always do mention *respondentia-interest* when- " ever they mean to insure it." It might be greatly inconvenient to introduce a practice contrary to general usage. And there may be some opening to fraud if it be not specified. He declared the ground of the present resolution to be this— " *That it is established now, as the law and practice of mer-* " *chants, that* respondentia *and bottomree must be mentioned and* " *specified in the policy of insurance.*" But he declared, at the same time, that they did not mean to determine generally,

" *That*

" *That no ſpecial intereſt in goods may be given in evidence, in* " *other caſes than thoſe of* reſpondentia *and bottomree, if the* " *circumſtances of the caſe ſhall admit of it.*"—Plaintiff non-ſuited.

Robertſon *v.* Ewer, Hil. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 127.

Seamen's wages and proviſions are not covered by an inſurance on the body of the ſhip.—This was an action on a policy of inſurance, on the ſhip Dumfries, at and from London to Africa during her ſtay and trade there, and at and from thence to her port or ports of diſcharge in the Britiſh Weſt-India iſlands, to recover a partial loſs. The facts were, that this ſhip, in the courſe of the laſt war, after performing her voyage to Africa, in coming from thence laden with ſlaves, to the Weſt Indies, touched at Barbadoes in December 1781, for the purpoſe of watering, at which iſland an embargo was laid on all ſhips, by order of Lord *Hood*, the commander in chief upon that ſtation; and the veſſel was detained a conſiderable time. The captain applied for leave to depart; but was refuſed: whereupon he attempted to ſail away privately in the night, but was purſued by the Salamander ſloop of war, and after a ſlight engagement, he was brought back, the Dumfries not having ſuſtained any damage, for which the underwriters could be charged, on account of a clauſe, exempting them from partial loſſes, not amounting to 3 *per cent.* Lord *Hood*, in conſequence of this breach of embargo, upon her return took almoſt all the men out of the Dumfries, diſperſed ſome of the crew among the ſhips of war, the captain and the reſt of the crew were confined; and the ſhip was detained at Barbadoes till the April following. This detention however was not proved to have ariſen ſolely from the embargo, as it appeared, that for ſome part of the time, the ſmall-pox prevailed among the ſlaves, and that the embargo was frequently taken off and renewed between December and April. The action was brought to recover from the inſurer upon the ſhip the additional wages paid to the ſeamen, and the charges for proviſions, during this detention. Mr. Juſtice *Buller* was of opinion, at the trial, that the only damages proved, being items for ſeamen's wages, proviſions, and demurrage, during the detention, could not be recovered under this policy on the ſhip only. To make the underwriter liable, there muſt be a loſs of the ſhip, for the policy is on the body of the ſhip only; and if ſhe arrive ſafe at her port of delivery, be the voyage ever ſo long, you cannot recover under ſuch a policy: if, indeed, ſhe be in ſuch a ſtate as to prevent her from completing her voyage, it is certainly a loſs. The plaintiff was nonſuited.—In the following term a motion was made to ſet aſide the nonſuit, which, after argument, was refuſed by the whole Court to be done, and upon that occaſion Lord Mansfied, Ch. J. ſaid: There is no authority to ſhew, that on this policy, the

insured can recover for such loss; but it is contrary to the constant practice. On a policy on a ship, sailors' wages or provisions are never allowed in settling damages. The insurance is on the body of the ship, tackle, and furniture; not on the voyage or crew. In this case it is admitted, that there was no damage done to the ship, tackle, or furniture; and therefore I think the direction was right, and that the plaintiff ought not to recover.—*Buller*, J. I take it to be perfectly well settled, that you are not to recover on a policy on the body of the ship for seamen's wages or provisions; these are not the subject of the insurance. The case put at the bar proves the rule. For if the ship had been detained in consequence of any injury which she had received in a storm, though the underwriter must have made good that damage, yet you could not have come upon him for the amount of wages or provisions, during the time she was so repairing. Here the ship itself is safe; and the Court only look to the thing itself, which is the subject of insurance; and the wages and provisions are no part of the thing insured.—Rule discharged (1).

Provisions sent out in a ship for the use of the crew are protected by a policy of assurance on the ship and furniture. —This was an action on a policy of insurance on an East-India and China ship; and on the tackle, ordnance, ammunition, artillery, and furniture, of the ship. At the trial it appeared that, while the ship was lying off Bank-Saul Island in the river Canton, it became necessary to refit her, for which purpose the stores and provisions were taken out of her, and put into a warehouse, called a Bank-Saul, and that while they were in the warehouse they were destroyed by an accidental fire. It was admitted that the policy covered all the articles but the provisions, which were merely for the use of the ship's crew: but if those provisions were not protected by the policy, then there was not an average loss of 3l. *per cent.* It was considered in the same light as if the accident had happened on board the ship (2). For the defendant it was contended that the provisions were not protected by the insurance; but one of the jury (3) said that it had been determined in Lord *Mansfield*'s time that they were

Brough v. Whitmore, Hil. Ter. 31 Geo. 3. B.R. 206.

(1) The case of *Eden* and *Court* against *Poole*, sittings after Hilary 1785, at Guildhall, was where a ship put into Ferrol to repair some damage, and when she was going to sail an embargo was lain upon her by the Spanish governor, under which she was detained some time. An action was brought against the underwriters on the ship, amongst other things, for the amount of seamen's wages and provisions during such detention; but Mr. Justice *Buller* was of opinion, that these charges were not allowable on such a policy.

(2) Vid. *Pelley* v. *The Royal Exchange Assurance Company*, 1 *Burr.* 341.

(3) Which was a special one.

included

included under the word "furniture," under which decision the merchants in the city had since acquiesced; on which the plaintiffs obtained a verdict. The objection was renewed on a rule to shew cause why a new trial should not be granted; on the authority of *Robertson* v. *Ewer*.—LORD KENYON, Ch. J. The question here arises on the meaning of the word "furniture;" one of the jurymen said, and in that he is now confirmed, that, according to the understandings of those who enter into these contracts, it includes the provisions for the use of the crew. Now, among the several accidents, against which the defendant insured, are *perils by fire*; and this ship being at Canton, it became necessary to refit her, and to take out all her goods and land them on this island, where the accident happened; by which these provisions, with the rest of the goods, were burned: and there is no doubt but that the loss on this island must be considered in the same light as if it had happened on board the ship itself. This was determined in *Pelly* v. *The Royal Assurance Company*. Then if these provisions be insured as part of the outfit of the ship, and they were consumed by one of the perils insured against, there is an end of the question; a loss has happened within the meaning of the policy; and consequently the defendant is liable. But it was said in the argument that, the instant any of the provisions were consumed on board, there could not be a total loss: but the short answer to that is, that that comes within the wear and tear of the ship, and it might as well be said that if a mast were a little injured there could not be a total loss. If this decision were to militate against any determination, or even an *obiter dictum*, of Lord *Mansfield*, I should have hesitated for some time before I delivered my opinion. But the case of *Robertson* v. *Ewer* is clearly distinguishable from the present; here the goods were consumed by an accident by fire on board the ship (for the island was for this purpose equivalent to the ship), and within the meaning of the policy of insurance: but in that case they were consumed *by the negroes during a detention* of the ship.—BULLER, J. I am clearly of opinion that the underwriters on the body and furniture of the ship are liable to pay the amount of these provisions, which were bought to replace those which were consumed by an accident within the meaning of the policy. Without commenting on the words of the policy, it is sufficient to say that a policy of assurance has at all times been considered in courts of law as an absurd and incoherent instrument; but it is founded on usage, and must be governed and construed by usage. Now it is perfectly clear that in every instance, where losses have been settled, the provisions put on board the vessel when she sailed have been considered as part of the ship. The value is taken in this way; the under-writers have a right to go

and

and ſee the ſhip, to examine the value of the hull, the maſts, and the proviſions; the value of the ſhip alone comprehends all theſe articles: but though the underwriters have a right to examine the ſhip itſelf, in point of fact they do not, becauſe they know from experience the quantity of proviſions neceſſary for the crew for the intended voyage; and if that value be ſtated to them in the ordinary way, they ſign their names immediately, without making further inquiries. Then if the proviſions be included in a policy on the ſhip; and the ſhip and all the proviſions be loſt, the under-writers muſt make good the whole loſs, whether it be a valued or an open policy. But it has been ſaid, that if an accident happen after ſome of the proviſions are conſumed, the underwriters are entitled to a deduction to the amount of ſuch proviſions: I will anſwer this, firſt, as the argument applies to a valued, and then to an open, policy. As to the firſt; from the nature of the policy, the proviſions are not inſured againſt all events; they are only inſured againſt particular riſks. Again, there is nothing from which there can be ſalvage; if the body of the ſhip and every thing on board be ſunk, or burned, there can be no ſalvage. And, in the caſe of an open policy, the inſured muſt prove by evidence what was the value of the whole, and then the ſame reaſons apply as in the caſe of a valued policy. With reſpect to the caſe of *Robertſon* v. *Ewer*, which has been relied on; I thought at firſt that it applied ſtrongly to the preſent; and if I ſtill entertained the ſame opinion, I would not, on account of any uſage to the contrary among under-writers, overturn a ſolemn determination of this Court: but that caſe, and the two others there mentioned, are clearly diſtinguiſhable from the preſent. In all thoſe the inſured wiſhed to charge the under-writers with the amount of the proviſions conſumed during the time when the ſhips were detained. Of thoſe therefore it is ſufficient to ſay that an inſurance is *on the ſhip for the voyage*; but, during a detention, the ſhip is not proceeding; and therefore the under-writers are not liable. This caſe alſo differs from that of *Robertſon* v. *Ewer* in another circumſtance; there the proviſions were conſumed by the ſlaves on board, and not by the ſhip's crew, and the ſlaves are conſidered as part of the cargo. The words of Lord *Mansfield* in that caſe muſt be taken with a reference to the caſe then before him: he was then ſpeaking of a charge of proviſions uſed during the detention of the ſhip, and for the maintenance of the ſlaves; and he ſaid, "there is no authority to ſhew that, on *this* policy, the inſured can recover for *ſuch a loſs*; but it is contrary to the conſtant practice." Then he proceeded to ſay, "on a policy on a ſhip, ſailors' wages or proviſions are never allowed in ſettling the damages." Now even if thoſe latter words be taken in their

general ſenſe, and not confined to the caſe immediately before the Court, they are accurate; for "proviſions" *eo nomine* are not taken into conſideration. In general, the captain of a ſhip takes on board proviſions ſufficient for the voyage; and if he be detained in any port, and he be a prudent man, he will not uſe what are called the ſhip's ſtores during his detention, but he will buy others for immediate conſumption during the detention, becauſe he cannot but know that he has the ſame length of voyage to perform that he had before he was detained: it makes no difference however to the under-writers whether he do ſo or not; for if the captain be obliged to purchaſe other ſtores for the remainder of the voyage, the under-writers are not anſwerable for theſe, but only for thoſe which were on board at the time of the inſurance, ſince they only formed a part of the value of the ſhip. On the whole, therefore, I am of opinion that there ſhould be no new trial. The caſes cited are diſtinguiſhable from the preſent; the uſage of merchants, as to the conſtruction of theſe inſtruments, ſtands unimpeached, and therefore it muſt prevail in this caſe.—GROSE, J. agreed.—Rule diſcharged.

Jones v. Schmoll, Guildh. Tr. Vac. 1785. 1 *Ter. Rep.* p. 130, note *a*.

And the aſſured cannot recover upon the policy, unleſs the loſs, which has happened, be a direct and immediate conſequence of the peril inſured.—This was an action on a policy of aſſurance "at and from Briſtol to the coaſt of "Africa, during her ſtay and trade there, and from thence "to her port or ports of diſcharge in the Weſt Indies." There was a memorandum on the policy, that "the aſſurers "are not to pay any loſs that may happen in boats during "the voyage (mortality by natural death excepted), and not "to pay for mortality by mutiny, unleſs the ſame amount "to 10l. *per cent.* to be computed on the firſt coſt of the "ſhip, outfit, and cargo, valuing negroes ſo loſt at 35l. per "head." The demand upon the policy was the loſs of a great many ſlaves by mutiny. The evidence of the captain was, that he had ſhipped 225 prime ſlaves on board: that on the third of May, before he ſailed from the coaſt of Africa, an inſurrection was attempted; that the women ſeized him on the quarter deck, and endeavoured to throw him overboard, but he was reſcued by the crew; that the women and ſome men threw themſelves down the hatchway, and were much bruiſed. That he ſent the ringleader on ſhore, and twelve men and women afterwards died of thoſe bruiſes, and from abſtinence: that, on the 22d of May, there was a general inſurrection, the crew were forced to fire upon the ſlaves, and attack them with weapons, it being a caſe of imminent neceſſity. Several ſlaves took to the ſhip's ſides, and hung down in the water by the chains and ropes, ſome for about a quarter of an hour, three were killed by firing, and three were

were drowned, the reſt were taken in, but they were too far gone to be recovered; many of them were deſperately bruiſed, many died in conſequence of the wounds they had received from the firing during the mutiny, ſome from ſwallowing ſalt water, ſome from chagrin at their diſappointment, and from abſtinence; ſeveral of fluxes and fevers; in all to the amount of 55. The under-writer had paid at the rate of 15 *per cent.* for 19, who were either killed during the mutiny, or had afterwards died of their wounds. Another conſequential damage was ſtated, that the mutiny had leſſened the remaining ſlaves in the eſtimation of the planters, and reduced their price.—Lord MANSFIELD ſaid, As to the latter loſs, I think the under-writer is not anſwerable for the loſs of the market, or the price of it: that is a remote conſequence, and not within any peril inſured againſt by the policy. The queſtion for the jury will be, Whether any of thoſe who died by any other means, except by being fired upon, or in conſequence of the wounds and bruiſes which they received during the ſtruggle, are within the meaning of the policy, which inſures againſt damage by mutiny? This policy is in the common form, and if it were not for the memorandum, I ſhould ſay, the caſe was not within the inſtrument. But as it now ſtands, it is very clear, that thoſe who were killed by the firing, or died in conſequence of their wounds, are within the policy; the other complicated caſes muſt be left to the jury. The firſt claſs, ſuch as were killed in the fray, certainly come within the meaning of the policy; and the ſecond claſs alſo, thoſe who died of the wounds they received. The third claſs are, I think, as clearly not within it; ſuch as being baffled in their attempts, in deſpair choſe a mode of death, by faſting, or died through deſpondency: that is not mortality by mutiny, but the reverſe, for it is by *failure of mutiny.* The great claſs are ſuch as received ſome hurt by the mutiny, but not mortal, and died afterwards of other cauſes, as thoſe who ſwallowed water, jumped overboard, *&c.* This is the great point.—The jury found, that all who were killed in the mutiny, or died of their wounds, were to be paid for. That all thoſe who died of their bruiſes, which they received in the mutiny, though accompanied with other cauſes, were to be paid for. That all who had ſwallowed ſalt water, and died in conſequence thereof, or who leaped into the ſea, and hung upon the ſides of the ſhip, without being otherwiſe bruiſed, or who died of chagrin, were not to be paid for.

A policy of inſurance on Eaſt-India ſhips, includes the chance of their being detained in India, and the riſque of the country voyage there.—But there were *nine* cauſes, in all, upon the ſeveral inſurances of this ſame Eaſt-India ſhip the *Winchelſea*, an Eaſt-Indiaman. The charter-party was ac-

Salvador *v.* Hopkins, and Heaton *v.* Rucker, Tr. Ter. 5 Geo. 3. B.R. 3 *Burr.* 1707.

cording to a *printed* form, which has long been in uſe, and contained a clauſe empowering the company's ſervants abroad to detain the ſhip a year longer, if they pleaſed, than the time originally limited by the charter-party. The inſurance was in theſe words: "*At and from Bengal to any ports or places whatſoever in the Eaſt Indies, China, Perſia, or elſewhere, beyond the Cape of Good Hope, forwards and backwards, and during her ſtay at each place until her arrival at London, as Money, &c.* On March 25, 1762, the ſhip ſailed. On September 19, ſhe arrived at Bombay. And on November 4, ſhe left Bombay the firſt time. On March 5, 1763, ſhe arrived at Calcutta in Bengal. And on the 28th of the ſame month the preſidency and council of Bengal entered into *a new agreement with the captain*; reciting, "That the charter-"party would expire on the 11th February 1764; but that "the preſident and council, finding it expedient to *detain* the "ſhip in India, and deſirous of having the time limited, in "the charter-party, *prolonged, &c.* The indenture therefore witneſſeth, that the captain lets the ſhip to freight, for *one whole year* from the ſaid 11th of February, 1764, &c. In July the ſhip arrived at Bombay a ſecond time. On December 11, ſhe left Bombay to go to Bengal, and ſhe arrived at Bengal early in 1764. On March 19 the ſhip left Bengal to go to Bombay. And on the 21ſt of that month, ſubſequent to the expiration of the old charter-party, the ſhip was loſt. On April 3, Mr. *Hume*, the plaintiff in ſeveral of theſe actions, received a letter from the captain, dated 14th April, 1763, incloſing a copy of the new agreement: which letter was publicly read in a coffee-houſe. On April 4, ſome inſurances were made by Mr. *Hume*. On July 17, other inſurances were made by Mr. *Hume*. All the other inſurances were made *after* the captain's letter of 14th April, 1763, was received, and publicly read in a coffee-houſe. On October 9, 1764, an account was received in London of the ſhip's loſs.—THE UNDER-WRITERS INSISTED, that the *policies* were *void*, becauſe at the time of underwriting they were not *expreſsly told of the new agreement*, "*To detain* the ſhip in *India* for a *year longer* than the en-"larged time provided for by the charter-party, which ex-"pired on the 11th of February, 1764." The cauſes were *at firſt* tried with different ſucceſs; but all the nine verdicts were *at laſt* uniform for the plaintiffs, the inſured againſt the under-writers.—Lord MANSFIELD, Ch. J. delivered the unanimous opinion of the Court. They thought the uſage of the *Eaſt-India Company's trade*, and the *courſe of their voyages*, to be in fact ſo *notorious*, and ſo well known both to the inſurers and the inſured, that they muſt be ſuppoſed fully apprized, and ſufficiently *conuſant* of it; and that the obligation of this policy is to be taken from the *words* of the

the charter-party (which refer to the uſage), and the *uſage* of theſe voyages, in the ſame manner as if it was expreſsly *inſerted* in the policy.—THE REASONS WHICH GOVERNED THE COURT on granting or refuſing new trials were: that the under-writers are *bound and preſumed* to *know* the courſe of the Eaſt-India trade, the terms of the charter-party, and the deſtination of the India ſhips (which are under the direction of the *company*, and *not* of their owners): that the charter-party is a *printed* form, of a very long ſtanding: that, beſides the liberty thereby given, "To pro-"long the ſhip's ſtay for one year," it is *very common*, by a *new* agreement, to detain her a *year longer* (for, no ſhip comes home in ballaſt); and the longer a ſhip is kept, the more beneficial it is to the owners.—That the *words of the policy* are *adapted to this uſage*; being without limitation of time or place; and without any reference to the firſt voyage particularly mentioned in the charter-party. The terms of the policy preciſely *deſcribe* the riſque in its utmoſt latitude; and neceſſarily *extend* to every prolongation of ſtay, and every country-voyage.—That any of the defendants *might have learned* at the India-houſe all that was to be known. No mention was made, or queſtion aſked, at the time of under-writing, "*When* the ſhip was chartered;" *When* ſhe "*ſailed* from *England*;" "*When* ſhe arrived in *India*;" "*Whether* ſhe was *continued a year*, according to the pro-"viſo in the printed charter-party;" and yet her continuance in the Eaſt Indies depended on all theſe facts. If they ought *neceſſarily to be diſcloſed*, the policy was *void*, to the *knowledge* of the under-writers, at the *time* they took the *premium*. The *chance* of her ſtay is *one* of the riſques inſured. The evidence in all the cauſes was very ſtrong, "That her ſtaying a year longer, *if known*, would *not* have "varied the *premium*." This ſhip was inſured at the *ſame* premium, *after* the prolongation of her ſtay in India *was* known. None of the defendants deſired to be *off*, after they *knew* that an account of the new agreement "To prolong "her ſtay for a year longer" had been *received* in England upon the 3d of April, 1764; which was *notorious to them all before* the intelligence of her *loſs*, which came in the October following. So that *if* there had been any force to the objection, it would have been *waived* by the *acquieſcence* of the under-writers, *after* they were *fully apprized* of the whole.—THE COURT eſteemed this to be the moſt convenient way of determining this queſtion; becauſe whoever ſhall hereafter inſure on an Eaſt-India ſhip, will know that he inſures the contingencies, and may take proper precaution againſt them, if he will; whereas if every perſon inſured ſhould be obliged to open to the inſurer *all* the grounds of his expectations about the ſhip's continuance in the Eaſt Indies, or coming to England, it might produce great litigation and

confuſion in caſes ariſing upon theſe Eaſt-India policies.—Judgment for the plaintiff.

Noble and another *v.* Kennoway, Mic. Ter. 21 Geo. 3. B R. 2 *Doug.* 510.

An under-writer is bound to know the nature and peculiar circumſtances of the branch of trade to which the policy relates: and, to prove the manner of conducting a particular branch of trade at one place, evidence may be given to ſhew the manner in which the ſame branch is carried on at another place.—The inſurance was upon the ſhips the Hope and the Anne, "At and from Dartmouth to Waterford, and from thence to the port, or ports, of diſcharge, on the coaſt of Labrador, with leave to touch at Newfoundland, and upon any kind of goods and merchandizes; and alſo, on *the ſhips* till they ſhould be arrived at their port of diſcharge, and ſhould have moored at anchor twenty-four hours, and *on the goods and merchandizes, until the ſame ſhould be there diſcharged, and ſafely landed.*" By a clauſe in the policy, money advanced to the *fiſhermen* was inſured. The Anne arrived ſafe on the coaſt of Labrador, on the 22d of June, and the Hope, on the 14th of July, 1778. From the time of their arrival the crews were employed in fiſhing, and had taken out none of their cargoes, except at leiſure hours (partly on Sundays), ſuch things as were immediately wanted. On the 13th of Auguſt an American privateer entered the harbour (Temple Bay), and took both the veſſels, there being nobody at that time on board either of them. The action was brought to recover the value of the goods. The defence was, that there had been *an unneceſſary delay in unloading the cargoes, in conſequence of which they had been expoſed to capture, and that the under-writers ought not to be liable for what had happened from the negligence of the inſured.* The plaintiffs reſted their caſe on the words of the policy, and on the uſage of the trade. They called two witneſſes who proved that they had been the ſame voyage three times in the three laſt years, and that they had proceeded in the ſame manner during each of the voyages; that the plaintiffs had no warehouſes ſufficient to have held the goods, if they had been landed; and that there were no ſettlements on the coaſt of Labrador, but thoſe belonging to the plaintiffs. The plaintiffs then called one *French* to prove the cuſtom of the Newfoundland trade. This evidence was objected to, but Lord MANSFIELD admitted it; and the witneſs ſwore, that in the Newfoundland trade it is cuſtomary to keep their goods on board ſeveral months, and that ſometimes they have part of their homeward cargo of fiſh, and part of their old cargo, on board at the ſame time. That the firſt object is to catch fiſh, and they unload only at times when they cannot fiſh. The old cargo being chiefly ſalt, and proviſions, it is taken out gradually, for curing the fiſh, and for conſumption. This witneſs was confirmed by one *Newman*. Neither *Newman* nor *French* had

had been at Labrador. One *Hunter* was then called, who proved that ſome years ſince he uſed to ſend veſſels of his own, and alſo chartered veſſels to Labrador, and that it was uſual in chartering veſſels to ſtipulate, that they ſhould have ſixty days allowed for diſcharging. That he apprehended they were oftentimes longer, in fact, and that it was not ſo eaſy to diſcharge a cargo at Labrador, as at Newfoundland. —Lord MANSFIELD: Every under-writer is preſumed to be acquainted with the practice of the trade he inſures, and *that* whether it is recently eſtabliſhed or not. If he does not know it, he ought to inform himſelf. It is no matter if the uſage has only been for a year. This trade has exiſted, and has been conducted in the ſame manner, for three years. It is well known that the fiſhery is the object of the voyage, and the ſame ſort of fiſhing is carried on in the ſame way at Newfoundland. The evidence on that ſubject was properly admitted to ſhew the nature of the trade.—WILLES and ASHHURST, Juſtices, of the ſame opinion.—BULLER, Juſtice: There was ſufficient evidence without calling in aid the uſage in the Newfoundland trade; for it appeared on the face of the policy, that the fiſhery was the purpoſe of the voyage. But I think the evidence objected to was properly admitted. If it can be ſhown that the time would have been reaſonable in one place, that is a degree of evidence to prove, that it was ſo in another. The effect of ſuch evidence may be taken off, by proof of a difference of circumſtances. It is very true that the cuſtom of one manor is no evidence of the cuſtom of another, that has been determined in many caſes; but the point here is very different, it is a queſtion concerning the nature of a particular branch of trade.—Rule diſcharged.

On the trial of an action upon a policy of aſſurance on a ſhip and its cargo from Sunbury, in Georgia, to Amſterdam, it appeared, that the plaintiffs lived in Georgia, and had formerly been owners of the veſſel, but before May 1785 had transferred their property in her to one *Pierce*, who reſided in the ſame country. The names of the plaintiffs were at the head of the policy, which was under-written by the defendant in September 1785; and the declaration ſtated that they had made it for the benefit of *Pierce*, in whom the intereſt was averred to be. Upon theſe facts two queſtions aroſe: 1ſt, Whether, when an agent effects a policy for his principal reſiding abroad, the act of the 25 *Geo.* 3. c. 44. (1) requires that ſuch agent's name ſhould be inſerted, *eo nomine*, as agent? 2dly, Whether under the ſame act it is neceſſary that ſuch agent who effects the policy for his principal re-

Pray *et al. v.* Edie, Tr. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 313.

(1) This act was afterwards repealed by ſtat. 28 *Geo.* 3. c. 56.

ſiding abroad, ſhould himſelf reſide in England?—Lord MANSFIELD, Ch. J. The preamble of the act recites, that great inconveniences had ariſen from omitting to inſert in policies of inſurance the names of the perſons for whoſe benefit, or on whoſe account, ſuch policies were effected. That is the miſchief: and it is remedied by enacting, that if *the principal reſides in* England, his *own* name ſhall be inſerted, or what amounts to the ſame thing, the name of his *agent*, eo nomine, *as agent for him.* If the agent were not to be named in the policy, in the capacity of *agent for the inſured*, the public would ſtill be left ignorant who the inſured was; and the principal intention of the act would be defeated. Then as to the caſe of the inſured *living abroad*, who *cannot inſure in his own name*, there can be no doubt but that the name of his agent muſt be inſerted, *eo nomine, as agent.* I am alſo ſtrongly inclined to think, that the other objection, with regard to the reſidence of the agent, is good; but it is not neceſſary to give a direct opinion on that point. —*Buller* J. It ſeems to me to have been the intention of the legiſlature, that the name of the agent who effects the policy for his principal reſiding abroad, ſhould be inſerted in the policy, *quaſi agent for ſuch perſon.* For the word "agent," in the ſecond clauſe, is to be underſtood in the ſame ſenſe as it is taken in the firſt; and I have as little doubt that the meaning of the act is, that ſuch agent ſhould reſide in Great Britain.—*Willes*, J. and *Aſhhurſt*, J. were of the ſame opinion.—And the rule was made abſolute.

French *v.* Backhouſe, and French *v.* Foulſton, Ea. Ter. 11 Geo. 3. B.R. 5 *Bur. Reſ.* 2727.

The ſhip's huſband has no right to inſure for any part-owner, without his particular direction, nor for all the owners in general, without a general direction or ſomething equivalent to it; "For a direction to inſure given by *one* part-owner only, will *not* bind the *reſt* of the part-owners." It is moſt uſual for all the owners to direct the huſband of the ſhip, "To act diſcretionally for them all." But this is *not his office to do without* particular directions.

Hill and another *v.* Secretan, Tr. Ter. 30 Geo. 3. C.B. 1 *Pul. & Bos.* 315.

A. being indebted to *B.* without any order from him, conſigns goods to *C.* to be held for *B.* and indorſes the bill of lading to *C.*; held that *B.* had an inſurable intereſt in the goods ſo conſigned.—This was an action on a policy of inſurance on goods on board the San Bernardo from St. Andero to London. It was proved that the houſe of *De la Torrè* in Spain conſigned twenty-nine bags of wool to the houſe of *Dubois* and Son in London, and indorſed the bill of lading to them; but that with the bill of lading came a letter annexed, directing *Dubois* and ſon to hold fifteen bags for a houſe at Halifax, and the remainder for the plaintiffs at Exeter, which was the ſubject of the preſent inſurance. It appeared alſo that *De la Torrè* was indebted to the plaintiffs in the ſum of 500l. but that they had given no orders for theſe

theſe goods. The ſhip was captured by the French, but afterwards retaken. The jury found a verdict for the plaintiffs.—And on a motion for a new trial, THE COURT were clearly of opinion, that as the goods were conſigned to *Dubois* and Son to hold for the plaintiffs, the former were to be conſidered as truſtees for the latter from the time the goods were put on board the ſhip; that the circumſtance of the plaintiffs being creditors of *De la Torre* raiſed a good conſideration for the conſignment, and therefore no doubt could be entertained of the plaintiffs having an inſurable intereſt.

Wolf *et al.* v. Horncaſtle, Mic. Ter. 39 Geo. 3. C.B. 1 *Pul. & Bos.* 316.

This was an action upon the caſe on a policy of inſurance, dated the 9th of January, 1797, and made by the plaintiffs by their names and firm of Meſſrs. *Wolffs* and *Dorville*, as well in their own names as for and in the name and names of all and every other perſon or perſons to whom the ſame did, might, or ſhould appertain in part or in all, upon goods on board the ſhip The Fahrſund's Wharf, *Peter Nicolay Mohr*, maſter, at and from Fahrſund to London, at a premium of ſix guineas *per cent.* The defendant underwrote the policy for 200l. there was a total loſs by perils of the ſea. The firſt count of the declaration averred, that the inſurance was made by the plaintiffs as the agents of one *Jochum Brink Lund*, and for his uſe and benefit, and that the plaintiffs at the time of making thereof were perſons reſiding in Great Britain, and did effect the policy as ſuch agents, and that the ſtyle and firm of Meſſrs. *Wolfs* and *Dorville* inſerted in the policy was at the time of making thereof the uſual ſtyle and firm of dealing of them the plaintiffs, and that *Jochum Brink Lund* was intereſted in the goods to the amount inſured. The ſecond count averred the intereſt in the goods to be in the plaintiffs, and that they made the ſaid inſurance for and on their own account. The defendant paid the premium viz. 12l. 12s. into court upon a plea of tender, which was admitted. On the trial of the cauſe a verdict was found for the plaintiffs with 187l. 8s. damages, and 40s. coſts, ſubject to the opinion of the Court on a caſe, ſtating, that *Jochum Brink Lund* was a merchant reſident at Fahrſund in Norway, and had contracted with certain perſons in London, carrying on trade under the firm of the Cudbear Company, to ſupply them with a quantity of moſs; that *the plaintiffs were the general agents of* the ſaid *Jochum Brink Lund* in London: that the ſaid *Jochum Brink Lund* having, on the 12th of November 1796, ſhipped 574 ſacks of moſs at Fahrſund in Norway, on board the ſaid ſhip called the Fahrſund Wharf, conſigned to the ſaid Cudbear Company in London, and upon their account and riſk, tranſmitted to the plaintiffs the invoice and bill of lading of the ſame, in a letter as follows: "The ſhip Fahrſund's Wharf "is now loading with a cargo of moſs; ſhe will be ready "to ſail in the courſe of eight or fourteen days, and uſually

"takes

" takes in fifty-ſix tons; pleaſe to hand the incloſed to the " Cudbear Company, that theſe friends may have an oppor- " tunity to ſecure themſelves by inſuring the moſs cargo, " the ſeaſon being ſo far advanced:" that the goods were by the ſaid bill of lading to be delivered to the ſaid Cudbear Company or order; that on the 10th of December, 1796, the ſaid *Jochum Brink Lund* drew a bill of exchange on the ſaid Cudbear Company for the amount of the ſaid cargo, 1112l. 8s. 2d. at three months ſight, in favour of the plaintiffs, and remitted the ſame to the plaintiffs to procure acceptance thereof, and to place to his credit; and at the ſame time adviſed the plaintiffs of his having drawn on them for 300l., which bill for 300l. was by the plaintiffs accepted and afterwards paid: that the Cudbear Company, after having received through the hands of the plaintiffs the bill of lading and invoice of the ſaid cargo, and having the ſaid bill for 1112l. 8s. 2d. preſented to them by the plaintiffs for acceptance on the 9th of January, 1797, *refuſed to accept the ſaid bill, or take to the cargo, or inſure the ſame, and returned the bill of lading and invoice to the plaintiffs:* that the plaintiffs thereupon cauſed the above inſurance to be made on the ſaid 9th of January, 1797, without any order ſo to do, and on the next day by letter informed their correſpondent *Jochum Brink Lund*, that the Cudbear Company had refuſed to accept the bill or take to the cargo, or make any inſurance, and that they the plaintiffs had made ſuch inſurance as aforeſaid. On receipt of which letter the ſaid *Jochum Brink Lund*, on the 28th day of January, 1797, wrote a letter to the plaintiffs, approving of the precaution which they had taken to inſure the moſs cargo. That the ſaid *Jochum Brink Lund* was at the time of the ſaid inſurance being effected indebted to the plaintiffs in 1400l. and upwards: that the ſaid ſhip the Fahrſund's Wharf, with the ſaid cargo on board, was afterwards loſt by perils of the ſea in the voyage inſured from Fahrſund in Norway to London. THE QUESTION reſerved for the opinion of the Court was, Whether the plaintiffs were entitled to recover? And the material queſtion was, Whether the plaintiffs had effected a policy within 28 *Geo.* 3. c. 56? which enacts, "that it ſhall " not be lawful to effect any policy of aſſurance on any ſhip or goods without firſt inſerting in ſuch policy *the names of the perſon intereſted, the conſignor, or the conſignee*; the perſon reſiding in Great Britain who ſhall receive the order, or the perſon who ſhall give the order for effecting the inſurance."—PER CURIAM: If the defendant can bring his caſe within the ſtatute, he has a right to do ſo, and we are bound to give him judgment. But has the defendant brought his caſe within the meaning of the ſtatute? Has he even brought it within the words of the ſtatute? And even if he had brought it within the words, and not within

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the meaning, we ſhould be clearly of opinion for deciding againſt him; and in ſo doing ſhould follow the directions of the ſtatute, which in the laſt clauſe ſays, "every policy and "policies of inſurance made and wrote contrary to the "*true intent and meaning* of this act ſhall be null and void." The objection is, that "the ſtatute requires the names or ſtyle and firm of dealing of the perſons intereſted, or the names or ſtyle and firm of the conſignors or conſignees of the goods inſured, or the names or ſtyle and firm of the perſons reſiding in Great Britain, who ſhall receive the order for and effect the policy, or of the perſons who ſhall give the order or directions to the agents immediately employed to negotiate or effect the policy, to be inſerted in the policy." Now it is material to go back to a time previous to the paſſing of this ſtatute, in order to ſee what was the real meaning of the legiſlature. Now, though the ſtat. 25 *Geo.* 3. has been ſince repealed; by putting the two acts together we may learn the true ſpirit and meaning of the laſt: what it was thoſe who introduced it wiſhed to be effected. The inconvenience recited by 25 *Geo.* 3. was the making policies in blank, and therefore it was enacted that "where "they were made by perſons reſiding in Great Britain, the "names of the perſons intereſted ſhould be inſerted therein, "or the names of the perſon who ſhould effect the ſame as "agents for the perſons intereſted, and in caſe of perſons re-"ſiding out of Great Britain, the name of the agent." Under this act it happened that many perſons not underſtanding the meaning of theſe proviſions, and not complying literally with them, loſt the benefit of their policies (1). The legiſlature therefore thinking that they had drawn the ſtring too tight, recited in 28 *Geo.* 3. "that it had been "found by experience that great miſchiefs and inconveni-"ences had ariſen to perſons intereſted in ſhips and to per-"ſons uſing commerce, from the 25 *Geo.* 3. c. 44. and "that it was expedient that other and more convenient pro-"viſions ſhould be made for the regulating inſurances on "ſhips, &c. than thoſe contained in the ſaid act, &c." Now we are bound to ſay that this ſecond ſtatute muſt receive the moſt liberal conſtruction that the words will bear. From the language of the two ſtatutes, as well as the conſideration that we are conſtruing a contract *uberrimæ fidei*; *viz.* a policy of inſurance, we muſt avoid bearing harder upon the plaintiffs than is abſolutely neceſſary. Let us ſee then whether the plaintiffs do or do not come within any of the deſcriptions of perſons in the laſt ſtatute. Theſe deſcriptions are four: the conſignor and the conſignee, the

(1) *Pray* et al. v. *Edie*. 1 *Term Rep.* 313.

perſon

perſon receiving and the perſon giving the order. It is perfectly clear that the plaintiffs are not the conſignors; but we are by no means prepared to ſay that they are not the conſignees. It is true that the goods were originally conſigned to another perſon, but the caſe muſt be conſidered as it ſtood at different periods: though the Cudbear Company were clearly the conſignees at firſt, it does not follow that they continued to be ſo. What is a conſignee? A conſignee is a perſon reſiding at the port of delivery, to whom the goods are to be delivered when they arrive there. *Lund* does not truſt the Cudbear Company without ſecuring himſelf; he therefore ſends the bill of lading to the plaintiffs, who are his general agents, in order that he may be ſecure of being paid for his goods. Certainly if the Cudbear Company had received the goods, they would have been the conſignees, but they refuſed to receive them: then who was entitled to receive them? It cannot be pretended that nobody had the right, and the captain could not keep them: then to whom could the right belong but to the perſons who had the bill of lading, and were the general agents of the conſignor? From the moment that the Cudbear Company refuſed to have any thing to do with the goods, the plaintiffs became the conſignees. If this be ſo, there is no objection to the policy, and we do not carry this conſtruction too far when the juſtice of the caſe is with the plaintiffs. But there are two other characters mentioned in the ſtatute. The next is the perſon who receives the order to inſure. Let us ſee therefore whether theſe plaintiffs had not an order to make inſurance. The goods were originally intended for the Cudbear Company; but they were ſent, accompanied with a letter which ſtated in the cleareſt terms that *Lund* intended that they ſhould be inſured. The Cudbear Company having refuſed to take the goods, could the plaintiffs, who were the general agents of *Lund*, could any man of ſenſe read his letter, and doubt of his intentions? In giving his reaſons he ſays that the ſeaſon is ſo far advanced, that he does not think it ſafe to ſend the goods without their being inſured. The plaintiffs muſt therefore have been blind if they had not ſeen that it was his intention to have them inſured. Then what was his intereſt? Why that they ſhould be inſured. It is agreed that a general agent has a right to exerciſe his diſcretion for the benefit of his principal: he muſt act on the ſpur of the occaſion, and if nothing elſe had paſſed, it may be doubted whether the conſignor would not have been liable to pay the premium. But the plaintiffs take the opportunity to inform the conſignor of their having made the inſurance, and he highly approves of their acts (1), which brings the caſe within the maxim that

(1) Vid. *French* v. *Backhouſe*, and *French* v. *Foulſton*. 5 *Burr.* 2727.

omnis

omnis ratihabitio retrahitur & mandato priori æquiparatur. It is therefore clear that the plaintiffs were the perſons who received the order to make this inſurance within the deſcription of the act of parliament. But there is ſtill another character to be conſidered; the ſtatute mentions, in the laſt place, the perſon who gives the order to make inſurance. Now it is impoſſible to ſtate a caſe that comes more directly within the act of parliament than this. Who were the perſons immediately concerned, who immediately employed the broker, who gave the immediate order for inſurance, but the plaintiffs? It appearing therefore that they come within the words of the act of parliament, the caſe ſtands clear of all objections, and is in law, conſcience, and juſtice with the plaintiffs. With reſpect to the ſecond count, *the plaintiffs had a clear right to inſure to the amount of* 300l. *for which they were intereſted in the goods.* It has been urged that they ſtand without intereſt in the goods, becauſe they had only a debt againſt *Lund.* It is true that a debt which has no reference to the article inſured, and which cannot make a lien on it, will not give an inſurable intereſt. *But a debt which ariſes in conſequence of the article inſured, and which would have given a lien on it, does give an inſurable intereſt.* The caſe is not at all altered by the goods not having arrived. There is no more common tranſaction in the city of London than to raiſe money on the ſecurity of a bill of lading and policy: theſe plaintiffs having advanced their money on that ſecurity, muſt, if the goods had arrived, have received 300l. out of them; the goods being loſt, the policy of inſurance ſtands in the place of them, and the plaintiff is entitled to receive that ſum under the policy.—Poſtea to the plaintiffs.

Bell *et al. v.* Gilſon, Mic. Ter. 39 Geo. 3. 1 *Pul. & Bos.* 345.

The produce of Holland, purchaſed in that country during hoſtilities between Holland and Great Britain, by a Britiſh agent reſident there, and ſhipped for Britiſh ſubjects, were inſured by them in this country, and held to be a legal inſurance.—On the trial of an action on a policy of aſſurance under-written by the defendant on 8th December, 1797, for 200l. on goods ſhipped on board the Elizabeth, Captain *Spewce*, from Rotterdam to Hull, at a premium of two guineas and a half *per cent.* A verdict was found for the plaintiffs for 194l. 15s. ſubject to the opinion of the Court on the following caſe. The plaintiffs being Britiſh merchants reſident in London, gave orders to Meſſrs. *Barrett* and Co. inſurance-brokers (alſo reſident in London), to effect the policy in queſtion, who as brokers effected the ſame in their own name and uſual firm of *Barrett* and Co. deſcribing themſelves therein *agents.* The ſhip Elizabeth was a neutral veſſel belonging to *H. Bauerman* and Son, of Greetſyl and Embden in Pruſſia, bound on the voyage inſured

ſured from Rotterdam to Hull, on which ſhe ſailed, and was captured as ſtated in the declaration; and the plaintiffs had goods on board her for the voyage inſured of greater value than the amount inſured. The ſaid goods, conſiſting of ſixty caſks of madders, were purchaſed for the plaintiffs, and on their account, at Rotterdam, by Robert Twiſs their agent reſident there. When the goods were purchaſed on the plaintiffs' account, and alſo at the time of the ſhipping and capture thereof, and when the ſaid inſurance was made, open hoſtilities had commenced and then exiſted between Great Britain and the perſons exerciſing the powers of government in the United States. During all that time it was and is the conſtant practice to enter goods at the Cuſtom-houſe direct from Holland, and was never impeded, though the officer at the Cuſtom-houſe knew whence they came, as he always inquired whether they were aliens or neutrals, on account of the alien duty. THE QUESTIONS for the opinion of the Court were, 1ſt. Whether the name of *Barrett* and Co. agents, inſerted in the policy, were a ſufficient compliance with the ſtat. 28 *Geo.* 3. c. 56? 2dly, Whether the ſaid inſurance on the ſaid goods were legal?—PER CURIAM: This queſtion ought now at leaſt to be quite at reſt, two deciſions having been already made upon this ſubject within the term; one in this court (1) and one in the King's Bench (2), both of which are directly in point. It may be material to remember, that previous to the paſſing of the 25 and 28 *Geo.* 3. many objections were made by the merchants, that policies in their frame were ſo looſe and incorrect, that an under-writer had no opportunity of knowing the nature of the thing inſured, or who the perſons were for whom he inſured. Great inconvenience aroſe, as appears by the preamble of one of the ſtatutes (3) from the circumſtance

(1) *Wolfi* v. *Horncaſtle*, *ante* p. 281.

(2) The following was the caſe alluded to: *De Vignier* v. *Swanſon*, B.R. November 16th. Action on a policy of aſſurance effected in the name of *Grandclos Meſle* and Co. who were brokers to the plaintiff, and alſo agents to her in ſeveral money tranſactions. The plaintiff, as well as *Grandclos* and Co. reſided in London. The latter were not called agents in the policy, but in the declaration were ſtated to be "the perſons reſiding in Great Britain, who received the order for and effected the "ſaid aſſurance." Intereſt in the plaintiff was averred. A verdict was found for the plaintiff, and a rule *niſi* for a nonſuit obtained, on an objection to the form of the policy as not ſufficiently complying with the 28 *Geo.* 3. c. 56. becauſe effected in the name of *Grandclos* and Co. without ſtating them to be *agents*. This point was to have been argued this day, but Lord *Kenyon* ſaid he was ſurpriſed to find the rule had been drawn up, as there was nothing in the caſe. Accordingly the rule, without argument, was diſcharged.

(3) 25 *Geo.* 3. c. 44. Whereas it hath been found by experience that the making or effecting inſurances on ſhips or veſſels, and on goods, merchandizes,

ſtance of many policies being made in blank, in conſequence of which the under-writers were not led to the knowledge of any of the parties. It was the converſation both in Weſtminſter-Hall and out of that place, that the under-writers wanted to know the name of ſomebody concerned, though it was not ſo material who that perſon ſhould be. And why was this? It was becauſe though they might not know the name of the principal, yet if they were in poſſeſſion of the name of the perſon who brought forward the policy, they might have ſome confidence, that if that perſon was a merchant of character, or a reſpectable broker, he would not be engaged in a diſhoneſt tranſaction: ſuch as was not unfrequent in the courſe of laſt war; *viz.* the inſurance of ſhips and cargoes, which were only carried out for the purpoſe of being ſunk. In this caſe the wiſh of the underwriters has been complied with, as well as what the legiſlature thought fit to direct; for the name of the perſon immediately employed to effect the policy has been inſerted. The caſe in the King's Bench goes farther than this, for there it was not even ſtated in the policy that the parties were *agents*, but only averred in the declaration that they were ſo; whereas here it is expreſsly ſaid in the policy that *Barrett* and Co. effected the policy "as agents," by which is imported that they acted not on their own account, but on the part of ſomebody for whom they were concerned. The ſecond queſtion is, whether this policy on goods, being Engliſh property, purchaſed ſince the commencement of hoſtilities, and ſhipped at Rotterdam, be legal or not? Now in the firſt place, it is extremely clear, that this is not an inſurance on enemy's property, and that we have nothing to do with that conſideration here. Let us ſee what the caſe does ſtate. It ſtates that the goods were purchaſed for the plaintiff at Rotterdam by his agent. But whoſe goods they were before they were ſo purchaſed is not mentioned. They might have been the property of Danes or Swedes, and then no objection could be made: or they might have been the property of an Engliſhman; for it appears by the caſe, that the plaintiff's agent in Holland was an Engliſhman; and if an Engliſhman could buy goods in Holland, why could not an Engliſhman alſo ſell goods there? and if theſe goods were bought of an Engliſhman, it is perfectly immaterial whether they were purchaſed in England or in

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chandizes, and effects in blank, and without ſpecifying therein the name or names of any perſon or perſons for whoſe uſe and benefit, and on whoſe account ſuch inſurances are made and effected, hath been in many reſpects miſchievous, and productive of great inconveniences, for remedy, whereof, be it enacted, *&c.*

Holland.

Holland. Suppoſe an Engliſhman, at the commencement of hoſtilities, to have goods in an enemy's country; may he not bring them away? In ſuch caſes a time is generally limited for the ſubjects of the ſtate againſt which hoſtilities are commenced, to leave the country; and will it be ſaid, that during that time, they may not carry away their goods? But I go one ſtep further. Suppoſe that the party has ſtolen theſe goods; and that being in poſſeſſion of them at the time of the policy made, he wants to bring them home. The under-writer will have no right to go into the ſtate of the property previous to the time when he inſured. Suppoſe certain requiſites to have been neceſſary, by the law of Holland, to make a good ſale in Holland, ſhall the under-writer ſay that the goods were not ſold according to the law of Holland? Or if they were ſeized by a pirate, and ſold by him to the plaintiff, ſhall the under-writer ſet up that as a defence? Theſe caſes are too monſtrous to bear conſideration. What is the nature of the contract of inſurance? It proceeds on this ground, that a party being poſſeſſed of goods which he wiſhes to bring home deſires to divide the riſk with other perſons. Whether the goods were improperly ſold to him or not, provided he has paid the value, he is intereſted to the amount of them: and ſhall he not inſure them? The under-writer cannot be permitted to go beyond the time when the goods were ſhipped. It has however been contended, that the ſubjects of this realm ſhall not bring home their own property from an enemy's country. Nothing but poſitive authority would warrant the Court in laying that down as law. If the ſubjects of this country have goods in an enemy's country, it is moſt clearly for the intereſt of this country that they ſhould be able to bring them home. Independent of caſes, we all know how frequently this ſubject has been canvaſſed. If we look into the parliamentary debates in 1746 and 1747, we ſhall ſee that Sir *Dudley Ryder*, Lord *Mansfield*, and the other great men of that time, argued the queſtion entirely on its expediency, and held that it was good policy to permit inſurances on enemy's property. In later times we have ſeen many policies tried profeſſedly on enemy's property, without ever hearing the objection raiſed. Lord *Mansfield* did all in his power to prevent ſo diſhonourable a defence being made. On the legality of ſuch inſurances Lord *Mansfield* never could be got to reaſon. He often ſaid that in former times it was conſidered for the intereſt of the country to inſure enemy's property, and on the perſuaſion of its being for the intereſt of the country, he always diſcountenanced any objection on that head. But he never went beyond the ground of expedience. At preſent ſuch inſurances are not expedient; the ſtate of the countries at war is ſuch as to make them otherwiſe. But the

the underwriters have taken care that ſuch a caſe as this ſhall never ariſe again; for from the moment that any one underwriter ſucceeded on this kind of defence, there was an end of inſurance on enemy's property. It is not however neceſſary to go into the ground of expedience: the illegality of ſuch under-writing is now pretty well ſettled (1).—Judgment for the plaintiff.

Commiſſioners appointed by the crown under the authority of an act of parliament which enabled them "*to take into their poſſeſſion and care all Dutch ſhips and effects detained or brought into the ports of Great Britain*, and to manage, ſell and diſpoſe of the ſame to the beſt advantage according to the inſtructions they ſhould receive from his majeſty and his privy-council," may inſure in their own names ſuch ſhips and effects after ſeizure abroad and while they are in tranſitu to this country. And a count ſtating the nature of their truſt and averring the intereſt to be in themſelves as commiſſioners, and another count to the like effect but without any averment of intereſt at all, were both holden good upon demurrer.—This was an action on a policy of inſurance brought by the plaintiffs, who were commiſſioners for the diſpoſal of Dutch ſhips and effects detained or brought into the ports of Great Britain by virtue of an act of the 35 *Geo.* 3. c. 80. ſ. 21 (2), againſt one of the under-writers. The firſt count of the declaration averred that the plaintiffs *as ſuch commiſſioners* at the time of the ſailing of the ſhips from St. Helena *were intereſted*, and that the ſaid inſurance was ſo made to and *for their uſe*, benefit, and account, *as ſuch commiſſioners*. The ſecond count was to a ſimilar effect, except that in that count it was averred *that the intereſt was in his majeſty, on whoſe account the plaintiffs had cauſed the inſurance to be made*; to which the general iſſue was pleaded. In the third count it was averred that the intereſt *was in the Dutch Eaſt-India* Company, for whoſe benefit the inſurance

Crauford *et al.* v. Hunter, Mic. Ter. 39 Geo. 3. B R. 8 *Ter. Rep.* 13.

(1) Vide *Park Inſur.* 239. 243.

(2) The 21ſt ſ. of the 35 *Geo.* 3. c. 80. reciting that ſeveral ſhips and veſſels belonging to the ſubjects or inhabitants of the United Provinces, and alſo other ſhips and veſſels, having on board goods, wares, merchandize and effects, belonging to ſuch ſubjects, had been or might be thereafter detained in or brought into the ports of this kingdom, and that ſuch cargoes and ſuch ſhips and veſſels might periſh and be greatly injured, if ſome proviſions were not made reſpecting the ſame, enacts "That it ſhall and may be lawful for his majeſty by and with the advice of his privy-council from time to time to grant a commiſſion or commiſſions under the great ſeal of Great Britain to three or more perſons, authorizing them to take ſuch ſhips and cargoes into their poſſeſſion and under their care, and to manage, ſell, or otherwiſe diſpoſe of the ſame to the beſt advantage, according to ſuch inſtructions as they ſhall from time to time receive from his majeſty, with the advice of his privy-council."

was made by the direction of the plaintiffs. To this there was a plea that the *Dutch Eaſt-India* Company were alien enemies; and a *non-pros* was entered as to this count. The fourth count was in general like the firſt, but did not aver the intereſt in any perſon. To the firſt and fourth counts there was a ſpecial demurrer aſſigning various cauſes; but the only ones on which there was any argument now were, as to the firſt count, that *it appeared that the plaintiffs as ſuch commiſſioners as aforeſaid had not at the beginning of the adventure* &c. *any inſurable intereſt* or concern in the ſaid ſhips and goods; and alſo that it was not alleged, nor did it appear, that the plaintiffs or either of them, or any other perſon or perſons whomſoever, had at the beginning of the ſaid adventure any inſurable intereſt or concern in the ſaid ſhips and goods. As to the fourth count, that it did not appear nor was it alleged that the plaintiffs or either of them as ſuch commiſſioners as aforeſaid or otherwiſe, or any other perſon or perſons whomſoever, had any intereſt, property, or concern in the ſaid ſhips and goods, or in the ſaid inſurance. Joinder in demurrer (1).—Lord KENYON, Ch. J. The claim of the plaintiffs cannot be reſiſted. When this inſurance was effected the ſhips in queſtion were at St. Helena, and were ſoon afterwards to come to this country to the plaintiffs as truſtees; the plaintiffs inſured in the character of truſtees; the underwriters knowing the ſtatute, which had then recently paſſed, muſt have known what kind of intereſt the plaintiffs had in this property; and knowing all this, they took the premium from the plaintiffs conſidering them as having a right to make the inſurance, and when the loſs happened they refuſed to pay what they had engaged to pay, pretending that the plaintiffs had no right to make the inſurance. Unconſcientious, however, as this objection ſo made by the defendant may be, if it be a legal objection, he

(1) The policy in this caſe was declared by a memorandum to be on ſhips and goods, viz. *Hooghly*, &c. *as ſhould be thereafter declared and valued*; and there was an averment in the declaration that notice on the loſs which happened to the ſhips and goods (therein mentioned) arrived in this kingdom before any declaration or valuation was or could be made of the ſaid ſhips and goods. And one of the cauſes of demurrer aſſigned was the want of ſuch declaration or valuation. This was ſpoken to upon the firſt argument, and it was inſiſted on as a condition precedent to the plaintiffs' right to recover. But the Court then intimated an opinion, that as the loſs had happened before any declaration of the value could be made, the plaintiffs were excuſed by the neceſſity of the caſe from making any; and that the value muſt be aſcertained upon an average of the value of all the ſhips. The counſel obſerved that the plaintiffs might have declared the value according to the truth of the caſe after the notice of the loſs had arrived: but, in deference to the opinion thrown out by the Court, they did not preſs this part of the argument any further, and it was not ſpoken to again on the ſecond argument.

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has a right to inſiſt upon it in a court of law. And the firſt queſtion here is, whether or not it has not been decided in caſes analogous to the preſent that this is ſuch an intereſt as may be inſured; I think it has. The ſhips, having been ſeized at ſea by his majeſty's ſhips of war for the purpoſe of being brought to this country, were at St. Helena, and were coming here to be under the care, management and diſpoſal of the commiſſioners appointed by the act of parliament which has been alluded to; having been ſo ſeized, they could not come here under any other management, or to any other perſons than the plaintiffs, as truſtees. Then can a truſtee inſure? there is no doubt but he may. It was ſaid, however, in the courſe of the argument, that there cannot be a truſtee for the crown: but that argument was ſoon abandoned, as untenable; and certainly it cannot be ſupported. Then can a conſignee inſure? Surely he may. Can an agent for prizes inſure? Certainly; and theſe plaintiffs are like agents for prizes. I never ſhall ſpeak lightly of any opinion given by Lord *Mansfield:* whether or not I ſhould agree to every thing that was ſaid in the *Omoa* caſe I am not now prepared to ſay, not having heard it argued: when ſuch a caſe comes before us I ſhall determine it as well as I can, always giving great weight to the deciſions of ſo able a judge as Lord *Mansfield.* But with one part of that caſe I fully concur, and on that no doubt can be entertained, namely, that an agent for prizes, though he has not the poſſeſſion, has ſuch an intereſt in the ſhips coming home that he may inſure; and in ſo deciding, Lord *Mansfield* only proceeded on principles previouſly ſettled and eſtabliſhed. Therefore as well on the authority of that caſe as on certain poſitions which muſt be admitted on all hands, I am of opinion, that the plaintiffs are entitled to our judgment on the firſt count. The ſecond queſtion, whether or not the plaintiffs may declare in the manner in which the fourth count is framed, depends (I think) on the conſtruction of the ſtatute 19 *Geo.* 2. c. 37. Notwithſtanding what has been ſaid in the argument on behalf of the defendant, I think that at common law a perſon might have inſured without having any intereſt. And this is in ſome meaſure proved by the caſe 2 *Vernon,* 269: ſince that an application was made to the Court of Chancery to have the policy delivered up: for that Court ſometimes relieves, as was ſaid by Sir *J. Jekyll* in *Cowper* v. *Cowper* (1), againſt the rigour of the law, when certain circumſtances are diſcloſed to induce that Court ſo to interfere. But the preamble and enacting part of the ſtat. 19 *Geo.* 2. c. 37. remove all doubt on this point. It recites

(1) Vid. 2 *P. Wms.* 753.

the miſchief and inconveniences that had ariſen from the making of aſſurances intereſt or no intereſt, and then it enacts (not declaring) that no ſuch aſſurance ſhall be made, except in certain caſes, which for very wiſe and politic reaſons were excepted. Therefore I am ſatisfied that this count is good, unleſs it be on an inſurance prohibited by that ſtatute. But that ſtatute only applies to "ſhips belonging to his majeſty or any of his ſubjects," and does not extend to foreign ſhips. The defendant's counſel then wiſhed us to conſider theſe ſhips as belonging to the government of this country: but that cannot be ſo conſidered; for the property in captured ſhips is not altered before condemnation in the Court of Admiralty.—ASHHURST, J. The principal queſtion in this caſe ariſes on the fourth count of the declaration, namely, whether or not it can be ſupported for want of an averment of intereſt in the plaintiffs in the ſubject-matter inſured; as to which I am of opinion that the declaration is good without ſuch an averment. For in the firſt place this does not ſeem to be a caſe that falls within the purview of the ſtatute againſt gaming policies. But without entering into that, it does in the preſent caſe appear to be ſufficiently clear that the plaintiffs were intereſted. It does not in any caſe appear to be neceſſary that there ſhould be any technical form of words made uſe of by way of averment of intereſt; it is ſufficient if the fact appear to be ſo. *Here was a ſeizure of enemy's property, and then it veſted in the crown.* Suppoſe the ſubject of the inſurance had been an enemy's ſhip taken as prize in time of war by a king's ſhip, and the captain as ſuch had inſured her, I ſhould conceive ſuch inſurance would be good, as the matter is of public notoriety, and the underwriters from ſuch a deſcription muſt have ſufficient notice of the property. The information given to the underwriters by the plaintiffs on the face of the preſent declaration is matter of equal notoriety; for it ſhews the act of parliament by which a power and authority was veſted in the crown for the ſeveral purpoſes therein mentioned, and that the plaintiffs were appointed commiſſioners by the king to take care of ſuch property of a certain deſcription as might come into their hands, and that this was property of that deſcription. This ſeems to be all that the underwriters could have occaſion to know, and that the plaintiffs were in the nature of agents. The plaintiffs did not affect to make this inſurance in their own right, but as truſtees for thoſe perſons who ſhould eventually be entitled to it. Therefore I am of opinion that the declaration is ſufficient.—GROSE, J. *I do not agree with my brother* Aſhhurſt *in one part of his opinion, namely, that the property in theſe ſhips was in the crown, becauſe the property could not be altered before condemnation.* The firſt queſtion in this caſe is, Whether or not the plaintiffs had an inſurable intereſt

intereſt in the ſhips and goods inſured? Now they were either truſtees, conſignees, or agents, for thoſe who might eventually be entitled to the produce. If they were truſtees or conſignees, it ſeems admitted that they might have inſured. And if they be conſidered as agents, then they had an inſurable intereſt, according to the deciſion in the *Omoa* caſe. As to the other queſtion; whoever reads the ſtat. 19 *Geo.* 2. muſt ſee what the law was before the paſſing of that act. Before that time a wagering policy was not illegal. The words of that ſtatute clearly ſhew that before that time any perſon might have inſured without intereſt; therefore it is not neceſſary to aver intereſt in any caſe not prohibited by that act. And this caſe does not come within the prohibition of that act, becauſe it was an inſurance on foreign ſhips.—LAWRENCE, J. With regard to the ſuppoſed contradiction on this declaration, the argument is thus; by a reference to the introductory part of the declaration, which applies to all the counts, it appears that the ſhips and goods were the property of the crown, and therefore it is a contradiction afterwards to ſay that they were not the property of his majeſty or any of his ſubjects. But the foundation of that argument fails; for it only appears that they were taken by his majeſty's ſhips and were in the poſſeſſion of the crown, without ſhewing that the crown had any right to them, which certainly does not amount to an averment that the property was in the crown; and that which is taken by the crown not in a ſtate of hoſtility does not thereby become the property of the crown. On the other parts of the caſe, I need only ſay that I agree with the reſt of the Court.—Judgment for the plaintiffs.

Captors of ſhips ſeized as prize may inſure their intereſt therein, and are not entitled to a return of premium although it be afterwards adjudged to be no prize, and reſtitution be awarded to the owners by the Court of Admiralty.—This was an action for money had and received brought by the plaintiffs, as agents and inſurance brokers, to recover 94l. 19s. 2d. being part of the premium of 105l. paid to the defendant as an under-writer for 500l. upon the policy of inſurance hereinafter ſtated. At the trial the jury found a verdict for the plaintiffs for 94l. 19s. 2d., ſubject to the opinion of the Court on the following caſe. On the 30th of January, 1797, Captains *Briſbane*, *Durban*, and *Guion*, having taken the ſhip Weſtcapelle, and her cargo, as prize, off the Cape of Good Hope, ſent a letter to Meſſrs. *Elphinſtone* and *Jackſon* mentioning the capture, and adviſing an inſurance on the ſhip and cargo of 40,000l. from all riſk during her paſſage to England. *Elphinſtone* and *Jackſon* in conſequence of ſuch orders directed the plaintiffs to cauſe the ſaid ſhip and cargo to be inſured to the extent of 40,000l,

Boehm *et al.* *v.* Bell, Hil. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 154.

and accordingly the plaintiffs on the 22d of April, 1797, effected a policy upon the ſhip and goods "*at and from the* Cape of Good Hope *to* London, *valued at* 150,000l. being on ſhip and cargo; this inſurance being effected by order and for account of the Hon. *W. Elphinſtone* and *J. Jackſon*, Eſq. agents for the captors at a premium of 20 guineas *per cent.* to return 8l. *per cent.* if departs from the Cape or St. Helena with convoy for England and arrives." The defendant ſubſcribed the policy for 500l. and received the premium, being 105. The ſhip after her capture ſailed from the Cape of Good Hope with convoy for St. Helena, where ſhe arrived and remained in ſafety for one month; ſhe ſailed from thence for England without convoy and arrived in ſafety. The ſhip and cargo were at the inſtance of the captors libelled as prize in the uſual manner in the Court of Admiralty as belonging to the ſubjects of Holland, enemies of the king of Great Britain, but on the 30th of Auguſt, 1797, a claim was there made and entered by certain perſons, all of them merchants, and reſpectively citizens of America, as the true and lawful owners and proprietors of the ſhip and cargo, and the Court of Admiralty admitted the claim (except ſuch part as was claimed by one *Huibright Maarhys*); and decreed the ſhip and cargo (except as aforeſaid) to be reſtored. The ſhip and cargo have been ſince reſtored to the claimants, and have been ſold by them; the former producing about 1500l. and the latter about 60,000l. The goods of *H. Maarhys* condemned by the ſentence have been ſince alſo ſold by the proper officer of the Court of Admiralty, and after deducting the expences of ſale have produced the ſum of 1014l., the invoice price thereof being about 300l. No fraud is imputable either to the plaintiffs or to the captors of the ſhip and cargo reſpecting the inſurance in queſtion. FOR THE PLAINTIFFS it was argued, that the aſſured are entitled to a proportionable return of premium, on the ground that the conſideration on which it was paid to the under-writer has failed; the inſurance having been made on the ſuppoſition that the property inſured was lawful prize, and the property of the captors, which turns out in the event to be without foundation, except as to about a fortieth part. —The defendant contended that the aſſured were not entitled to a return of any part of the premium, becauſe the policy did attach, the riſk was incurred, and conſequently the conſideration of the premium has not failed. The defendant is entitled to retain it on three grounds; 1ſt, The aſſured had an inſurable intereſt to the amount of the ſum inſured, and in the event of a loſs might have recovered againſt the under-writer. But, 2dly, the extent of the intereſt of the aſſured is immaterial in this caſe, becauſe this is a valued policy, wherein the parties have agreed on the amount of the intereſt inſured.

insured. 3dly, At any rate, as this was an insurance on a foreign ship, it was not necessary that the assured should have any interest at all, it not being within the stat. 19 *Geo.* 2. c. 37.; as was holden in *Craufurd* v. *Hunter*, *ante*, p. 289.—Lord KENYON, Ch. J. I will not enter into a discussion of either of the two last points made by the defendant's counsel, because the first alone furnishes, in my opinion, an answer to this action. The real question in this case is one of the most simple that can be stated; it is merely this, whether the assured had or had not any interest. This ship was captured by the captains of the ships mentioned in the case, who were acting in the service of their country, and on whose conduct there is not the smallest imputation; they had the possession of the property insured, and from that possession certain rights and duties resulted. If it were a legal capture the captors were entitled; if the capture were improperly made, they were liable to be called to an account in the Court of Admiralty, where they might be amerced in damages and costs. They had therefore a right to insure themselves against the decision that might have loaded them with damages and costs. It was important to them to take care that there should be something forthcoming to answer for the amount of those damages. On this short ground therefore I am clearly of opinion, that the assured had an insurable interest, that the risk was begun, and that there can be no return of premium. —GROSE, J. This is a claim by the plaintiffs for a return of premium on the ground that the assured had no insurable interest in the property. But it would be opening a source of infinite litigation if we were to decide that this action could be maintained, and that a portion of the premium ought to be returned in the event of its appearing that the assured had not an interest up to the extent of the insurance. Three answers have been given to this case by the defendant's counsel: of the two last I shall only say that they are important, and will deserve much consideration when it becomes necessary to decide on them; but here it is not necessary to give an opinion upon either of them. With regard to the first, it seems to me that the whole difficulty has arisen from confounding an absolute indefeasible interest with an insurable interest. It is not pretended that the assured had the absolute property in the subject of insurance; neither need they have such property to make the policy legal; it is sufficient if they had an insurable interest. And according to what was said by Lord *Mansfield* in the case of *Le Cras* v. *Hughes* they certainly had an insurable interest. If they had succeeded in the Court of Admiralty, it will be admitted that they had an insurable interest: and in case of their not succeeding there, there were events in which they might be made answerable, and against which it was competent to

them to to inſure. I am therefore ſatisfied that they had an inſurable intereſt in the ſubject inſured; and this is a full anſwer to the preſent action.—LAWRENCE, J. The caſe turns on this ſhort queſtion, Whether or not the aſſured had an intereſt which they might inſure? Did they mean to game? or was not there a loſs againſt which they might indemnify themſelves by a policy of inſurance? I do not mean a certain, but a poſſible, loſs. Now it has been ſhewn that this was a caſe in which the Court of Admiralty might have decreed them to pay damages and coſts, and that is ſufficient. It might be aſked, in the language of Lord *Mansfield* in *Le Cras* v. *Hughes*, "had not the inſured ſuch an intereſt in the ſhip coming home as to entitle them to an indemnity?" I think that they had, and therefore that the plaintiffs are not entitled to a return of premium.—Poſtea to the defendant.

Kewley *et al. v.* Ryan, Tr. Ter. 34 Geo. 3. C.B. 2 *Hen. Black.* 343.

This was an action on a policy of inſurance, and the material facts of the caſe were as follow. On the 24th of May, 1793, *Freeland* and *Rigby*, merchants at St. Vincent's, wrote to the plaintiffs, merchants at Liverpool, who were alſo partners in a houſe of the ſame name at Grenada, requeſting them to get 1260l. inſured on 70 bales of cotton *ſhipped on board* the Elizabeth, from Grenada to England, *and alſo* 1300l. *on another cargo of cotton and other goods, which they intended to ſhip on board ſome other ſhip that ſhould ſail with the firſt convoy*, and therefore directing *the latter inſurance to be on ſhip or ſhips*. The plaintiffs accordingly by their broker inſured 1260l. on board the Elizabeth in London, and 1300l. *on board ſhip or ſhips, viz.* 700l. at Liverpool, and 600l. in London. The policy for 700l., of which the defendant underwrote 50l., and on which the action was brought, was *at and from* Grenada *to* Liverpool, on any kind of goods as intereſt ſhould appear, *in ſhip or ſhips on account of Freeland and Rigby*, warranted to ſail on or before the 1ſt of Auguſt, 1793, and to return 3 *per cent.* if the ſhip ſailed with convoy bound to Great Britain, and arrived, &c. without any exception of the goods on board the Elizabeth. The policy for 600l. effected in London, was alſo *on ſhip or ſhips* at and from Grenada to Liverpool, but with an exception of 1260l. "*on* "70 *bales of cotton per Elizabeth Crettin*," the ſame underwriters in London having before ſubſcribed the policy on the Elizabeth. But the plaintiffs did not communicate to the underwriters at Liverpool the letter of *Freeland* and *Rigby*, directing an inſurance on the Elizabeth, nor any circumſtance reſpecting the goods ſhipped on board the Elizabeth, and the inſurance made on that ſhip. The Elizabeth ſailed early in June, and arrived ſafe at Liverpool, in Auguſt, 1793. The Heart of Oak, on board of which *Freeland* and *Rigby* had ſhipped their ſecond cargo of cotton, &c. ſailed the latter end of July, bound for Liverpool, but with a deſign *formed before the*

the commencement of the voyage (as appeared by the clearances, and was admitted on all sides) *to touch at Cork in her way to Liverpool*, but was totally lost before she arrived at the dividing point. The defendant pleaded the general issue, and a tender of 1l. 10s. on account of the safe arrival of the Elizabeth, which the plaintiff took out of court, and obtained a verdict for 48l. 10s. On a motion for a new trial the following questions arose: FIRST, Whether such a policy as this *on ship or ships* was a good one? SECONDLY, Whether the policy on ship or ships was discharged by the safe arrival of the Elizabeth; or in other words, whether the insured had a right to apply the insurance to the Heart of Oak that was lost? THIRDLY, Whether the voyage insured being from Grenada to Liverpool, the policy was rendered void by an intention to touch at Cork, in the way to Liverpool, the ultimate port of delivery, that intention not having been carried into effect?—THE COURT declared their opinion as to the first point which had been made in the argument, that the legality of the policy on ship or ships was too well established both by usage and authority to be disputed; as to the second, that the insured had clearly a right to apply such an insurance to whatever ship he thought proper, within the terms of it, for which the case of *Henchman* v. *Offley* (1) was an autho-

(1) *Henchman* v. *Offley*, B.R. Mic. 23 *Geo.* 3. This was an action on a policy of insurance, of 6000l. on goods to come in *ship or ships* from Bengal to London; and the facts of the case were the following. The plaintiff in India wrote to his correspondent in England to get two insurances, one of 6000l. on goods on board *any ship or ships* which should sail between the first of November, 1779, and the first of July, 1780, and the other of 4000l. on goods on board *any ship or ships*, which should sail between the first of February and the thirty-first of December, 1780. The two insurances were accordingly effected, and the plaintiff loaded goods to the amount of 4889l. on board the ship General Barker, and 4500l. on board the ship Ganges, and at the time of the loading, entered a certificate before Sir *Elijah Impey*, the chief justice, that he had put such goods on board the one ship, and such on board the other, and that he had shipped on board the Ganges 4889l. of the risque intended to be covered by the 6000l. policy. Both ships sailed within the time mentioned in the first policy; the General Barker was lost, but the Ganges arrived safe at the place of her destination; and this action was brought on the policy for 6000l. which the plaintiff contended he had a right to apply to the General Barker, and went for a total loss. At the trial two objections were made. 1st. That evidence could not be given of what passed in the East-Indies. 2d. That there ought to be a contribution, all the under-writers called upon as for an average loss, and both policies taken into the account, and that the plaintiff ought only to recover in the proportion of 4889l. to 4500l. or at most as 4889l. was to 1111l.—Lord *Mansfield* over-ruled the objection as to the evidence, and was of opinion, that the plaintiff might apply the 6000l. policy entirely to the General Barker; and a verdict was found accordingly. But a new trial was moved for, and a rule granted to shew cause. And after argument the Court discharged the rule, but ordered the salvage on the 1111l. to be deducted out of the damages recovered, which made a deduction of about one fifth.

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rity; as to the third, that where the *termini* of the intended voyage were really the ſame as thoſe deſcribed in the policy, it was to be conſidered as the ſame voyage, and a deſign to deviate, not effected, would not vitiate the policy. That in *Wooldridge* v. *Boydell*, it appeared there was no intention that the ſhip ſhould go to Cadiz at all, which was mentioned in the policy as her port of delivery, and in *Way* v. *Modigliani* there was an actual deviation, by the ſhip going to fiſh on the banks of Newfoundland, thoſe caſes therefore were wholly different from the preſent, for here the ſhip was really bound to Liverpool, though there were alſo clearances for Cork. The remaining queſtion therefore was, Whether the letter of the 24th of May, by which *Freeland* and *Rigby* directed an inſurance to be made on the Elizabeth, and the actual circumſtances of that inſurance, ought to have been communicated to the underwriters on the preſent policy? But as nothing was neceſſary to be diſcloſed, but what was material to the riſk run, and as the inſurance on the Elizabeth was not material to that riſk, the concealment was not fraudulent, and therefore could not affect the right of the plaintiffs to recover. — Rule diſcharged.

Andre *et al. v.* Fletcher, Mic. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 161.

Every re-aſſurance in this country either by Britiſh ſubjects or foreigners, whether on Britiſh or foreign ſhips, is void by 19 *Geo.* 2. c. 37. unleſs the aſſured be inſolvent, become a bankrupt, or die.—On the trial of an action on a policy of inſurance, tried at the ſittings after Trinity Term, 1787, at Guildhall, London, the jury found a verdict for the plaintiffs, ſubject to the opinion of the Court on the following caſe. *James Simandy* of Marſeilles in France, on the 8th day of Auguſt, 1780, ſubſcribed a policy of aſſurance at Marſeilles, on a ſhip called *La Vierge des Carmes* and *Les Ames au Purgatoire*, *Cipriano Moreſco* maſter, at and from Marſeilles to Carthagena, for 7200 livres, or 315l. at a premium of 8l. *per cent.* The defendant on the 26th of Auguſt, 1780, ſubſcribed the policy ſtated in the declaration, at a premium of 2 guineas *per cent.* for the ſaid ſum of 315l. being a re-aſſurance of the ſaid *J. Simandy*'s ſubſcription to the firſt-mentioned policy. The ſhip, on her voyage from Marſeilles to Alicant and Carthagena, was captured by an Engliſh privateer on the 14th of September, and carried into Mahon, and there condemned as prize; and *Simandy*, on the 15th of February, 1781, paid the ſum ſubſcribed by him at Marſeilles to the aſſured. *Simandy* is living; and at the time of the ſubſcribing of the policy ſtated in the declaration, he was ſolvent. The queſtion for the opinion of the Court was, Whether the plaintiffs were entitled to recover? And the plaintiffs contended that the *re-aſſurance being on a foreign ſhip* was illegal under the 19 *Geo.* 2. as it had been determined that that ſtatute does not prohibit inſurances on *foreign ſhips* "*intereſt or no intereſt.*"

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—SED PER CURIAM: There is no doubt in this caſe upon the words of the act of parliament; the fourth ſection of which is preciſe and poſitive, "that it ſhall not be lawful to "make re-aſſurance, unleſs the aſſurer ſhall be inſolvent, be-"come a bankrupt, or die." Now in this caſe, this is not a re-aſſurance made abroad, but in this country; ſuch a contract therefore is void, being in the very teeth of the act. It has been argued, that becauſe the prior part of the ſtatute, which reſtrains inſurances "intereſt or no intereſt," has been held not to extend to foreigners, this clauſe ſhould alſo be confined to inſurances on Engliſh ſhips. The caſe of *Thelluſſon* v. *Fletcher* was rightly determined, becauſe the firſt ſection is expreſsly confined to aſſurances *on ſhips belonging to his majeſty, or any of his ſubjects:* but the fourth clauſe is general, without any reſervation, and reaches the preſent caſe; and there is no reaſon why it ſhould be reſtrained to Engliſh ſhips.—Judgment for the plaintiff.

In the conſtruction of the act 19 Geo. 2. c. 37. it has been holden, that all inſurances made by perſons having no intereſt in the event about which they inſure, or without reference to any property on board, are merely wagering policies, and abſolutely null and void.—Upon a motion for a new trial, it appeared that this was an action brought by the plaintiff, who was a ſurgeon on board an Eaſt Indiaman, againſt the defendant, a paſſenger in the ſame ſhip, to recover a ſum of 1000l. upon a ſpecial agreement, bearing date the 18th of July, 1774; by which, after reciting, that "whereas the "plaintiff had agreed to pay to the defendant the ſum of 20l. "ſterling at the next port the ſhip ſhould arrive at, it was "witneſſed that he the defendant, in conſideration thereof, "did undertake that the ſaid ſhip ſhould ſave her paſſage to "China that ſeaſon; and in caſe ſhe did not, that then he "would pay to the plaintiff the ſum of 1000l. at the end of "one month after the arrival of the ſaid ſhip in the river "Thames." At the trial it appeared, that the plaintiff duly paid the amount of the 20l. to the defendant at the next port, in pagodas: that the veſſel being delayed below the Cape and Madras, in conſequence of a miſcalculation of five days in the reckoning, and the moonſoons ſetting in earlier than uſual, ſhe loſt her paſſage. *That the plaintiff had ſome goods on board, which were liable to ſuffer by the loſs of the ſeaſon*; and that whilſt it was ſtill doubtful whether the ſhip would or would not ſave her paſſage, the captain had applied to each of the parties, to perſuade them to reſcind the agreement; repreſenting that the ſum to be paid in either event would be more than the loſer could afford. That the plaintiff was willing to have cancelled the agreement; but the defendant poſitively refuſed. The jury found a verdict for the plaintiff, damages 980l. with liberty for the defendant to move for a new

Kent v. Bird, Ea. Ter. 29 Geo. 3. B. R. Cowp. 583.

new trial upon THE QUESTION, Whether this were not an agreement within the ſtatute 19 *Geo.* 2. c. 37. and therefore void? The caſe was fully argued.—Lord MANSFIELD, Ch. J. A policy of inſurance is, in the nature of it, a contract of indemnity, and of great benefit to trade. But the uſe of it was perverted by its being turned into a wager. To remedy this evil, the ſtatute of the 19 *Geo.* 2. c. 37. was made; which, after enumerating in the preamble the various frauds and pernicious practices introduced by the perverſion of this ſpecies of contract; and amongſt others, that of gaming or wagering under pretence of inſuring veſſels, &c. proceeds, under general words, to prohibit *all* contracts of inſurance by way of *gaming* or *wagering*. Here the plaintiff gives ſo much to the defendant in conſideration that the ſhip ſhould ſave her paſſage to China; and if not, then, upon her returning ſafe to England, he is to receive 1000l. If the firſt of theſe events happened, the defendant won; but he could not loſe, unleſs both happened. Is not this gaming? Is not this wagering? If this were allowed, all wagering policies would be turned into this form, and the act would be entirely defeated. If there is no intereſt in the caſe, it is gaming and wagering. Therefore there muſt be a new trial.

Fowry and another *v.* Bourdieu, Mic. Ter. 21 Geo. 3. B.R. 2 *Doug.* 467.

An inſurance being made without intereſt, and the premium paid, the inſured ſhall not recover back the premium after the ſhip has arrived ſafe.—The plaintiffs had lent to *Lawſon*, captain of the Lord Holland Eaſt Indiaman, 26,000l. for which he had given them a common bond, in the penal ſum of 52,000l. While he was with his ſhip at China, the plaintiffs got a policy of inſurance underwritten by the defendant and others, which was in the following terms: "At and from China to London, beginning the adventure, *upon the goods* from the loading thereof on board the ſaid ſhip at Canton in China, &c. "*upon the ſaid ſhip, &c.* from and immediately following "her arrival at Canton in China, valued at 26,000l., being "the amount of captain *Patrick Lawſon*'s common bond, "payable to the parties as ſhall be deſcribed on the back of "this policy; and it bears date the 16th day of December, "1775; and, in caſe of loſs, no other proof of intereſt to "be required than the exhibition of the ſaid bond: warranted free from average, and without benefit of ſalvage "to the inſurer."—At the head of the ſubſcriptions was written, "*On a bond as above expreſſed.*"—Captain *Lawſon* ſailed from China, and arrived ſafe with his privilege (as it is called), or adventure, in London, on the 1ſt of July, 1777, none of the events inſured againſt having happened. The receipt of the *premium* was acknowledged on the back of the policy. In 1780 the inſured brought this action for a return of the *premium*, on the ground that the policy being without

without interest, the contract was void. On the trial of the cause before Lord MANSFIELD, his lordship was of opinion, that the policy was a gaming policy, prohibited by the statute of 19 *Geo.* 2. c. 37. and both parties equally guilty of a breach of the law; that the rule, therefore, of *melior est conditio possidentis* was applicable to the case, and the plaintiffs could not recover the *premium*. A verdict was accordingly found for the defendant, agreeably to his lordship's direction: but, the next morning, he expressed a doubt as to the propriety of his opinion, because the money had been paid upon an executory agreement, the *premium* having been paid before the risk commenced. It was therefore moved, that there might be a new trial, and the point was argued at the bar.—Lord MANSFIELD. In many instances first thoughts are best. I am now very much inclined to my first opinion. There are two sorts of policies of insurance; mercantile and gaming policies. The first sort are contracts of indemnity, and of indemnity only; and from that principle a great variety of decisions and consequences have followed. The second sort may be the same in form, but in them there is no contract of indemnity, because there is no interest upon which a loss can accrue. They are mere games of hazard; like the cast of a die. In the present case the nature of the insurance is known to both parties. The plaintiffs say, "We mean to game; but we give our "reason for it; Captain *Lawson* owes us a sum of money, "and we want to be secure in case he should not be in a "situation to pay us." It was a hedge. But they had no interest, for, if the ship had been lost, and the under-writers had paid, still the plaintiffs would have been entitled to recover the amount of the bond from *Lawson*. This then is a gaming policy, and against an act of parliament; and therefore it is clear that the Court will not interfere to assist either party: according to the well-known rule, that, in *pari delicto, &c.* Not that the defendant's right is better than that of the plaintiffs, but they must draw their remedy from pure fountains.—WILLES, J. was of a different opinion, and said: The *premium* has been paid, and yet no risk run; for the policy was void from the beginning, and the insured could not have recovered from the under-writers if the ship had been lost. But I cannot think it a gaming policy. It does not appear to me that the parties had an idea they were entering into an illegal contract. The whole was disclosed, and they *thought* there was an interest. This was a mistake, but it is a new point of law; and it would be very hard that a party should lose what he has paid under a mere mistake. I think in conscience the defendant ought to refund the *premium*—ASHHURST, J. I am clear that there ought not to be a new trial. A policy of insurance ought to be a

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mere contract of indemnity, and nothing more; but here the money might have been paid twice; which ſhews deciſively that this was a gaming policy.—BULLER, J. It is very clear to me that the plaintiffs ought not to recover. There was no fraud on the part of the underwriters, nor any miſtake in matter of *fact*. If the *law* was miſtaken, the rule applies, that *ignorantia juris non excuſat*. This was a mere gaming policy, without intereſt. There is a found diſtinction between contracts executed and executory, and if an action is brought with a view to reſcind a contract, you muſt do it while the contract continues executory, and then it can only be done on the terms of reſtoring the other party to his original ſituation. There was a caſe of *Walker* v. *Chapman* ſome years ago in this court, where a ſum of money had been paid in order to procure a place in the *Cuſtoms*. The place had not been procured, and the party who had paid the money having brought his action to recover it back; it was held, that he ſhould recover, becauſe the contract remained executory. So, if the plaintiffs in the preſent caſe had brought their action before the riſk was over, and the voyage finiſhed, they might have had a ground for their demand; but they waited till the riſk (ſuch as it was, not indeed founded in law, but reſting on the honour of the defendant), had been completely run. It makes no difference whether the *premium* was paid before the voyage, or after it.—Rule diſcharged. Lord MANSFIELD ſaid, he deſired it might not be underſtood, that the Court held, that, in all caſes where money has been paid on an illegal conſideration, it cannot be recovered back. That in caſes of oppreſſion, when paid, for inſtance, to a creditor to induce him to ſign a bankrupt's certificate, or upon an uſurious contract, it may be recovered, for in ſuch caſes, the parties are not *in pari delicto*.

Cox and another Executors of Shultz *v.* Parry, Mic. Ter. 27 Geo. 3 B R. 1 *Ter. Rep.* 464.

Payment of money into court is only an acknowledgment by the defendant of the contract, and that the plaintiff is entitled to recover the ſum ſo paid: but it does not preclude him from taking any objection to the action beyond that ſum; though unleſs ſuch ſum were paid, ſuch objection would be a bar to the whole demand.—To an action on a policy of inſurance, the defendant pleaded the general iſſue, and *paid money into court*. A verdict having been found for the plaintiffs, a new trial was moved for on the grounds, that this was a verdict againſt evidence; and that upon the conſtruction of the 25 *Geo.* 3. c. 44. the plaintiffs could not ſupport this action in point of law, *the name of* Shultz *not being inſerted in the policy*. After argument, the Court took time to conſider of the caſe: and ASHHURST, J. now delivered the opinion of the Court.—This was an action on a policy of inſurance made in the name of *Lyon de Simons*, on goods

goods and jewels on board the Halfwell from London to the Eaſt Indies. This policy was made on the 23d December laſt; which being long ſubſequent to the paſſing of the ſtatute 25 *Geo.* 3. *the policy cannot by law be applied to any goods which were not the property of* De Simons, *or in which he was not intereſted.* But the plaintiffs have endeavoured to make another uſe of it, and to apply it not only to the goods which were ſhipped in the name of *De Simons*, but alſo to goods ſhipped in the name of *Shultz*. And in order to do that, they proved on the trial that *Shultz* ordered two policies to be made, one in the name of *Shultz* on goods and jewels for 1400l., the other (which is the policy in queſtion) in the name of *De Simons*, to the amount of 1600l. on goods and jewels; which policy was to be lodged in the hands of *De Simons* as a ſecurity for 1600l. which *Shultz* had borrowed of him. When *Shultz* borrowed the money of *De Simons*, he aſſigned over to him the jewels, which were ſhipped in the name of *De Simons*, and they were to be redelivered to *Shultz* in the Eaſt Indies, upon his paying the principal and intereſt there. *The jewels ſhipped in the name of* Shultz *are totally loſt, but thoſe ſhipped in the name of* De Simons *have been recovered.* If the plaintiffs can apply the policy to the goods ſhipped in the name of *Shultz*, as well as to thoſe ſhipped in the name of *De Simons*, there has been an average loſs, and the verdict which the plaintiffs have obtained ought to ſtand. If it cannot be ſo applied, the underwriters are liable only for the ſalvage of the jewels ſhipped in the name of *De Simons*; and, more having been paid into court, the verdict is wrong. *I have already ſtated, that by law the policy can only be applied to the intereſt of* De Simons, *the ſtatute having made it void to other purpoſes. But a great queſtion in the caſe is, whether the defendant has not precluded himſelf from making that objection by paying money into court.* Therefore it will be neceſſary to ſee what effect paying money into court has in the cauſe. It admits, that the plaintiffs have a right to maintain the action (1), and reduces the queſtion ſimply to the quantum of damages which they are entitled to recover. In this caſe, *if the defendant had not paid money into court, the plaintiffs muſt have been nonſuited; for the executors of* Shultz *could not have recovered on a policy made in the name of* De Simons *only. But as the defendant has paid money into court, he has thereby admitted that the plaintiffs are entitled to maintain their action on the policy to the amount of that ſum. But he has admitted nothing more. He does not, by paying money into court, vary the conſtruction*

(1) Vide *Elliot* v. *Callow.* 2 *Salk.* 597, which agrees with this determination, & 5 *Burr.* 2640.

and

and import of the policy, ſo as to entitle the plaintiffs to recover beyond that extent. The queſtion ſtill remains, Whether upon this contract the plaintiffs are entitled to more? In order to aſcertain that, it is incumbent on the Court to examine and expound what the contract is. At the time it was made, it could only be good as an inſurance on the goods which belonged to *De Simons*; it is made in his name; it is a good and valid contract as far as it reſpects his goods, but is void as to all others. And the plaintiffs ſhall never be admitted to ſay that this contract, though apparently legal, is in fact illegal, as being made for their benefit; and yet they mean to avail themſelves of that illegality, and to recover damages upon it. Beſides this, we think that (independent of the objection in point of law) the verdict is not ſupported by any fact of the evidence. Here his lordſhip commented on the evidence, as by no means proving that *Shultz* did not intend to make diſtinct policies upon the diſtinct goods ſhipped in his own name and that of *De Simons*. And he concluded On the whole, we are of opinion that this is a verdict both againſt law and againſt evidence; and therefore muſt be ſet ſet aſide.

Johnſton and another *v.* Sutton, Mic. Ter. 20 Geo. 3. B.R. 1 *Doug.* 253.

An aſſurance of a voyage expreſsly prohibited by the laws of this country, is void.—This was an action on a policy of inſurance on goods on board the ſhip Venus, loſt or not loſt, "at and from London to New-York, warranted to "depart with convoy from the Channel for the voyage." On the trial of the cauſe a verdict was found for the plaintiffs. The defendant obtained a rule to ſhew cauſe why there ſhould not be a new trial, and the facts appeared to be theſe: The ſhip was cleared for Halifax and New-York. She had proviſions on board, which ſhe had a licence to carry to New-York, under a proviſo in the prohibitory act of 16 *Geo.* 3. c. 5. *But one half of the cargo, including the goods which were the ſubject of this policy, was not licenſed, and was not calculated for the* Halifax *market, but for* New-York. There had been a proclamation by Sir *William Howe* to allow the entry of unlicenſed goods at New-York, and though there were bonds uſually given at the cuſtom-houſe here, by which the captain engaged to carry the goods to Halifax, thoſe bonds were afterwards cancelled, on producing a certificate from an officer appointed for that purpoſe at New-York, declaring, that they were landed there. *The commander in chief had no authority under the act of parliament to iſſue ſuch proclamation, or to permit the exportation of unlicenſed goods.* The Venus was taken in her paſſage to New-York (1), by an American privateer.—Lord MANSFIELD, The

(1) The ſtatute (§ 1.) prohibited all commerce with the province of New-York (amongſt others), and confiſcates all ſhips and their cargoes which

The whole of the plaintiffs' caſe goes on an eſtabliſhed practice, directly againſt an act of parliament. If the defendant did not know that the goods were unlicenced, the objection is fair as between the parties. If he did, he would not deſerve to be favoured. But, however that may be, it was illegal to ſend the goods to New-York, and, *in pari delicto, potior eſt conditio defendentis.* It is impoſſible to bring this within the caſes which have been cited (1), becauſe here there was a direct contravention of the law of the land.—Rule abſolute.

Camden *et al.* *v.* Anderſon, Tr. Ter. 36 Geo. 3 B.R. 6 *Ter. Rep.* 723.

The excluſive right of trading to the Eaſt Indies, granted to the Eaſt-India Company by ſtat. 9 & 10 *W.* 3. has never been put an end to. And though ſuch parts of that act as inflicted penalties, &c. were repealed by ſtat. 33 *Geo.* 3. c. 52. and though the latter act ſays that no acts or parts of acts thereby repealed ſhall be pleaded or ſet up in bar of any action, &c. it is competent to under-writers who have ſubſcribed policies on ſhips trading to the Eaſt Indies in contravention of the ſtat. of *Will.* to avail themſelves of the illegality of ſuch trading in an action brought on the policies. —This was an action on a policy on the ſhip Albemarle "at and from London to any port or ports in New South "Wales, and at and from thence to all ports and places in "the Eaſt Indies, Perſia, China, or elſewhere, and at and "from thence until her ſafe arrival back at London, with "liberty to touch, ſtay, and trade at any port or place where-"ſoever or whatſoever as well on this as on the other ſide "of the Cape of Good Hope." The declaration, after ſtating the policy, alleged that the ſhip ſailed on the ſaid voyage from London to Port Jackſon in New South Wales, and from thence to certain ports or places in the Eaſt Indies, and arrived at Bombay in the Eaſt Indies, and in the ſaid voyage back to London from Bombay was captured by certain enemies and perſons unknown. Plea the general iſſue. On the trial a ſpecial verdict was found as follows: The plaintiffs were owners of the ſhip in queſtion. In the London Gazette of the 16th November, 1790, the following advertiſement was publiſhed; "Navy Office, November "15th, 1790; The principal officers and commiſſioners of

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which ſhall be found trading, or going to, or coming from trading with them. Then there is a proviſo (§ 2.) excepting ſhips laden with proviſions for the uſe of his Majeſty's fleets or garriſons, or the inhabitants of any town poſſeſſed by his Majeſty's troops, provided the maſter ſhall produce a licence, ſpecifying the voyage, &c. and the quantity and ſpecies of proviſions; but by the ſame proviſo it is declared, that goods not licenced, found on board ſuch ſhips, ſhall be forfeited.

(1) Theſe were caſes of inſurances of ſhips trading contrary to the revenue laws of foreign countries.

" his majeſty's navy do hereby give notice that on Thurſ-
" day 28th inſtant, they will be ready to receive propoſals
" from the owners of ſhips in the ſervice of the Eaſt-India
" Company that are not likely to be taken up for the two
" enſuing ſeaſons, or other perſons, for carrying 2000 con-
" victs, or any part of that number, to the ſettlement of
" New South Wales, on the conditions and under the regu-
" lations to be ſeen at this office. The court of directors of
" the Eaſt-India Company have conſented that the ſhips
" which may be engaged for this purpoſe may proceed to
" Bombay, and load home with cotton on private account
" under the inſpection and direction of the company's ſer-
" vants at that ſettlement; provided ſuch cottons are ſold at
" the company's ſale, ſubject to the uſual expences (the
" company's duty excepted); and provided the ſaid ſhips
" do not interfere with any other part of the company's ex-
" cluſive commerce," &c. On the 18th of November, 1790, an agreement was made between the plaintiffs and the principal officers and commiſſioners of the navy on behalf of the king for the conveying of convicts and government ſtores and proviſions on board of certain ſhips to be provided by the plaintiffs for that purpoſe from Great Britain to ſuch parts in New South Wales as ſhould be required for the ſervice of his majeſty. It then ſtated the making of the policy, and the ſubſcription thereof by the defendant; and the intereſt of the plaintiffs in the ſubject-matter of the inſurance. On the 9th of February, 1791, the plaintiffs wrote a letter to the directors of the Eaſt-India Company, ſtating their contract with the navy board, and that it was agreed that the ſhips ſhould have leave to go to Bombay to load cotton for London; they therefore deſired the directors to grant them licences for the ſeveral ſhips therein named, amongſt which was the Albemarle; and the plaintiffs alſo requeſted permiſſion to ſend on board the Raymond deſtined for Bombay 30,000l. in ſpecie, for the purpoſe of purchaſing cargoes of cotton with which they propoſed to load their ſhips. On the 2d March, 1791, an indenture was made and executed between the plaintiffs, owners of the ſhip Albemarle, and the Eaſt-India Company, whereby the latter granted licence for the ſaid ſhip Albemarle to make one voyage to Botany Bay in New South Wales, *for the purpoſe of carrying convicts, government ſtores, and proviſions, and for no other purpoſe whatever*; and after the delivery of the ſame to proceed to Bombay, there to purchaſe and load cotton; and the (plaintiffs) owners covenanted *(inter alia)* that no other than the neceſſary ſtores and proviſions of the ſhip, and thoſe ſent by government, ſhould be carried in the ſaid ſhip to the Eaſt Indies or elſewhere beyond the Cape of Good Hope; and alſo that the owner, maſter, mariners, and perſons be-

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longing to the ſaid ſhip, or either of them, ſhould not directly or indirectly carry on or be concerned in any kind of trade or traffick whatſoever in the Eaſt Indies, or elſewhere within the limits of the company's charter. The ſpecial verdict then ſtated that before the ſailing of the ſaid ſhip the (plaintiffs) owners gave orders in writing to the maſter in two letters dated the 19th of March, 1791, to proceed with the ſhip, after the delivery of the convicts and government ſtores at Port Jackſon, to Goa in the Eaſt Indies, within the limits of the company's excluſive charter, *and there to diſpoſe of or ſend by other veſſels to* Bombay *for ſale copper and other articles of trade not authoriſed by the licence of the company, and to ſell the ſame at* Goa *or* Bombay *on behalf of the owners of the ſhip.* The ſhip was at London when the policy was effected, and departed from thence on the 26th of March, 1791, *with a cargo of goods belonging to the plaintiffs, the owners, conſiſting of copper and other articles not licenced by the company.* She afterwards arrived at Port Jackſon in New South Wales. After the departure of the ſhip from London, and while ſhe was proceeding on her voyage, the plaintiffs on the 5th of May, 1791, wrote to their correſpondent *John Taſker*, at Bombay, informing him that they had directed the ſhip Albemarle to proceed to Goa with a cargo, the proceeds of which could not be leſs than 16,000l., with inſtructions to the captain to ſell the cargo at Goa if the market ſhould be good; if not, and better prices could be obtained at Bombay, to ſend the ſame to Bombay by ſome country ſhips, provided that could be done with ſafety; and requeſted *Taſker* to ſend his inſtructions to the captain of the ſaid ſhip at Goa, who had orders to obey the ſame. It then ſtated that the ſhip Albemarle departed from Port Jackſon on her voyage for the Eaſt Indies, and while ſhe was proceeding on her ſaid voyage put into and ſtopped at the port of Goa in the Eaſt Indies, purſuant to the intention of the plaintiffs, and the orders given by them to the captain. The ſhip arrived at Goa on the 20th of May, 1792, and quitted it on the 27th of September following; and during that time *the captain ſold the unlicenced cargo according to orders.* She arrived at Bombay on the 7th of October, ſet ſail from thence on her voyage back to London on the 23d of December, 1792, in the courſe of which ſhe was captured by enemies unknown. The 33 *Geo.* 3. c. 52. is an act for continuing in the Eaſt-India Company for a further term the poſſeſſion of the Britiſh territories in India, together with their excluſive trade, under certain limitation, &c. Section 71. re-enacts the excluſive trade. Section 72. re-enacts all profits, benefits, privileges, powers, capacities, rights, remedies, methods of ſuit, penalties, forfeitures, diſabilities, proviſions, matters, and things, whatever, which the company had by virtue of any former charter or act of parliament, as

if the ſame were re-enacted in the body of that act, ſubject to the alterations, &c. contained therein. Section 146 repeals ſo much of the 9 & 10 *W.* 3. c. 44. as inflicts any penalty or forfeiture for illicit trading to the Eaſt Indies; the whole of the 5 *Geo.* 1. c. 21. and ſo much of any act or acts as continue the ſame; ſo much of the 7 *Geo.* 1. c. 21. as relates to the puniſhment or proſecution of perſons illegally trading or going to the Eaſt Indies; the whole of the 9 *Geo.* 1. c. 26.; ſo much of the 3 *Geo.* 2. c. 14. and of the 17 *Geo.* 2. c. 17. as creates any penalty with reference to the 7 *Geo.* 1. c. 21.; ſo much of the 10 *Geo.* 3. c. 47. as ſubjects illicit traders to or from the Eaſt Indies to penalties; ſo much of the 13 *Geo.* 3. c. 63. as provides for the delivery of advices to the ſecretary of ſtate, &c.; ſo much of the 21 *Geo.* 3. c. 65. as prohibits the lending of money to foreign companies, &c.; the 24 *Geo.* 3. ſt. 2. c. 25. except, &c.; the 26 *Geo.* 3. c. 16. except ſo much as repeals former acts; and ſo much of the 26 *Geo.* 3. c. 57. as makes offences againſt the law for ſecuring the excluſive trade of the company, &c. enforceable in the Eaſt Indies. Section 147 provides that the aforeſaid repeal ſhall not extend to any offence committed againſt any of the ſtatutes thereby wholly or in part repealed before the paſſing of the act, &c. but that all and every ſuch offences may be proſecuted, &c. as if the act had not been made. Section 150, "For obviating any doubts which might ariſe how far any of his majeſty's ſubjects might, notwithſtanding the aforeſaid repeal of the ſaid ſeveral acts or parts of acts, be entitled to recover any debts due to them in Great Britain or in parts beyond the ſeas, or otherwiſe to enforce the execution of any contracts or agreements, by reaſon of any pretext to be ſet up by any other perſon or perſons that ſuch debts were contracted, or that ſuch contracts or agreements were made contrary to the reſtrictions or prohibitions in the ſaid acts or ſome of them contained, enacts, that it ſhall not be competent or lawful for any defendant in any ſuit or action then depending or thereafter to be brought in any court either in Great Britain or in the Eaſt Indies to plead or ſet up any act or acts in the whole or in part repealed by that act in bar of any ſuch ſuit or action; but that the plaintiff ſhall have the ſame remedy and judgment, &c. as if the ſaid acts or parts of acts ſo repealed had never been made, any act or acts to the contrary notwithſtanding." IT WAS ADMITTED on the part of the plaintiffs, that the trading to Goa in the manner ſtated by the ſpecial verdict was illegal at that time, being in contravention of the excluſive privilege of the Eaſt-India Company, ſecured to them by various acts of parliament as well as by charter. But it was contended that as all theſe tranſactions happened before the paſſing of the 33 *Geo.* 3. c. 52. the illegality of them could not be taken advantage of

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in this action; for the 146th ſection repealed all penalties and forfeitures contained in the acts therein ſpecified againſt ſuch illicit trading, and therefore muſt be taken to have repealed the ſame in all other acts in *pari materiâ*, if any ſuch exiſted. PER CURIAM: The objection that was taken to the plaintiff's recovering in this action was, that the voyage was illegal; and this depends on the obſervations that were drawn from the ſeveral acts of parliament referred to. This takes its origin from the ſtat. 9 and 10 *W.* 3. c. 44., by which, in conſideration of a conſiderable ſum of money advanced by the Eaſt-India Company, the excluſive right of trading is given to them, which the public had a right to redeem on certain terms, namely, repaying the money advanced, and giving three years' notice (1). But thoſe terms have never been complied with: on the contrary, by ſeveral acts of parliament in the reigns of Queen *Anne*, *George* the Second, and in the preſent reign, the excluſive right of trading has been from time to time continued, and it never has for one moment been put an end to. Therefore all acts in trading that have been done contravening the proviſions of the firſt act of parliament are illegal, unleſs ſome ſtatute has relaxed the prohibitions of the ſtatute of *William* the Third, and given private perſons a right to carry on trade to the Eaſt Indies. The principal act relied on for that purpoſe is the ſtat. 33 *Geo.* 3. c. 52., which has brought together in one code almoſt all the ſtatutes reſpecting the Eaſt-India Company. The 146th ſection of that act repeals ſome acts of parliament in toto, and ſo much of ſome others as inflicts any penalty or forfeiture for trading to the Eaſt Indies. In particular it repeals, not the whole of the ſtat. 9 & 10 *W.* 3., but only ſo much of it as inflicts any penalty or forfeiture for trading, &c.; it alſo repeals ſo much of the ſtat. 21 *Geo.* 3. c. 65. as prohibits any of the ſervants of the company, &c. from lending money to any foreign company, &c., or as makes proviſion by penalty or forfeiture *or otherwiſe* for ſecuring the ſole and excluſive trade of the company to the Eaſt Indies. Then for obviating any doubts that might ariſe from the ſaid repeal of the ſaid ſeveral acts or parts of acts, it is enacted by ſect. 150. that "it ſhall not be lawful for any defendant to plead or ſet up any act or acts in the whole or in part repealed by that act in bar of any ſuit or action, &c. but that the plaintiff ſhall have the ſame remedy to recover and be entitled to the like judgment, &c. as if the ſaid acts or parts of acts ſo repealed had never been made." Now the queſtion ariſes on the wording of this clauſe, whether the defendant is prohibited ſetting up as a bar any part of an

(1) Vid. Sect. 79.

act of parliament of which only other parts are repealed by this clauſe. It was properly inſiſted on at the bar, that the legiſlature only meant, that where the whole act is repealed no part of it ſhould be pleaded or ſet up, and that where only a part of an act was repealed, ſuch part ſhould not be ſet up. The ground on which this opinion proceeds in this caſe is, that the ſtatute firſt mentioned, namely, the 9 & 10 *W.* 3. c. 44. has from the time when it paſſed down to the preſent moment been an exiſting law, operating on the rights of the parties. And though ſubſequent acts of parliament have continued the prohibitions enacted by that ſtatute, and though ſome of thoſe acts of parliament have been totally repealed, and others repealed in part, the legiſlature appear to have anxiouſly expreſſed their intention in the 33 *Geo.* 3. c. 52. that only that part of the ſtat. 9 & 10 *W.* 3. which is particularly pointed out ſhould be repealed. If they had intended to repeal the whole of that act of parliament, and that the prohibitions contained in it ſhould be entirely put an end to, it might have been effected by fewer words than are uſed to repeal that part of the act. And on conſidering the whole of this laſt act of parliament, it appears to us that the conſtruction inſiſted on by the defendant is the fair one, namely, that the legiſlature meant to repeal the prohibition to lend money to foreign companies, &c. but by no means had it in contemplation either to abridge the monopoly, or to take away any of the conſequences of the monopoly given to the Eaſt-India Company. The words in the different acts of parliament ſhew that the ſtatute of William the Third was always conſidered as being in force; they ſpeak of *continuing* the prohibitions. Then if this be the fair conſtruction of the ſtatutes, the conſequence ſeems inevitable. If the ſtatute of *William* has never been put an end to, then the policy in queſtion was effected in contravention of that act of parliament, as breaking in upon the monopoly granted to the Eaſt-India Company; and therefore it is void. On the whole we are of opinion that judgment muſt be entered for the defendant.—Judgment for the defendant.

Camden *et al. v.* Anderſon, in Error, in the Exch Cham. Ea Ter. 38 Geo. 3. C B. 1 *Pul. & Boſ.* 272.

A writ of error having been brought in this court, on the above judgment of the court of King's Bench, the caſe was twice argued; and after time taken to conſider, EYRE, Ch. J. delivered the opinion of the Court:—The caſe of the plaintiffs in this action is *primâ facie* plain and clear; for a conſideration in money, the defendant *Anderſon* has aſſured the plaintiff's ſhip the Albemarle againſt capture in the voyage deſcribed in the policy ſtated in the declaration. The ſhip was captured by the enemy in the courſe of that voyage, by which a loſs is incurred, which the defendant has undertaken to make good. The defence is founded upon a principle

principle of law, which is paramount to all obligation by which the parties to a contract can bind themſelves, and is powerful enough to control it, and to render it null and void in law. That which is unlawful in itſelf, and which is a public wrong, cannot be the ground of an action. The defendant inſiſts, that the voyage inſured was in an illicit and a clandeſtine trade; that, as ſuch, it was unlawful, and could not be the ſubject of an aſſurance. The principle has been admitted, in the courſe of the argument, at the bar; the application of it to the particular caſe only has been controverted. The plaintiffs in the action inſiſt, that the proviſions of the ſtatute of 33 *Geo.* 3. preclude the application of it to this caſe; admitting that which upon this ſpecial verdict it is impoſſible to deny, that this ſhip Albemarle was engaged in an illicit and clandeſtine trade. [Here his lordſhip proceeded upon the ſame grounds as the court of King's Bench, to ſhew that it was clear that the ſtatute of 33 *Geo.* 3. has left the excluſive trade of the Eaſt-India Company untouched.] His lordſhip afterwards obſerved, that theſe plaintiffs, if they ſhould be driven from this which has been conſidered as their ſtrong hold, might ſtill inſiſt that the excluſive trade of the company is no more than their private right, the infringement of which may perhaps give a right of action to the company, as for a civil injury over and above the ſeveral parliamentary proviſions which have been made for ſecuring it, but can have no further effect, and particularly cannot taint with illegality tranſactions and contracts which are collateral to it. As for inſtance, if a printer were to bring his action againſt his employer for printing a pirated copy of a work protected by the ſtatute of Queen Ann. The employer perhaps could not object by way of defence againſt this action, that the printing as an infringement of the private right of the author was unlawful, and the contract void in law. But this excluſive trade of the Eaſt-India Company is now ſo interwoven with the general intereſts of the ſtate, that it is no longer to be conſidered as the private right of a corporation, but is become a great national concern, and the infringement of it is a public miſchief and a public wrong, and as ſuch is prohibited by the common law. The principle, and the effect of that prohibition, as applied to the preſent caſe, may be collected from the caſe of a bond given to the ſheriff to indemnify him againſt the voluntary eſcape of his priſoner, which is pronounced to be void by the common law. That caſe is put in *Beawfage*'s caſe, 10 *Co.* 100. and is recognized in the books of the beſt authority in our law, *viz.* *Yelv.*, *Dyer*, *Hobart*, and *Plowden*. The references are in the margin of 10 *Co. fo.* 100 (1). If we con-

(1) *Yelv.* 197. *Dyer* 324. pl. 32, 33. *Hob.* 14. *Plowd.* 64. b. 67. b. 68. b.

ſider it in one ſingle point of view, as it regards the public revenue of the ſtate, it will be found to be no leſs the right of the public than of the Eaſt-India Company. That parliament has ſo conſidered it may be collected from the preambles of the ſtatutes made for the protection of this trade. If we find an action brought upon a contract for a few bags of tea, or a few tubs of foreign ſpirits bought or ſold in the courſe of a contraband trade, we ſay without heſitation, this is a contract againſt law, and no action can be maintained upon it, and if the action were founded upon a policy of aſſurance upon a ſhip, or goods, employed or carried in the courſe of that contraband trade, we ſhould not heſitate to ſay, that no action lies upon ſuch a policy; and ſurely it muſt be a reproach to law and juſtice if we were now to countenance an action upon this policy, the object of which is, to aſſure to theſe plaintiffs the ſafety of a ſhip engaged in a trade ſo illicit and clandeſtine as this trade has been declared by parliament to be, under ſuch aggravated circumſtances of fraud and colluſion, in the manner of carrying it on, as are deſcribed in this ſpecial verdict, and which it might have been reaſonably ſuppoſed no man who had a regard for his reputation as a merchant, or had any ſenſe of truth and private honour, would have ſuffered to have ſtood againſt him upon the public records of one of the king's ſupreme courts of juſtice. Let this judgment be affirmed.—Judgment affirmed.

Wilſon *v.* Marryat, Mic. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 31.

If there be any illegality in the commencement of an integral voyage, and an inſurance be effected on the latter part of the voyage, which taken by itſelf would be legal, ſtill the aſſured cannot recover on the policy.—The plaintiff declared on a policy of inſurance made the 29th of February 1796, and averred to be for the uſe and benefit of *John Collet*, upon the American ſhip Argonaut and cargo, "*at and from Bourdeaux to Madeira and the Eaſt Indies and back to America, with liberty to touch, ſtay, and trade, at all ports and places whereſoever on her outward and homeward bound voyage.*" The declaration then ſtated that the ſhip ſailed from Bourdeaux, and that in the courſe of the voyage inſured ſhe was ſeized, and detained by certain officers of the king, by means whereof ſhe became loſt to the ſaid *John Collet*. On the trial the jury found a ſpecial verdict, and ſtated that the ſhip Argonaut on the 12th of June, 1795, was purchaſed at Philadelphia in the United States of America by *John Collet* and *A. Butler*, who to the time of the loſs hereinafter ſtated continued owners thereof in equal moieties. *Collet* on the 25th of July, 1795, ſailed in the ſhip as maſter thereof from Philadelphia with a cargo of corn and flour for France, *with a view of proceeding from thence with the ſhip after the diſpoſal of her cargo to Madeira and the Eaſt Indies, and from thence back to the United States.* Before the ſhip's departure from

from Philadelphia *Butler* wrote to *Collet* this letter—"Having given you a power of attorney for the complete management of my half of the ſhip Argonaut, her preſent cargo, and any others you may chooſe to put on board her, agreeable to your own judgment and will, the following obſervations are offered ſolely to aſſiſt your reflections, and lead you to procure that information which muſt be neceſſary to form a ſound judgment how to act. For the employment of the Argonaut, three plans occur as probable to be accompliſhed, *viz.* Firſt plan; after your arrival in France to get a freight to the Iſle of France, and go from thence to Bombay, and get a freight of cotton to Canton; from Canton to take a freight back to the coaſt of Coromandel or Malabar, and in ſhort to keep the ſhip employed in the country commerce until ſhe has gained ſufficient to make a complete inveſtment in China for this country. Second plan; to go from France to London and there obtain a freight for any of the Company's ſettlements in the Eaſt Indies, and from ſuch ſettlement purſue the ſame plan of operations by country freight, or take a freight direct from Bengal for this country, or for Hamburgh, or other neutral ports. Third plan; to obtain a credit in London and go out to Bombay or Bengal with a complete inveſtment on our own accounts, to obtain a freight to China, and with that and the proceeds of the Engliſh inveſtment to load at Canton for this country, or with the proceeds of the Engliſh inveſtment to load at Bengal for this country directly back, or for France." On the 1ſt of May, 1796, *Collet* arrived with the ſhip at Breſt in France, and there ſold the flour which had been laden on board her in America, and afterwards proceeded to Bourdeaux in France, where he ſold the remainder of the cargo; and certain other goods, being the ſame mentioned in the 3d count and American property, belonging to *Collet* (the United States of America not being then at war with any of the belligerent powers), were there purchaſed and loaded on account of *Collet* on board the ſhip, which, with the cargo, on the ſaid 1ſt of May, 1796, was in ſafety at Bourdeaux. The ſhip from the time of her firſt ſailing from America to the time of the loſs continued American. Whilſt the ſhip remained at Bourdeaux *Collet* came from thence to London, and having procured a credit with *Wilſon* (the plaintiff), the latter under the direction of *Collet*, and during his ſtay in London, purchaſed upon commiſſion within this kingdom with the monies, or upon the credit of him *(Wilſon)*, goods of Britiſh growth and manufacture on account of *Collet* and *Butler*, the ſame being the goods in the 5th count mentioned, and being the property of *Collet* and *Butler*; and *Wilſon*, under the like direction of *Collet*, and during his ſtay in London, cauſed the ſaid goods to be ſhipped at London on the

the joint account and riſk of *Collet* and *Butler* on board three other American ſhips, in which they were conveyed from London to Madeira in the ſaid policies in the 1ſt and 5th counts mentioned, for the purpoſe of being reſhipped at Madeira into the ſhip Argonaut, and of being carried therein together with the goods ſo ſhipped on board her at Bourdeaux from Madeira to the Britiſh territories in the Eaſt Indies, and of being imported into thoſe territories, and traded with there; and the value of the ſaid laſtmentioned goods ſtill remains due from *Butler* and *Collet* to the plaintiff. The ſhip Argonaut on the 1ſt of May, 1796, ſailed from Bourdeaux with the goods ſo loaded on board her there to Madeira, in order to take on board her the goods ſo ſhipped from London, and having arrived at Madeira took on board there as well thoſe goods as certain Portugueſe wines *for the purpoſe of proceeding with her whole cargo to the Britiſh territories in the Eaſt Indies*, and of landing and trading with the ſame there; the ſaid goods, &c. not being ſuch the importation whereof into the ſaid territories was or is entirely prohibited; and neither *Collet* or the ſaid ſhip having been licenſed by the Eaſt-India Company to ſail or trade there. The Argonaut with her cargo having afterwards ſailed from Madeira in the proſecution of her ſaid voyage to the Eaſt Indies, in the courſe of ſuch voyage, to wit, on the 2d of Auguſt, 1796, at Symon's Bay near the Cape of Good Hope, was with her cargo ſeized and detained by Sir *G. K. Elphinſtone*, commander of a ſquadron of the king's ſhips of war, upon ſuſpicion of being an illicit trader; by means whereof not only *Collet*'s moiety of the ſhip and goods in the 3d count mentioned were loſt to him to the amount of the ſum inſured by him reſpectively thereon, but alſo the goods in the 5th count mentioned were loſt to *Collet* and *Butler*, who were intereſted therein to the amount within alleged. From the time of the ſhip's departure from Bourdeaux until and at the time of the ſeizure of the ſame *Collet* was maſter thereof; and two Britiſh boys, whom *Collet* carried with him from London at the ſolicitation of their friends, were employed on board the ſhip during the voyage. *Butler* was a natural-born ſubject of this kingdom, but was reſident and domiciled in the ſtate of Penſylvania in America before and at the time of the declaration of the independence of the United States, and has ever ſince continued to be reſident and domiciled there; and upon ſuch declaration of independence became, and from thence hitherto hath been and ſtill is, a citizen of the ſaid United States. *Collet* was alſo a natural-born ſubject of Great Britain, and long before and until July, 1784 (being after the ratification of ſuch independence), was a ſeaman engaged in the navigation of Britiſh merchant ſhips. In July, 1784, he went with his wife and children to ſettle and permanently reſide

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in the United States of America, and then became and was received as a citizen of the ſame ſtates: he has ever ſince been domiciled there, and has been from time to time employed in the command and navigation of ſhips belonging to himſelf and other perſons citizens of the United States. On the 16th of February, 1793, the proclamation (uſually made at the beginning of every war) was made here by the king by the advice of his privy-council, forbidding all mariners and ſeafaring men, natural-born ſubjects of this country, entering or continuing in the ſervice of foreign princes and ſtates, or ſerving in any foreign ſhip or veſſel, without the king's ſpecial licenſe. *Collet* had not obtained any ſpecial licenſe from his majeſty in that behalf. On the 19th of November, 1794, a treaty of amity, commerce, and navigation, was ſigned at London on the part of Great Britain and the United States of America, which, with an additional article thereto ſubjoined, was ratified and confirmed on the part of the United States at Philadelphia on the 14th of Auguſt, 1795, and by his majeſty at St. James's on the 28th of October in that year; being the ſame treaty mentioned and referred to in the act of the 37 *Geo.* 3. c. 97, &c. That treaty (amongſt other things) contained an article ſet out below (1). The plaintiff at the times when he cauſed the

(1) "His majeſty conſents that the veſſels belonging to the citizens of the United States of America ſhall be admitted and hoſpitably received in all the ſea-ports and harbours of the Britiſh territories in the Eaſt Indies. And that the citizens of the ſaid United States may freely carry on a trade between the ſaid territories and the ſaid United States in all articles of which the importation or exportation reſpectively to or from the ſaid territories ſhall not be entirely prohibited; provided only that it ſhall not be lawful for them in any time of war between the Britiſh government and any other power or ſtates whatſoever to export from the ſaid territories, without the ſpecial permiſſion of the Britiſh government there, any military ſtores, or naval ſtores, or rice. The citizens of the United States ſhall pay for their veſſels, when admitted into the ſaid ports, no other or higher tonnage duty than ſhall be payable on Britiſh veſſels when admitted into the ports of the United States; and they ſhall pay no other or higher duties or charges on the importation or exportation of the cargoes of the ſaid veſſels than ſhall be payable on the ſame articles when imported or exported in Britiſh veſſels. But it is expreſsly agreed that the veſſels of the United States ſhall not carry any of the articles exported by them from the ſaid Britiſh territories to any port or place except to ſome port or place in America, where the ſame ſhall be unladen; and ſuch regulations ſhall be adopted by both parties as ſhall from time to time be found neceſſary to enforce the due and faithful obſervance of this ſtipulation. It is alſo underſtood that the permiſſion granted by this article is not to extend to allow the veſſels of the United States to carry on any part of the coaſting trade of the ſaid Britiſh territories; but veſſels going with their original cargoes or part thereof from one port of diſcharge to another are not to be conſidered as carrying on the coaſting trade. Neither is this article to be conſtrued to

the ſaid goods to be ſhipped at London, and alſo when he cauſed the policies of aſſurance to be effected was a natural-born ſubject of the king, reſident in London, and knew that the ſhip called the Argonaut was deſtined for the Britiſh territories in the Eaſt Indies, and that the ſaid goods were intended to be carried on board her directly from the reſpective places at which the ſame were ſo ſhipped and intended to be ſhipped as aforeſaid to thoſe territories, and intended to be landed and imported there for the purpoſe of trade therein. —Lord KENYON, Ch. J. delivered the opinion of the Court. The queſtion is, Whether, as the ſhip and goods inſured have been totally loſt to the aſſured, the party againſt whom this action is brought be or be not liable to pay that loſs on his contract of indemnity? In diſcuſſing that queſtion other points of great magnitude were raiſed. On the part of the defendant it was ſaid that this was a caſe of vaſt importance, becauſe it was an attempt by the plaintiff to invade the monopoly of the Eaſt-India Company, and to ſupplant them in their trade, and that this affected the public as well as individuals, becauſe the Eaſt-India Company is ſo nearly connected with the political ſtate of the country, and becauſe our poſſeſſions in the Eaſt Indies contribute ſo largely to the revenues of this country. On the other hand it is a caſe of great importance, inaſmuch as it involves in it the fair expoſition of the treaty between this country and America. And in the courſe of the argument we were (a little irregularly) threatened on both ſides, by the one party not to touch the concerns of the Eaſt-India Company, by the other not to irritate our allies in America. With regard to the Eaſt-India Company, they will always find their intereſts ſecured by the laws of this country as adminiſtered in our courts of juſtice. And I hope that there is no jealouſy, or even ground of jealouſy, on the part of the Americans, but that they know that when their rights come to be diſcuſſed here, the greateſt attention will be paid to their intereſts.

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to allow the citizens of the ſaid ſtates to ſettle or reſide within the ſaid territories, or to go into the interior parts thereof without the permiſſion of the Britiſh government eſtabliſhed there. And if any tranſgreſſion ſhould be attempted againſt the regulations of the Britiſh government in this reſpect, the obſervance of the ſame ſhall and may be enforced againſt the citizens of America in the ſame manner as againſt Britiſh ſubjects or others tranſgreſſing the ſame rule. And the citizens of the United States, whenever they arrive in any port or harbour in the ſaid territories, or if they ſhould be permitted in manner aforeſaid to go to any other place therein, ſhall always be ſubject to the laws, government, and juriſdiction of whatever nature eſtabliſhed in ſuch harbour, port, or place, according as the ſame may be. The citizens of the United States may alſo touch for refreſhment at the iſland of St. Helena, but ſubject in all reſpects to ſuch regulations as the Britiſh government may from time to time eſtabliſh there."

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They have long been acquainted with the habits of this country, and with the mode of adminiſtering juſtice here: until within theſe few years their cauſes uſed to come over here to be diſcuſſed, and I never heard that the deciſions in our courts ever awakened the leaſt jealouſy in the breaſts of the inhabitants of that country. The great queſtion in the cauſe is, Whether or not, the loſs having happened, any circumſtances be diſcloſed in the verdict on which the defendant can reſiſt the plaintiff's claim? Three objections have been raiſed on the part of the defendant. I will diſpoſe of that firſt, which was the laſt in the argument, namely, that *Collet*, the captain of the ſhip and part-owner, was an Engliſhman by birth, and was not therefore a citizen of America within the meaning of the treaty between this country and America. On a former day we intimated our opinion that there was not much weight in this objection, and after conſideration we are clearly of opinion that there is none. *Collet* is a citizen of this country by birth, ſo that he cannot throw off his allegiance to this country: but he is alſo a citizen of America for the purpoſes of commerce, it being found by the ſpecial verdict that he has been adopted as a citizen of that country. And the circumſtance of his being a natural-born ſubject here cannot deprive him of the advantages of being a citizen of that country. The next objection ariſes on the conſtruction of the 13th article of the treaty between this country and America, which has been confirmed by act of parliament. It was contended that the intercourſe muſt be *immediate and direct* between America and the Eaſt Indies, on the true meaning of that article: but on the fulleſt conſideration that we can give, comparing this with the other articles of the treaty, we are alſo of opinion that this objection is unfounded. That the party inſured might have come from America to other countries in Europe, and bought goods and carried them back to America, and from thence to the Eaſt Indies, ſeemed to be admitted. Then, in point of reaſon, why may not that which may be done indirectly be done directly? and on the fair conſtruction of the words of this article we think that this objection cannot prevail. The remaining objection is that the voyage inſured was a part of a voyage, the whole of which (ſuppoſing it to be one integral voyage) was not legal in its inception, and that if there be any infirmity in any part of an integral voyage, the whole for this purpoſe becomes illegal. But this argument is too refined as applied to this caſe. Before the commencement of this voyage there was a rumour that a treaty between the two countries was in agitation, and this perſon came to England probably with a view of carrying on the voyage to the Eaſt Indies under the treaty. However, in deciding this

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caſe we muſt look to the facts diſcloſed in the ſpecial verdict. Now it is not there ſtated that the continuation of the voyage to the *Britiſh ſettlements in the Eaſt Indies* was the voyage that was at all hazards to be performed when the voyage began in America. For though different plans had been ſuggeſted by *Butler* in his letter for the continuation of the voyage, it is only found by the ſpecial verdict that *Collet*, when he ſailed from America intended to go to the Eaſt Indies, without ſaying to that part that belongs to Great Britain. As far as reſpected the Americans, every other part was *mare liberum*; and though before the treaty the party aſſured could not have gone to any of our ports in the Eaſt Indies without being guilty of an infraction of our laws, he might have gone to any other port in the Eaſt Indies. Every thing therefore in the verdict relating to theſe different plans, though a fair ſubject of inveſtigation and diſcuſſion, may now be laid out of our conſideration; it not being found in any part of the ſpecial verdict what preciſe voyage the parties had in contemplation at the inception of the voyage in America. Then, if the voyage inſured be not infected by what was done in America, it was a legal voyage. The ſhip originally ſailed from Philadelphia to Breſt and then to Bourdeaux, which ſhe might legally do; and before ſhe left the latter place the treaty between this country and America was ratified; it then appears that in May 1796 ſhe ſailed to Madeira, where ſhe took in other goods, "for the purpoſe of proceeding with the whole cargo to the Britiſh territories in the Eaſt Indies," which then ſhe might well do under the treaty that had before that time been ratified. Then it does not appear that *Collet* had any intention of going to any of our ſettlements in the Eaſt Indies until after the ratification of the treaty. And though I admit that, if there had been any infirmity in any part of the integral voyage, it would have made the whole illegal, ſo that the aſſured could not recover upon a policy on any part of it, yet it not appearing that in fact there was any illegality in any part of this voyage, we are of opinion that this objection alſo fails. On the whole therefore we are of opinion that the plaintiff is entitled to the judgment of the Court.

Ciſt v. Maſon *et al.* Hil. Ter. 26 Geo. 3. B.R. 1 Ter. Rep. 84.

Where a policy does not appear on the face of it to be illegal, the Court will not grant a new trial in order to let the defendant into proof that it was ſo; but he ſhould have ſhewn it on the trial.—This was a caſe for money had and received, to recover the *premiums* upon certain policies of inſurance underwritten by the plaintiff. The defendants were Weſt-India merchants, and had property in the iſlands captured by the French laſt war. It was a common practice to ſupply theſe iſlands with proviſions from Ireland, notwithſtanding

ſtanding they were in the hands of an enemy; and the defendants, who acted as their own brokers, had for this purpoſe employed neutral veſſels, and had cauſed them to be under-written by the plaintiff from different ports in the continent to Ireland, thence to Madeira, and St. Thomas; and to all of them was annexed *the liberty of going to any one of the captured iſlands*. It had been long doubted whether theſe policies were legal: but in the caſe of the Bella Juditha (1), whereon a ſimilar policy was effected, the Court were of opinion that the aſſured could not recover. The plaintiff in conſequence of the above deciſion had refuſed to pay where there had been a loſs. The defendant's counſel at the trial contended, that as *theſe* voyages were illegal, and as both the parties were *in pari delicto*, the maxim of law *melior eſt conditio poſſidentis* ought to prevail: BUT LORD MANSFIELD, Ch. J. being of opinion that theſe policies were not illegal on the face of them, directed a verdict for the plaintiff. It was now moved for a new trial to let the defendants into evidence to prove that this kind of trading was ſo notoriouſly illegal that the plaintiff muſt have known it to be ſo; that the reaſon why this evidence was not offered at the trial was founded on a preſumption that the jury of their own knowledge muſt have concluded that the illegality of theſe contracts was known to the parties at the time of making them,—Lord MANSFIELD, Ch. J. This, upon the face of it, is the caſe of a neutral veſſel. It is no where laid down that policies on neutral property, though bound to an enemy's port, are void. And indeed I know no caſes that prohibit even a ſubject trading with the enemy, except two; one of which is a ſhort note in 2 *Roll. Abr.* 173, where trading with Scotland, then in a general ſtate of enmity with this kingdom, was held to be illegal; and the other was a note (which is now burned) which was given to me by Lord *Hardwicke*, of a reference in King *William*'s time to all the judges, whether it were a crime at the common law to carry corn to the enemy in time of war; who were of opinion that it was a miſdemeanor. By the maritime law, trading with an enemy is cauſe of confiſcation in a ſubject, provided he is taken in the act; but this does not extend to a neutral veſſel.—ASHHURST, J. The defendant makes this application to the Court in order to ſupply his own negligence, when it is evident he was not taken by ſurpriſe at the trial. If it do not appear on the face of the policy that it is void, it ought to have been ſhewn by evidence: but no ſuch evidence was offered.—BULLER, J. As to the illegality of

(1) *Dalmady* v. *Motteux*, Mich. 25 *Geo.* 3. N.B. In that caſe the Court decided principally upon the ground of an embargo having been laid on proviſions in Ireland.

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the contract being within the knowledge of both parties, ſuch a fact is not to be taken for granted; what paſſes between two parties can never be ſuch a matter of notoriety as ſhould be left to a jury to preſume.—Rule refuſed.

Camden *et al.* *v.* Anderſon, Tr. Ter. 34 Geo. 3. B.R. 5 *Tr. Rep.* 709.

Two partners purchaſed a ſhip, under a bill of ſale, conformable to the ſtat. 26 *Geo.* 3. c. 60; afterwards they took in two other partners, but there was no transfer of the ſhip to them jointly with the others; held that the four partners had not any inſurable intereſt in the freight of the ſhip. The right to freight reſults from the right of ownerſhip; and theſe four partners had neither a legal or an equitable title to the ſhip.—This was an action upon a policy of inſurance on freight valued at 5000l. There were three plaintiffs on the record, *Camden*, *Calvert*, and *King*, in whoſe names the policy was effected; and the declaration conſiſted of two counts; the firſt of which averred the intereſt to be in the plaintiffs; and the ſecond averred it to be in the plaintiffs and one *T. Curtis*. It was proved on the part of the plaintiffs that the ſhip in queſtion, the freight of which was the ſubject of the inſurance, had been paid for by the four perſons named in the laſt count, who were in partnerſhip. In anſwer to which the defendants produced a regiſter made in 1786 in purſuance of the 26 *Geo.* 3. c. 60. wherein the ſhip was regiſtered in the names of *Camden* and *Calvert* only, and it was inſiſted that as the plaintiff's title to freight aroſe only from their ownerſhip, the regiſter was deciſive evidence that no other perſons than thoſe two were intereſted in the property. And as no count in the declaration ſtated the intereſt to be in the two only, the plaintiffs took a verdict, with liberty to the defendant to move to enter a nonſuit; and a rule having been obtained for that purpoſe, and cauſe ſhewn—Lord KENYON, Ch. J. On the preſent queſtion I cannot entertain any doubt; for the right to freight reſults from the right of ownerſhip; and if the plaintiffs have no title to the ſhip they have no intereſt in the freight. At the trial I compared this to the caſe of an action for uſe and occupation: if one perſon permit another to enjoy his eſtate, it is not competent to the latter to diſpute the title of the former: but if the former bring an action, which depends on his own title, he cannot ſucceed unleſs he ſhew a title. So if theſe plaintiffs had let out the ſhip to other perſons, perhaps thoſe perſons would not have been ſuffered to conteſt the plaintiffs' title: but here the plaintiffs claim the freight only in right of ownerſhip, and cannot recover without ſhewing a right of ownerſhip; they had no right to inſure the freight, unleſs they ſhew a right to the ſhip. It is not pretended that they had any legal title to the ſhip; and according to the Lord Chanc llor's deciſion in *Hibbert* v. *Rolleſton* they have no equitable title. His lordſhip

ſhip thought that the regiſter act was equally binding in a court of equity as in a court of law, and refuſed to compel the vendor to make a legal conveyance to the purchaſer. And indeed if an equitable intereſt in ſhips could prevail in contradiſtinction to a legal intereſt, it would repeal the wiſe proviſions of that act, which has already proved highly beneficial to the trading and commercial intereſts of this country. The words in Lord *Hawkeſbury*'s act reſpecting the transfer of ſhips are, that every bill of ſale, in which the certificate of the regiſtry of the ſhip is not truly recited, "ſhall be utterly null and void to all intents and purpoſes." It is admitted that the plaintiffs have not complied with the requiſitions of this ſtatute, and therefore the transfer to them is null and void to all purpoſes. And as this is an action for freight, which can only be maintained in conſequence of ownerſhip, the plaintiffs are not entitled to recover, becauſe it appears that they have no title to the ſhip.

Where a mate of a ſhip or a ſailor is to receive ſomething at the end of the voyage in lieu of wages, ſuch as ſlaves; he cannot inſure it: nor can he recover the value of ſuch thing in an action againſt his agent for negligence in not procuring ſuch an inſurance.—The plaintiff, having been hired to go as a mate in a ſhip from the coaſt of Africa to the Havannah, for which he was to receive wages at the rate of 5l. *per* month, *and three privilege ſlaves free of expence on the ſhip's arriving at the port of ſale*, directed the defendant, who was his agent at Liverpool, to get an inſurance on his privilege; and for the defendant's neglect the plaintiff brought this action on the caſe againſt him. A verdict being taken for the plaintiff.—THE COURT were clearly of opinion that the ſlaves were not the ſubject of inſurance, and that the plaintiff could not recover in this action more than he could have recovered in an action againſt the under-writers. Webſter *v.* De Taſtet, Hil. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 157.

In an action on a policy on a foreign ſhip, when there is a ſtipulation that the policy ſhall be ſufficient proof of intereſt, if there is judgment by default, the plaintiff on the writ of inquiry needs only to prove the defendant's ſubſcription to the policy, without giving any evidence of intereſt.—On a rule to ſhew cauſe why the inquiſition on a writ of enquiry, in an action on a policy of inſurance on goods on board three French veſſels from Saint Domingo to Bourdeaux ſhould not be ſet aſide. It was urged on the part of the defendant, that it was incumbent on the plaintiff to give evidence of intereſt.—THE COURT ſaid, that this was not a policy within the ſtatute, *foreign ſhips not having been included in the act on account of the difficulty* of bringing witneſſes from abroad to prove the intereſt. By ſuffering judgment, the defendant had confeſſed the plaintiff's *title* to recover, and the *amount* was fixed by the ſtipulation in the Thelluſon *v.* Fletcher, Hil. Ter. 20 Geo. 3. B.R. 1 *Doug.* 314, 315.

policy.—And BULLER, J. obſerved, that writs of inquiry are often ſued out in caſes where they are not neceſſary, as for inſtance, in actions on covenants for the payment of a ſum certain; and, for this, he cited a caſe in 2 *Saunders* (1). He ſaid it does not follow, becauſe a writ of enquiry has been awarded, that the amount of the demand is uncertain. In actions upon a bill of exchange, or a promiſſory note, nothing but the inſtrument is to be proved before the jury, the ſum being thereby aſcertained. Though, even in caſes where there is no neceſſity for a writ of inquiry, that proceeding is of uſe, when the plaintiff goes for intereſt, which the jury aſſeſſes in the name of damages—Rule diſcharged.

Loſſes.

Senat *v.* Porter, Hil. Ter. 37 Geo. 3. B R. 7 *Ter. Rep.* 158.

THE plaintiff's agent ſhewed to the defendant, an underwriter, the captain's proteſt containing an account of the loſs of the ſhip inſured, demanding payment: held that this did not entitle the defendant to read the proteſt in evidence in an action on the policy.—On the trial of this action on a policy of inſurance a queſtion aroſe reſpecting the admiſſibility in evidence of the captain's proteſt. The facts were theſe: When *Vaux*, the broker, applied to the defendant informing him of the loſs and demanding payment, he produced the different papers relating to the ſubject, and among the reſt the proteſt ſigned by the captain; the defendant told him he had looked into the papers, but that "*there was a* "*point in the caſe*," and he refuſed payment. On the part of the defendant it was contended that the proteſt was made evidence in this caſe by the plaintiff as a paper delivered by his agent to the defendant, containing an account of the loſs on which he reſted his claim; and therefore that it amounted to a declaration made by the plaintiff to the defendant of the facts on which he required payment. Lord *Kenyon* was of opinion that the proteſt was not admiſſible in evidence, and the plaintiff obtained a verdict.—AND THE COURT were of the ſame opinion afterwards on a motion for a new trial. —PER CURIAM: The proteſt does not become evidence on account of its having been voluntarily ſhewn any more than it would if the plaintiff had been compelled by a judge's ſummons to ſhew it to the defendant. The voluntarily ſhewing it does not amount to an admiſſion of the facts contained in the paper.

Berens *v.* Rucker, Tr. Ter. 1 Geo. 3. B.R. 1 *Black.* 313.

By capture.]—Inſurers are liable to pay the charge of a compromiſe *bonâ fide* made to prevent the ſhip from being condemned as lawful prize, or to avoid a greater expence.—Action on a policy of inſurance dated 21ſt July, 1758, on a Dutch ſhip, called the *Tyd*, and its cargo, at and from St.

(1) *Hilditch* v. *Otway*, T. 21 *Car.* 2. 2 *Saund.* 106.

Euſtatius,

Eustatius, to Amsterdam; —— warranted a Dutch ship, and the goods Dutch property, and not laden in any French port in the West-Indies. The cargo was worth 12,000l. and was insured at fifteen guineas *per cent.*; for, though the common premium before the French war was but three guineas *per cent.* yet it was thus advanced, by the number of captures which the English had made of neutral vessels, on suspicion of illicit trade, and the detention of those vessels, by the proceedings in the courts of admiralty. The defendant under-wrote 82l. of the plaintiff's, for a premium of 12l. 18s. 3½d. In May, 1758, the ship was at St. Eustatius taking in her cargo, which consisted of sugar and indigo, and other French commodities, which were put on board her, partly out of barks from sea, partly from the shore of the island. The 18th of June, 1758, she sailed on her voyage: 27th of June was taken by an English privateer: 28th June was carried into Portsmouth. On the 1st of August, the sailors were examined upon the standing interrogatories prescribed by stat. 29 *Geo.* 2. c. 34. and the captain entered his claim in the admiralty court. In October, 1758, the claimants were cited to specify, what part of the goods were taken from the shore of St. Eustatius, and what from the barks.—Citation continued from court to court, till February, 1759. The 24th of February, 1759, interlocutory decree was pronounced for the contumacy of the claimants, in not specifying what parts of the cargo were so taken, and that therefore the goods should be presumed French property. Appeal to lords commissioners of prizes. Many causes stood before it. The market was very high. The cargo in part was perishable. *Wherefore the agent of the owners agreed with the captors, to give them* 800l. *and costs, to obtain a reversal of the sentence. The reversal was had by consent; and in order to give costs to the captors, it was decreed by consent, that there was a sufficient cause for seizure; and thereupon costs were decreed to the captors; and restitution of the cargo to the owners was also ordered.* The ship, when restored, proceeded to Amsterdam, and arrived there the 11th of August, and the chamber of insurances in that city settled the average of the plaintiff, towards the loss and the expences, at 14l. 3s. 8d. occasioned by the capture, detention, and litigation. And for this sum the action was brought. Lord MANSFIELD, Ch. J. The first question is, Whether this was a just capture? Both sentences are out of the case, being done and undone by consent. The capture was certainly unjust. The pretence was, that part of this cargo was put on board off St. Eustatius, out of barks, supposed to come from the French islands, and not loaded immediately from the shore. This is now a settled point by the lords of appeal, to be the same thing, as if they had been landed on the Dutch shore, and then put on board

afterwards; in which caſe there is no colour for ſeizure. The rule is, that if a neutral ſhip trades to a French colony, with all the privileges of a French ſhip, and is thus adopted and naturalized, it muſt be looked upon as a French ſhip, and is liable to be taken. Not ſo, if ſhe has only French produce on board, without taking it in at a French port: for it may be purchaſed of neutrals. Second queſtion, Whether the owners have acted *bonâ fide* and uprightly, as men acting for themſelves, and upon a reaſonable footing; ſo as to make the expences of this compromiſe a loſs to be borne by the inſurers? The judge of the admiralty's order to ſpecify was illegal; contrary to the marine law and the act of parliament, which is only declaratory of the marine law. Becauſe, if they had ſpecified, it could be of no conſequence, according to the rule I before mentioned. Yet the captors were however in poſſeſſion of a ſentence, though an unjuſt one. And a court of appeal cannot, or ſeldom does, upon a reverſal give coſts or damages, which have accrued ſubſequent to the original ſentence: for thoſe damages ariſe from the fault of the judge, not of the parties. Under all theſe circumſtances, therefore, the owners did wiſely to offer a compromiſe. The cargo was worth 12000l. The appeal was hazardous, the delay certain. *Van de Poll*, the Dutch deputy in England, ne otiated the compromiſe. The chamber of commerce at Amſterdam ratified and thought it reaſonable. Had the whole ſentence been totally reverſed, the coſts muſt have ſat heavy on the owners. I therefore think the inſurers liable to anſwer this average loſs, which was ſubmitted to, to avoid a total one.—Verdict for plaintiff.

Neſbitt and another *v.* Luſhington, Tr. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 783.

By detention.] If an armed force board a ſhip, and take part of the cargo, the under-writers are not liable on a count, ſtating the loſs to be by a ſeizure by people to the plaintiffs unknown; for "people" in the policy means the governing power of the country.—This was an action on a policy of inſurance on wheat and coals on board the *Induſtry*, Captain *Caſſidy*, from Youghall to Sligo, for 100l. The firſt count in the declaration, after ſetting forth the policy, &c. &c. ſtated that when the ſhip was proceeding on her voyage, ſhe was by tempeſtuous weather, and the force and violence of the winds and waves, neceſſarily obliged, for the preſervation of the ſhip and cargo, to ſail and proceed to Elly Harbour, in Ireland, where ſhe was, with force and in a violent and unlawful manner, attacked and boarded, and arreſted, diſtrained, and detained by people to the plaintiffs unknown; by reaſon whereof the wheat and coals became and were wholly loſt to the plaintiffs; with an averment that the plaintiffs ſued, laboured, &c. about the defence and ſafeguard, and recovery of the ſaid goods, and neceſſarily expended, &c. In the ſecond count

count the loſs was ſtated thus; that the ſhip having her cargo on board, was, in Elly Harbour, "with force and in a violent and piratical manner, attacked and boarded, ſeized and taken, by certain pirates to the plaintiffs unknown; by reaſon whereof the ſaid goods then and there became and were wholly loſt to the plaintiffs, &c." There were alſo the general counts for money paid, lent, had, and received, and on an account ſtated. The policy was in the uſual form, and the perils inſured againſt were "The ſeas, men-of-war, fire, enemies, pirates, rovers, thieves, jettizons, letters of mart and countermart, ſurpriſals, takings at ſea, arreſts, reſtraints, and detainments of all kings, princes, and people, of what nation, condition, or quality ſoever; barratry of the maſter and mariners; and all other perils, loſſes, and misfortunes, that have or ſhall come to the hurt, detriment, or damage, of the ſaid goods and merchandizes, or any part thereof." It alſo contained the common printed "memorandum: corn, fiſh, ſalt, fruit, flour, and ſeed, are warranted free from average, unleſs general, or the ſhip be ſtranded; ſugar, tobacco, hemp, flax, hides, and ſkins, are warranted free from average under 5l. *per cent.*; and all other goods free from average under 3l. *per cent.* unleſs general, or the ſhip be ſtranded." It appeared in evidence, that the ſhip was forced by ſtreſs of weather into Elly Harbour, in Ireland. And there happening to be a great ſcarcity of corn there at that time, the people came on board the ſhip in a tumultuous manner, took the government of her from the captain and crew, and weighed her anchor, by which ſhe drove on a reef of rocks, where ſhe was ſtranded; and they would not leave her till they had compelled the captain to ſell all the corn (except about 10 tons) at a certain rate, which was about three fourths of the invoice price. The 10 tons were loſt in conſequence of the ſtranding, by which it was damaged, and was obliged to be thrown overboard. The ſhip afterwards arrived at her place of deſtination with the remainder of her cargo, which was about 25l. worth of coals. The jury found a verdict as for a total loſs; but it was underſtood that the real loſs would be adjuſted if the Court ſhould be of opinion that the plaintiffs were entitled to recover under the circumſtances. THE QUESTIONS were, 1ſt, Whether there had been any loſs within the policy? 2dly, Whether it was a total loſs? 3dly, Whether a general or particular average? 4thly, Whether the ſubject inſured, being corn, fell within the memorandum in the policy? Lord KENYON, Ch. J. There is ſome novelty in this caſe: and I wiſh that the plaintiffs could have recovered in this form of action, becauſe they certainly may in another, as to part of the loſs. That which happened in this caſe does not fall within the meaning of "*arreſts, reſtraints, and detainments of kings, princes, and* PEOPLE."—

The meaning of the word "PEOPLE" may be diſcovered here by the accompanying words; *noſcitur à ſociis*; it means "the ruling power of the country." *But I think that this loſs falls within a capture by pirates:* and if a particular average could have been recovered upon this policy, the plaintiffs might have recovered upon the count, ſtating the loſs to have happened by piracy. But, this being a policy upon corn, the memorandum ſtates that the under-writer will not be liable for any average, unleſs general, or the ſhip be ſtranded. And I am of opinion that this is not a general average; becauſe the whole adventure was never in jeopardy. There is no pretence to ſay that the perſons who took the corn intended any injury to the ſhip, or to any other part of the cargo but the corn, which they wanted in order to prevent their ſuffering in a time of ſcarcity. Therefore the plaintiffs could never have called on the reſt of the owners to contribute their proportion, as upon a general average. On the meaning of the memorandum I have no doubt. The articles there enumerated are of a periſhable nature: as it might be difficult to aſcertain whether their being damaged aroſe from any accident, or from the nature of the articles themſelves, this memorandum is inſerted in all policies, to prevent diſputes; and by it the under-writers expreſsly provide that they will not pay any average on theſe articles, unleſs it be general, or the ſhip be ſtranded. When a ſhip is ſtranded, then the under-writers agree to aſcribe the loſs to the ſtranding, as being the moſt probable occaſion of the damage, though that fact cannot always be aſcertained. Therefore here all the damage done to the cargo thrown overboard may be aſcribed to the ſtranding; but the objection is, that the declaration imputes the loſs to another cauſe. I do not ſay whether or not there was any moment when the inſured might have abandoned: but in fact they did not abandon; and there was no total loſs; for the cargo produced three-fourths of its real value, and the ſhip performed her voyage. On the whole it appears to me, that the plaintiffs are entitled to recover for part of this damage, though they cannot recover in this form of action.—BULLER, J. With reſpect to the objection, that this does not fall within the reaſon of the memorandum; there are only two inſtances, in which the owner may recover an average loſs on the articles there enumerated; either where the average is general, or where the loſs ariſes from the ſtranding of the veſſel. Now this cannot be ſaid to be a general average, for the reaſons already given. And as to the other inſtance of ſtranding, the plaintiffs are entitled to recover for any loſs occaſioned to the cargo in conſequence of the ſtranding, provided it be a direct and immediate conſequence of the ſtanding: but they cannot recover for that which was taken by the mob; for that was not the conſequence of the ſtranding,

ing, but, on the contrary, the ſtranding was occaſioned by the mob coming on board for the corn. The rioters took poſſeſſion of the ſhip in order to get at the cargo: but this loſs cannot be aſcribed to the ſtranding. Suppoſe the mob had taken out 100 quarters of corn before the ſhip had been ſtranded, and had uſed no threat to deſtroy the whole, if that were not delivered to them, it is clear that the under-writers would not be liable. Then the fact of their taking the corn after the was ſtranded is as much unconnected with that circumſtance as if it had been taken before. But the loſs which happened to that part of the cargo which was thrown overboard being aſcribable to the ſtranding, and being a direct and immediate conſequence of the peril inſured againſt, might have been recovered, had there been any count in the declaration applicable to a loſs by ſtranding. There is no pretence to ſay that this was a total loſs, for the reaſons given by my lord. The word "people" means "the ſupreme power;" "the power of the country," whatever it may be. This appears clear from another part of the policy; for where the under-writers inſure againſt the wrongful acts of individuals, they deſcribe them by the names of "pirates, rogues, thieves:" then having ſtated all the individual perſons againſt whoſe acts they engage, they mention other riſks, thoſe occaſioned by the acts of "kings, princes, and people, of what nation, condition, or quality ſoever." Thoſe words therefore, muſt apply to "nations" in their collective capacity. GROSE, J. of the ſame opinion.—Rule abſolute.

By barratry.] Barratry is every ſpecies of fraud or knavery in the maſter or mariners of a ſhip, by which the owners or freighters are injured; and a deviation, if ſuch, is barratry, whether the loſs happen during ſuch fraudulent voyage, or after: but it is otherwiſe, if the deviation be with the privity or conſent of the owners. This was an action on a policy of inſurance upon goods on board the *Thomas and Mathew*, from London to Seville. The policy was made in the common form, with liberty to touch at any ports or places, &c. The loſs was aſſigned different ways in the declaration: firſt, by ſtorms and perils of the ſea, in conſequence of which the ſhip was obliged to go to Dartmouth to be repaired; and, that afterwards a further loſs happened by ſtorms, &c. Secondly, that it happened by ſtorms and perils of the ſeas in the voyage generally; and thirdly, by the barratry of the maſter. On the trial of the cauſe it was proved, that this ſhip was put up as a general ſhip from London to Seville; and was let to freight to one *Darwin*, to whom ſhe was chartered by *Brown* the captain: that it is the courſe of veſſels going on this voyage, to ſtop at ſome port in the weſt of Cornwall, to take in proviſions: that this ſhip having taken her cargo on board,

Vallejo *et al.* *v.* Wheeler, Mic. Ter. 15 Geo. 3. B. R. *Cowp. Rep.* 143. 1 *Ter. Rep.* 230.

ſailed from London to the Downs: that while ſhe lay there, all the other ſhips bound to the weſtward, bore away; but ſhe ſtaid till the night after, and then ſailed to Guernſey, which was out of the courſe of the voyage: that the captain went there for his own convenience, to take in brandy and wine on his own account; after which he intended to proceed to Cornwall: that the night after the ſhip quitted Guernſey, ſhe ſprung a leak, which obliged her to put into Dartmouth. When ſhe was refitted, ſhe ſet ſail again and proceeded for Helford, in Cornwall, where it was always intended ſhe ſhould ſtop to take in proviſions; but in her way ſhe received further damage, and on her arrival there, was totally incapable of proceeding on the voyage, and the goods were much damaged. It was attempted on the part of the defendant to prove, that one *Willes* was the owner of the ſhip: that the voyage to Guernſey was on his account; and, that the goods taken on board there were his property: but this evidence went little further than information and belief, except that it was proved, that when the ſhip arrived at Helford, the wine was delivered to him in his cellar. The learned judge directed the jury, that if the going to Guernſey was *without the knowledge of Darwin*, it was barratry, and they ought to find for the plaintiff; but if done with his knowledge, then it was not barratry: that if they ſhould be of opinion, that it was without the knowledge of *Darwin* he deſired them to ſay, whether they thought it was with the knowledge of *Willes* or not. The jury found a verdict for the plaintiff, and ſaid, they thought the going to Guernſey was without the knowledge of *Darwin*, whom they looked upon to be the true owner; but they were of opinion, it was with the knowledge of *Willes*. On a motion afterwards for a new trial the caſe was twice argued; after which THE JUDGES *were unanimouſly of opinion, that the plaintiff was entitled to recover.*—Lord MANSFIELD, Ch. J. The ground of the motion for a new trial in this caſe is, that under the circumſtances, as they were given in evidence to the jury, the carrying the ſhip to Guernſey was merely a *deviation*, but not *barratry*. Much more ſtreſs was laid at the trial than in either of the arguments upon this fact; namely, that the deviation being with the knowledge of *Willes*, the owner (though not owner *pro hâc vice*) of the ſhip, it could never be barratry; and, therefore, the jury were preſſed to ſay, whether it was with the conſent of *Willes* or not; and they ſaid, it was. To be ſure nothing is ſo clear, as that if the owner of a ſhip inſure, and bring an action on the policy, he can never ſet up as a crime a thing done by his own direction or conſent. It was therefore a material fact to proceed upon, if *Willes* had any thing to do in the caſe; but he had not. It

appeared

appeared to me, that the nature of barratry had not been judiciouſly conſidered, or defined in England with accuracy. In all mercantile tranſactions, the great object ſhould be certainty; and, therefore, it is of more conſequence that the rule ſhould be certain, than whether the rule is eſtabliſhed one way or the other; becauſe ſpeculators in trade then know upon what ground to proceed. His lordſhip then ſtated three caſes which had been quoted from *Strange*; and after giving a definition of the word barratry, he proceeded thus: In this caſe, the under-writer has inſured againſt all barratry of the maſter; and we are not now in a caſe where the owner or freighter is privy to it: if we were, it is evident, that no man can complain of an act to which he is himſelf a party. In this caſe, all relative to *Willes* may be laid out of it: he is originally the owner; but not the inſurer here. *Darwin* was the freighter of the ſhip, and the goods that were on board were his: if any fraud be committed on the owner, it is committed on *Darwin*. The queſtion then is, What is the ground of complaint againſt the maſter? He had agreed to go on a voyage from London to Seville; *Darwin* truſts he will ſet out immediately, inſtead of which the maſter goes on an iniquitous ſcheme, totally diſtinct from the purpoſe of the voyage to Seville: that is a cheat and a fraud on *Darwin*, who thought he would ſet out directly; and whether the loſs happened in the act of barratry, that is during the fraudulent voyage, or *after*, is immaterial, becauſe the voyage is equally altered, even though there is no other iniquitous intent. But in the preſent caſe there is a great deal of reaſon to ſay, that the loſs ſuſtained was in conſequence of the alteration of the voyage. The moment the ſhip was carried from its right courſe, it was barratry; and here the loſs happened immediately upon the alteration. Suppoſe the ſhip had been loſt *afterwards*, what would have been the caſe of the inſured if he were not ſecured againſt the barratry of the maſter? He would have loſt his inſurance by the fraud of the maſter; for it was clearly a deviation, and the inſured cannot come upon the under-writer for a loſs, in conſequence of a deviation. Therefore, I am clearly of opinion, that this ſmuggling voyage was barratry in the maſter.—Mr. Juſtice *Aſton:* I wonder that there ſhould remain a doubt at this day, what is meant by barratry in the maſter. In different ordinances different terms are uſed; but they all have the ſame meaning. In one of the ordinances of Stockholm it is called, "knavery of the maſter or mariners;" and the facts ſtated here, clearly fall within that deſcription. Where it is a deviation with the conſent of the *owner of the veſſel*, and the maſter is not acting for his own private intereſt; in ſuch caſe it is nothing but a deviation with the conſent of the owner, and the under-writer is excuſed. In this caſe the hull of the ſhip belonged

belonged to *Willes*: but he had nothing to do with it, having chartered it to *Darwin*: the jury therefore did right in conſidering *Darwin* the owner *pro hâc vice*. Having conſidered him in that light, the conduct of the maſter was clearly barratry; for he was acting for his own benefit, without intending any good to his owner, and without his conſent and privity. Nobody knows when the firſt commencement of the injury happened; but moſt probably, on the return of the ſhip to Dartmouth from Guernſey, where he had been for the purpoſe of ſmuggling. Therefore, I am clearly of opinion, that this change of the voyage for an iniquitous purpoſe was barratry; which is not confined to the running away with the ſhip, but comprehends every ſpecies of fraud, knavery, or criminal conduct, in the maſter, by which the owners or freighters are injured.—Mr. Juſtice *Willes*: The only doubt I had in this caſe was, at what time the loſs happened: and I think it may reaſonably be ſaid to have happened in conſequence of the ſmuggling voyage: for if the ſhip had proceeded on her firſt intended courſe, ſhe would have eſcaped the ſtorm. Though this was a deviation, yet it is a fair and juſt rebutter to ſay, that it was barratry in the maſter, which is a peril inſured againſt by the policy.—Mr. Juſtice *Aſhhurſt* continued of the ſame opinion, which he held at the trial; and the rule for a new trial was diſcharged by the unanimous opinion of the whole court.

Nutt *et al.* aſſignees, &c. of Edward Hague, a bankrupt, *v.* Bourdieu, Tr. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 323.

Barratry can only be committed againſt the owner of the ſhip, and without his conſent.—This was an action on a policy of inſurance, made by *Hague* before he became a bankrupt, on goods laden on board the ſhip Rachette (otherwiſe the Bellona), for a voyage from London to Rochelle, ſubſcribed by the defendant on the 27th October, 1769, for the ſum of 120l. at 1l. 10s. *per cent.* premium. On the trial of the cauſe, the jury found a verdict for the plaintiffs, damages 93l. 6s. 8d. and coſts 40s. ſubject to the opinion of the Court on the following caſe: That the bankrupt ſhipped on board the veſſel in queſtion goods to the amount of 1800l. for Rochelle. That the captain, by the inſtigation and direction of Meſſrs. *Le Grands*, the owners of the ſhip, went with the ſhip and cargo to Bourdeaux, inſtead of Rochelle, where the cargo was ſold by the agents of *Le Grands*. That a petition was preſented by the plaintiffs to the lieutenant-general of the admiralty of Guienne, ſtating the whole of the tranſaction between the bankrupts and the owners and captain, that in order to procure a landing at Bourdeaux, their original deſtination being to Rochelle, falſe bills of loading were made out by the captain at the inſtigation of *Le Grand*. The petition then proceeded to pray relief. In conſequence of the above petition, a decree was made, declaring *Rene Guinè*, the captain, *guilty and convicted of the crime of barratry*

ratry of the master, for having signed false bills of lading in order to change the voyage of the said ship; for reparation whereof he was condemned to perpetual service on board the king's gallies, &c. It likewise declared the said *Dominique Le Grand* guilty and convicted *of having been an instigator and accomplice of the said barratry of the master*, and condemned him to serve the king on board his gallies for five years, &c. The said *Rene Guine* and *Dominique Le Grand* were also condemned jointly and severally to pay unto the plaintiffs the amount of the merchandizes furnished by *Hague*, and all charges, expences, and interest, &c. THE QUESTION was, Whether the Plaintiffs were entitled to recover? The Court, on this day, ordered another on the first argument. Lord MANSFIELD, Ch. J. said, that with regard to the sentence which had been passed abroad, and which declared the master and owner to have been guilty of barratry, it was entirely out of the question. That though it was a most righteous judgment; yet that it was no part of the consideration of the Court there, what was meant by barratry in an English policy. The question was left entirely open. That their idea of barratry was manifestly different from the construction put upon that word in our own courts, for they had found the owner guilty of barratry, which was entirely repugnant to every definition of barratry which had ever been laid down in an English court of justice. A few days afterwards the Court declared it unnecessary to hear a second argument. Accordingly, Lord MANSFIELD, Ch. J. delivered the opinion of the Court. All questions upon mercantile transactions, but more particularly upon policies of insurance, are extremely important and ought to be settled. The general question here is on the construction of the word barratry in a policy of insurance. It is somewhat extraordinary that it should have crept into insurances, and still more that it should have continued in them so long; for the under-writer insures the conduct of the captain, whom he does not appoint, and cannot dismiss, to the owner who can do either. The point to be considered is, whether barratry, in the sense in which it is used in our policies of insurance, can be committed against any but the owners of the ship? It is clear beyond contradiction that it cannot. *For barratry is something contrary to the duty of the* master and mariners, the very terms of which imply that it must be in the relation in which they stand to the owners of the ship. The words used are master and mariners, which are very particular. An owner cannot commit barratry. He may make himself liable by his fraudulent conduct to the owner of the goods, but not as for barratry. And, besides, barratry cannot be committed against the owner with his consent; for though the owner may become liable for a civil

loss

loſs by the miſbehaviour of the captain, if he conſent, yet that is not barratry. Barratry muſt partake of ſomething criminal, and muſt be committed againſt the owner by the maſter and mariners. In the caſe of *Vallejo* and *Wheeler* the Court took it for granted that barratry could only be committed againſt the owner of the ſhip. The point is too clear to require any further diſcuſſion.—Poſtea to be delivered to the defendant.

Havelock *v.* Hancill, Ea. Ter. 29 Geo. 3. B. R. 3 *Ter. Rep.* 277.

If a ſhip be inſured by the terms of the policy in any lawful trade, and the barratry of the maſter be mentioned as one of the riſks to be borne by the inſurer; the under-writers will be liable for a loſs which happens by the barratry of the maſter by ſmuggling.—This was an action upon a policy of inſurance ſubſcribed by the defendant as an under-writer, wherein he undertook to the plaintiff to inſure the ſhip called *The Economy*, IN ANY LAWFUL TRADE (except the loading and carrying of ſtones, rock ſalt, and iron ore), for twelve calendar months, to commence on her ſailing from Sunderland; and inſured (amongſt other things) againſt the barratry of the maſter and mariners. The declaration, after ſtating the policy, proceeded to ſtate that the ſhip ſailed on the 26th of March, 1785, in good ſafety, and in a lawful trade from Sunderland, &c. &c. and afterwards, to wit, on the 6th of December, 1785, the ſaid ſhip before ſhe arrived at Sunderland put into the port of Shields, where *John Wilkinſon*, the maſter, in a barratrous and fraudulent manner, without the knowledge, conſent, or privity, and againſt the will of the plaintiff (the owner), did ſecretly, fraudulently, clandeſtinely, unlawfully, and barratrouſly, import in the ſaid ſhip from Oſtend into the port of Shields a large quantity of foreign brandy, &c.; whereby the ſaid ſhip became forfeited, and was ſeized by the officers of the cuſtoms, &c. To this there was a general demurrer and joinder. Lord KENYON, Ch. J. It is too late now to conſider whether it was wiſe that policies ſhould extend to protect the owners againſt the acts of the maſter or mariners, over whom the under-writers have no control. But ſuch has been the language of policies, and ſuch the conſtruction of them. Now in the preſent caſe the owner has not engaged in any unlawful trade; for the words "lawful trade" in the policy mean the trade in which the ſhip is ſent by the owners. It is ſtated correctly that the ſhip was ſent on a lawful voyage: but owing to the miſconduct of the maſter ſhe was loſt; for he in defiance of his duty took on board certain commodities which ſubjected the ſhip to ſeizure. This falls within the general definition of barratry (being done againſt the conſent of the owner) againſt which the under-writer has inſured.—Demurrer over-ruled.

A ſhip

A ſhip being inſured for a voyage, the under-writer is not liable for any loſs ariſing from ſeizure after ſhe has been 24 hours in port; though ſuch ſeizure was in conſequence of an act of ſmuggling committed by the maſter during the voyage.—This was an action on a policy of inſurance on the ſhip *Hope*, from Hamburgh to London, ſubſcribed by the defendant on the 19th of Auguſt, 1785, for the ſum of 200l. at one guinea per cent.—On the trial of the cauſe, the jury found a verdict for the plaintiffs, ſubject to the opinion of the Court on the following caſe. "That the defendant under-"wrote the policy. That the plaintiffs were intereſted in "the ſhip to the amount of the ſum inſured. That in the "courſe of the voyage the maſter committed barratry by "ſmuggling on his own account, by hovering and running "brandy on ſhore in caſks under 60 gallons. That on the "1ſt September, 1785, the ſhip arrived in ſafety at her "moorings in the river Thames, and remained there in "ſafety till the 27th of the ſaid month of September, when "ſhe was ſeized by the revenue officers for the ſmuggling "before ſtated. That about a fortnight or three weeks "after the ſeizure the plaintiffs informed the under-"writers thereof; and that they would hold them liable "on the policy." THE QUESTION for the opinion of the Court is, Whether the plaintiffs were entitled to recover againſt the defendant for any and what ſum? And the principal queſtion which aroſe in this caſe was, Whether the ſeizure of a ſhip after the completion of her voyage, for a cauſe of forfeiture accruing during the voyage, was within the policy? Then, 2DLY, Suppoſing it to be a loſs within the policy, Whether the aſſured, having given early notice that they ſhould hold the under-writer liable, are entitled to abandon? WILLES, J. delivered the unanimous opinion of the Court. After ſtating the caſe; the queſtion for the conſideration of the Court is, Whether the plaintiffs can recover under theſe circumſtances againſt the defendants? and there is no doubt in this caſe but that the maſter was guilty of barratry by ſmuggling on his own account, without the privity of his owners. Many definitions of barratry are to be found in the books, but perhaps this general one may comprehend almoſt all the caſes. Barratry is every ſpecies of fraud or knavery in the maſter of the ſhip by which the freighters or owners are injured; and in this light a criminal deviation is barratry, if the deviation be without their conſent. But the general queſtion here is, Whether, as the loſs occaſioned by the barratry of the maſter did not happen during the continuance of the voyage, the inſurers are liable? I muſt own this appears to me to be a novel queſtion, and not to have been decided by any former determinations. But as in all commercial tranſactions the great object is certainty,

Lockyer *et al.* *v.* Offley, Ea. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 252.

tainty, it will be neceſſary for this Court to lay down ſome rule, and it is of more conſequence that the rule ſhould be certain, than whether it is eſtabliſhed one way or the other. Difficulties occur on both ſides in laying down any rule. The firſt thing to be obſerved is, that the policy by the terms of it is an undertaking by the inſurer for a limited time, during the voyage from Hamburgh to London, till the ſhip has been moored 24 hours in ſafety; and the ſhip was not actually ſeized till near a month afterwards. But it has been ſaid, that under the 24 *Geo.* 3. c. 47. and the exciſe laws, the forfeiture attaches the moment the act is done, and that the barratry was committed during the voyage. It may be ſo as to ſome purpoſes, as to prevent intermediate alienations or incumbrances; but I think the actual property is not altered till after the ſeizure, though it may be before condemnation. I will put this caſe; ſuppoſe, before the ſeizure of the ſhip, ſhe had gone another voyage, and on her return had been ſeized, would the crown be entitled to an account of her earnings, after deducting the expences of the outfit? Surely not. Till the ſeizure of the ſhip, it was not certain that the officers of the crown knew of the illicit trade carried on by the maſter, or whether they would take advantage of the forfeiture. It would be a dangerous doctrine to lay down that the inſurer ſhould in all caſes be liable to remote conſequential damages. This has been compared to a death's wound received during the voyage, which ſubjected the ſhip to a ſubſequent loſs. To this point the caſe of *Meretony* and *Dunlope* (1) ſeems very material. That was an inſurance on a ſhip for ſix months, and three days before the expiration of the time ſhe received her death's wound, but, by pumping, was kept afloat till three days after the time: there the verdict was given for the inſurer, which was confirmed by the Court. I will put another caſe; ſuppoſe an inſurance on a man's life for a year, and ſome ſhort time before the expiration of the term he receives a mortal wound, of which he dies after the year, the inſurer would not be liable. The caſe of *Vallejo* and *Wheeler* was cited for the plaintiffs; but that does not conclude this queſtion, for there the ſhip was loſt during the voyage. But it was alſo argued that the ſhip, even in the hands of a fair purchaſer, would be liable to the forfeiture. I do not know that it has ever been ſo decided; it may depend on circumſtances, ſuch as length of poſſeſſion, laches in ſeizing, or other matters. But ſuppoſe the law to be ſo, it does not follow from thence, that though the ſhip is always liable to a confiſcation, yet that the inſurer at any diſtance of time is anſwerable for the loſs under a limited undertaking.

(1) E. 23 *Geo.* 3.

And

And this brings me to that part of the caſe, which weighs moſt with the Court in favour of the defendant, and to which it does not appear to us that any ſufficient anſwer has been given. It was agreed, in the argument, that the cuſtom-houſe officers might ſeize for the forfeiture within three years after the fact committed; and that the attorney-general might file an information at any time whilſt the ſhip was in being. Is the inſurer during all this time to continue liable? Suppoſe the ſhip had gone ſeveral voyages afterwards; and ſuppoſe a partial loſs paid, and the underwriter's name ſtruck off, ſhall an action be brought on the policy afterwards? His accounts could never be ſettled, nor could he be finally diſcharged, while the ſhip was in exiſtence. Such a poſition would be monſtrous, and would be attended with infinite inconvenience. There muſt be ſome certain and reaſonable limitation in point of time laid down by the Court, when the inſurer ſhall be releaſed from his engagement. If he be liable for a month, he may be for a year, and ſo on. And we all think that the law on inſurances would be left unſettled, and in much confuſion, if any other time were ſuggeſted than that preſcribed by the policy, namely, the continuance of the voyage, and the ſhip's being moored 24 hours in ſafety. We are all therefore of opinion, that judgment ought to be given for the defendant. Theſe being our ſentiments, there is no occaſion to ſay any thing on the other parts of the argument, either upon the ſubject of abandonment, or whether this was a partial or a total loſs.—Poſtea to the defendant.

Phyn *et al.* v. The Royal Exchange Aſſurance Company, Hil. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 505.

A deviation of a veſſel from the voyage inſured through the ignorance of the captain, or from any other motive not fraudulent, though it avoids the policy, does not conſtitute an act of barratry.—This was an action on a policy of inſurance on goods from London to Jamaica. The declaration contained two counts; one alleging the loſs to have been by capture, the other by barratry. It appeared in evidence at the trial, that the ſhip on board which the goods were laden failed on her voyage from London for Jamaica; and that the captain's inſtructions from his owners were to proceed immediately to that iſland. But after the veſſel had cleared the channel ſhe was carried by ſtrong currents and from other circumſtances out of her reckoning, until at length ſhe was found to be between the Grand Canary and the iſland of Teneriffe. In this ſituation it was admitted that the direct courſe to Jamaica was to the ſouth-weſt; inſtead of which the captain bore up for the iſland of Santa Cruz, which lies to the north-weſt in ſight about thirty miles, where the veſſel came to an anchor. There an embargo was laid upon her by the Spaniſh government, and ſoon after the news arriving of war having been declared between Spain and

and Great Britain, the veſſel and cargo were afterwards condemned as prize. On the part of the plaintiffs it was contended, that they were neceſſarily entitled to recover on one or other of the counts in the declaration; on the firſt if there were no deviation; or admitting that the ſhip's going to Santa Cruz inſtead of purſuing a ſouth-weſterly courſe to Jamaica, after the captain knew with certainty where the ſhip was, was a deviation, ſo as to preclude the plaintiffs from recovering upon the firſt count as for a loſs by capture, ſtill that ſuch a wilful deviation by the captain againſt the directions of his owners, without any conſideration of advantage to them, and merely for the ſake of procuring a temporary refreſhment for himſelf and his company, was an act of barratry upon which the plaintiffs were entitled to recover on the ſecond count. Lord KENYON thought that it could not be barratry without a fraudulent purpoſe in the captain at the time; and he left the queſtions to the jury with that direction, who found that the captain's going to Santa Cruz "was a deviation, and was owing either to ignorance or "ſomething elſe, but that it was not fraudulent;" and they accordingly found a verdict for the defendants. It was afterwards moved to ſet the verdict aſide. Lord KENYON, Ch. J. as it ſeems admitted that there muſt be fraud to conſtitute barratry, and as the jury have expreſsly ſaid, that there was no fraud in this caſe, there was no barratry, and conſequently there ought not to be a new trial. ASHHURST, J. We are bound by the verdict of the jury, who have negatived barratry by ſaying there was no fraud in the caſe. GROSE, J. The queſtion is, Whether this were a barratrous deviation? Now, in order to ſee whether this were or were not barratry, I will refer to the opinion of a very able lawyer, Mr. J. *Aſton*, who in the caſe of *Vallejo* v. *Wheeler*, ſaid that there muſt be fraud or knavery to conſtitute barratry; "Barratry "is not confined to the running away with the ſhip, but "comprehends every ſpecies of fraud, knavery, or criminal "conduct, in the maſter, by which the owners or freighters "are injured." An opinion of Mr. J. *Buller* in *Saloucci* v. *Johnſon* has however been cited to ſhew that he thought that fraud was not neceſſary to conſtitute barratry; but that is not fairly to be collected from what fell from that judge in that caſe, where it was not neceſſary to give a definition of barratry; and in a ſubſequent caſe, *Roſs* v. *Hunter*, *ante*, where his attention was more immediately called to this ſubject, he conſidered that barratry could not exiſt without fraud; "In "one ſenſe of the word, it is a deviation by the captain for "fraudulent purpoſes of his own; and that is the diſtinction "between deviation, as it is generally uſed, and barratry." Therefore Mr. J. *Buller* agreed with M. J. *Aſton* in thinking that fraud is a neceſſary ingredient in barratry. Then it

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was argued that this is a verdict against evidence, because the jury have found that there was no fraud: but I should doubt my own opinion on a question of fact when put in opposition to that formed by persons who are more conversant than I am in transactions of this kind, unless it manifestly appeared by the evidence that there had been some mistake. The plaintiff's counsel do not say that the captain did any thing fraudulently for purposes of his own against the interest of his owners: and it is enough for me to say, that I do not see that any fraud was committed, that we cannot presume fraud, and that the jury have negatived fraud. LAWRENCE, J. Some stress has been laid on an expression of mine in *Moss* v. *Byrom*, where it is supposed I gave an opinion that fraud was not a necessary ingredient in barratry, in saying "whatever "was done by the captain to defeat or delay the performance "of the voyage was barratry in him, it being to the pre-"judice of his owners:" but what fell from me there must be taken with a reference to the case then in judgment before the Court, where there were strong circumstances to shew a criminal intention in the captain; and the words said to have been used by me must be understood thus, "Those things "that were done by the captain in that case to defeat or delay "the voyage constituted barratry, &c." There is no case that I know of in which it was said that the act of the captain is barratry merely because it is against the interest of the owners, unless it be done with a criminal intent. In the case of *Stamma* v. *Brown*, of which I have a manuscript note, *Lee*, Ch. J., in defining barratry, said "barratry must be "some breach of trust in the master, *ex maleficio*." In this case the jury, having negatived fraud, have in my opinion negatived criminality in the captain; and therefore this was not a barratrous deviation.—Rule discharged.

In an action by the assured of goods against the under-writers for a loss by the *barratry* of the master, proof that the person who was described in the policy as *master*, and who was treated with and acted as such, carried the ship out of her course for fraudulent purposes of his own, *primâ facie*, is sufficient to entitle the plaintiff to recover, without shewing negatively that he was not the *owner*, or that any other person was. Such proof lies on the defendant, wishing to avail himself of it, to establish.—This was an action against an under-writer upon a policy of insurance on goods on board the *Live Oak*, *whereof was master Joseph Rati*, at and from Jamaica to New Orleans. The first count of the declaration, which was in the usual form, contained an averment that the ship "before her arrival at New Or-"leans was, together with the goods, &c. by the *barratry* "of the said *Joseph Rati*, he then and there being *master* of "the said ship, &c. run away with and wholly lost to the "plaintiff, &c." There was a second count in the declar-

Ross *v* Hunter, Mic. Ter. 31 Geo. 3 B R. 4 *Ter. Rep.* 33.

ation as upon a loſs by the perils of the ſea. It appeared at the trial that the *Live Oak* was put up by *Rati*, who acted as maſter, *as a general ſhip*, at Kingſton in Jamaica in 1783, and that the plaintiff, amongſt other perſons, ſhipped the goods in queſtion, which were flour and other dry goods, on board her. She ſailed on the voyage inſured in May, 1783, and arrived in June following at the mouth of the river Miſſiſſippi, which leads up to New Orleans in Spaniſh America, at the diſtance of about 35 leagues. When the captain had got thus far he dropped anchor; and went in his boat up the river to New Orleans, and on his return, *without carrying the ſhip to her port of deſtination, ſtood away for the Havannah; after his departure from whence he was never afterwards heard of.* It appeared that he had a private adventure of negroes of his own on board, which there was reaſonable evidence for ſuppoſing he intended to have diſpoſed of at New Orleans, but finding it difficult to do ſo on account of an interdiction againſt the importation of them by the Spaniſh government, he went to the Havannah in queſt of a market for them. Several letters were agreed to be received in evidence which paſſed between the plaintiff and his correſpondents, from whence it appeared that they had made every enquiry concerning *Rati*, but without ſucceſs: and there was ground for believing that the veſſel was afterwards loſt. *In theſe letters he was mentioned as the maſter of the veſſel, and treated as one who had run away with the cargo; but whether he, or what other perſon, were owner of the ſhip did not appear.* The defendant offered no evidence, but contended that upon the plaintiff's own ſhewing he could not recover; for, as to the ſecond count, *the underwriter was diſcharged, there having been a clear deviation proved from the voyage inſured, which was admitted.* And as to the firſt count, there was no evidence of the captain's having been guilty of *barratry*; for *non conſtat* that he was not *owner* or *general freighter* of the ſhip himſelf, or, if he were not, that he had acted contrary to the directions of the owner in going out of his original courſe: in either of which events he could not be guilty of *barratry*. But, admitting the evidence to be ſufficient for that purpoſe, it was contended that there had been a previous deviation before the *barratrous* intention took effect. BUT LORD KENYON being of opinion that the plaintiff was entitled to recover on the firſt count, the jury found accordingly. And now upon motion to ſet aſide the verdict and grant a new trial on the above facts; cauſe was ſhewn againſt the rule on two grounds: FIRST, that the proof offered by the plaintiff was, *primâ facie*, evidence of *barratry*. SECONDLY, it was a queſtion of fact for the jury to decide at what time the *barratrous* intention commenced, which they had done by their verdict. AND IN SUPPORT OF THE RULE it was inſiſted, 1ſt, That the plaintiff

plaintiff having by his declaration averred the loſs to have happened by the *barratry* of the maſter, had taken upon himſelf to make out that propoſition in *toto*. Secondly, That at all events there was a deviation in this caſe before the barratrous intent commenced, which was ſufficient to diſcharge the under-writer; for either the captain never intended to go to New Orleans at all, in which caſe, by a variety of authorities, there was no inception of the voyage inſured, though he navigated for ſome time in the ſame tract: or he did not quit the intention of going there till after he had returned in his boat from New Orleans, and had found that he could not land his cargo of negroes.—Lord KENYON, Ch. J. The concluſion which the jury have drawn by their verdict is, that this was barratry, and the queſtion now is, Whether the evidence be ſufficient to ſupport that concluſion? The firſt point to be conſidered is, whether *Rati* can be taken to be the *owner* of the ſhip. Now as to that he was clearly proved to be the *captain*; but there was no proof whatever of his being *owner*. And if that fact were neceſſary to conſtitute the defence of the under-writer, the affirmative proof lay upon him. If we were to infer any thing, it would be the contrary, for *Rati* acted as *captain*; the letters ſpeak of him as having been once before *conſigned* to the houſe of *Taylor* and *Montford*: he is therein treated as a criminal who had run away with the ſhip and cargo. It is ſufficient however to ſay, that there was no proof of his being owner. Then the next queſtion which ariſes is, Whether the ſhip going out of her courſe is to be attributed to deviation or barratry? Upon this head the queſtion was well put at the bar, When did the barratry commence? It commenced when he firſt went out of the due courſe of his voyage in violation of his duty; and the verdict of the jury was founded upon that ground.—ASHHURST, J. The ſhip in queſtion was put up as a general ſhip, of which *Rati* was ſtated to be the *maſter*; *that* primâ facie *then ſuppoſes him not to be the owner*. Then the rule of evidence applies in this caſe, that the affirmative is always to be proved by thoſe whoſe intereſt it is to prove it. *Here it was the plaintiff's intereſt to prove that* Rati *was the maſter, which he did accordingly; if then it were for the defendant's intereſt to prove that he was alſo owner, it was incumbent on him to ſhew it*; but there being no evidence of that ſort, the jury did right in finding him guilty of barratry on the facts which were in evidence before them.—BULLER, J. Barratry is a queſtion of law which, like other queſtions of law, ariſes out of facts, and has been well ſettled. In one ſenſe of the word it is a deviation by the captain *for fraudulent purpoſes of his own*; and that is the diſtinction between *deviation*, as it is generally uſed, and *barratry*. Then

the queſtion is, Whether the captain in this caſe deviated *with a fraudulent view*, ſo as to conſtitute *barratry* upon the evidence given in the cauſe? That will depend upon two queſtions: Firſt, What it is neceſſary for a plaintiff to prove upon a declaration for the barratry of the captain? and ſecondly, What evidence there was in this caſe of fraud in the captain? 1ſt, It appeared that the ſhip had been put up as a *general* ſhip, ready to take the goods of any perſon to the port to which ſhe profeſſed to be deſtined; the owner of goods therefore may in ſuch a caſe be ſuppoſed, in general, to be an entire ſtranger to the ſhip; he deals with the captain *quà* captain; he knows him in no other character; he acts under the information of the advertiſement which is uſually put forth on thoſe occaſions, wherein *Rati* was in the preſent inſtance deſcribed to be *maſter*. By the terms too of the policy the under-writer contracted to indemnify the plaintiff againſt the barratry of this very man. In caſe then of a loſs, what is incumbent on the plaintiff to prove? He muſt prove the ſubſcription of the under-writer, his own intereſt in the goods, his ſhipping them on board the veſſel deſcribed in the policy, and the loſs of them in conſequence of ſuch an act by the captain as amounts to barratry, that is, that he went out of the courſe of his voyage *for a fraudulent purpoſe*. It was not incumbent on the plaintiff to prove that the captain was not the owner, for that would be calling on him to prove a negative: and if the captain were not the owner, it is immaterial who was. Proof of that fact, which operates in diſcharge of the other party, lies upon him. I agree that, if the captain had freighted the ſhip for the voyage, he could not be guilty of barratry; but the proof of ſuch fact lies equally on the defendant. It is then aſked, why it ſhould not be preſumed that the captain went out of his courſe by the directions of his owner, if he had any? The reaſon is plain, becauſe the Court cannot preſume fraud in another perſon. The caſe put of an indictment for burglary does not anſwer the purpoſe for which it was cited. For ſuppoſe the goods were not actually taken and carried away, obſerve what would be ſufficient to be proved; the fact of breaking and entering the houſe; and whoſe houſe it was; and that it was in the night; becauſe all theſe circumſtances are ſpecifically alleged in the indictment, and they are all affirmatives; then the intent with which theſe facts were done is equally material: but if the proſecutor prove all the former circumſtances, it is a queſtion for the jury to determine whether he did not enter with the view of ſtealing the goods, unleſs the party accuſed can ſhew to their ſatisfaction that his intent was innocent. That brings me to the next queſtion, which in my opinion is the moſt material one here, namely,

namely, What was the view of the maſter when he ſunk his anchor at the mouth of the river Miſſiſſippi? for if it were done with a fraudulent view, I hold that the very ſinking of his anchor was an act of barratry. His intent in ſo doing was a queſtion for the jury, and they have found by their verdict that it was with the barratrous intention charged. It appears that he had ſome negroes on board belonging to himſelf, which he wiſhed to have diſpoſed of at New Orleans, but finding upon going up thither in his boat that he ſhould not be able to do ſo, he returned back again to his ſhip, and immediately ſailed for another port. Then is it too much to ſay that he went to New Orleans for the purpoſe of his own private advantage; the evidence too to be collected from the letters ſhews, that he was conſidered as a thief and a criminal, and purſued as ſuch; and that all the perſons concerned treated him in the character of maſter only.—GROSE, J. of the ſame opinion.—Rule diſcharged.

Where a ſhip was chartered from London to Teneriffe, there to take on board a certain number of pipes of wine, and proceed to the Weſt-India iſlands, for which the owner was to receive freight at the rate of ſo much per pipe; a policy of inſurance on ſuch freight was held to attach from the ſailing of the ſhip from London.—This was an action on a policy of aſſurance on half the freight of the ſhip *Nancy* valued at l. *at and from London to Teneriffe, at and from thence to any of the Weſt-India Iſlands* (Jamaica excepted), *and at and from thence to the bay of Honduras.*" The declaration, after ſtating the policy, &c. alleged that before the making of the policy the plaintiff by charter-party of affreightment chartered the ſhip to *H.* and *S. Cox* upon the voyage; in which the plaintiff covenanted that the ſhip "ſhould on or before the 9th of February then next depart out of the river Thames, and directly proceed with or without convoy to Port Oratava in Teneriffe, or as near thereto as ſhe could ſafely get, and after the ſhip ſhould be ready to receive goods lie 20 days, and load and receive on board her from Meſſrs. *Cox* 500 pipes of wine, and then ſail and proceed to Barbadoes, &c." and Meſſrs. *Cox* covenanted to pay the plaintiff for the freight and hire of the ſhip *for the ſaid voyage* at the rate of 35s. per pipe, the ſaid freight to be paid within 20 days after a certificate of the delivery of the wine. That the ſhip ſailed from London on the 9th of February, 1794, under ſuch letting *upon the ſaid voyage* deſcribed in the charter-party, and whilſt ſhe was proceeding upon the ſaid voyage towards Teneriffe ſhe was taken as prize; with an averment of the plaintiff's intereſt in half of the freight. The defendant paid ſix guineas (the premium) into court, and pleaded the general iſſue as to the reſt. At the trial, after the plaintiff had proved his caſe as

Thompſon v. Taylor, Mic. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 478.

in the declaration, the defendant's counſel objected that the plaintiff could not recover becauſe the right to freight had not commenced: but a verdict was taken for the plaintiff, with liberty to the defendant to move to ſet it aſide and enter a nonſuit; and accordingly a rule to ſhew cauſe to that effect having been obtained, and cauſe ſhewn. — Lord KENYON, Ch. J. This caſe was not ſo fully conſidered, or ſo well underſtood at *niſi prius* as it is now; for it was there taken for granted that every conſideration reſpecting the ſhip's ſailing from London to Teneriffe might be laid out of the queſtion without prejudicing the plaintiff's right: if that were ſo in fact, this caſe could not have been diſtinguiſhed from the caſe of *Tonge* v. *Watts*, 2 *Stra.* 1251; where, "as the goods were not actually on board ſo as to make the plaintiff's right to freight commence," it was held that the plaintiff could not recover on an inſurance on the freight. But this caſe is clearly diſtinguiſhable from that, and reſts on peculiar circumſtances. The property, againſt the loſs of which the aſſured wiſh to be indemnified, is that which he had a right to receive under the charter-party; and it ſeems now admitted, that if the contract had its inception, if any thing were done under it by the plaintiff who let his ſhip to hire, his right to freight commenced. That depends on the words of the charter-party, which are, "that the ſhip ſhould on or before the 9th of February depart out of the river Thames, and directly proceed to Port Oratava in Teneriffe, and after the ſhip ſhould be ready to receive goods, lie 20 days and load and receive on board her from Meſſrs *Cox* 500 pipes of wine, and then ſail and proceed to Barbadoes." Now it ſeems to me that the argument on behalf of the plaintiff is well founded, that there was an inception of this contract by the owner of the ſhip; for the ſhip did ſail from the Thames towards Teneriffe, and was captured in the courſe of that voyage. In the caſe in *Strange* the inception of the contract would have been the taking of the goods on board: but, as the loſs happened before the goods were put on board, there was no inception of the contract, and the plaintiff was nonſuited. But in the caſe of *Montgomery* v. *Egginton*, there was an inception of the contract, becauſe part of the goods had been put on board; and the party there recovered on an inſurance on freight. So here, as the plaintiff had begun to perform his part of the contract, as he had done ſomething under it, which if matured would have entitled him to his freight, I think he may recover on this policy which was an inſurance on that freight. His contract under the charter-party was entire, and we cannot divide it; the ſhip was to ſail from hence to Teneriffe, where ſhe was to take wine on board and carry it to the Weſt Indies; he was to receive freight for

for the whole voyage; and the plaintiff had performed part of the contract. Therefore on the principle on which the caſe in *Strange* was decided, though the circumſtances of that caſe are different from thoſe in the preſent, I am of opinion that the plaintiff is entitled to recover.—GROSE, J. agreed.—LAWRENCE, J. alſo agreed, and ſaid that this was not unlike *Grant* v. *Parkinſon*, *Park* on Inſur. 305, which happened a few years ago, where it was held that the profits of a cargo of molaſſes might be inſured notwithſtanding the ſtatute 19 *Geo.* 2. c. 37.—Rule diſcharged.

The inſurance of a ſhip to Jamaica determines by her mooring 24 hours in any port there, and does not continue till ſhe arrives at her laſt port of delivery.—This was an action on a policy of inſurance on a ſhip *at and from* Jamaica to London, the ſhip had alſo been inſured *from London to Jamaica generally*, and was loſt in coaſting that iſland, after ſhe had touched for ſome days at one port there, but before ſhe had delivered all her outward-bound cargo at the other ports of the iſland. This was an action on the homeward policy; and in order to ſhew when the homeward-bound riſk commenced, it was neceſſary to ſhew at what time the outward-bound riſk determined; and the jury, which was ſpecial, after an examination of merchants as to the cuſtom, by their verdict decided, that the outward riſk ended when the ſhip had moored in any port of the iſland, and did not continue till ſhe came to the laſt port of delivery, and a new trial being afterwards moved for, it was refuſed. Camden v. Cowley, Tr. Ter. 3 Geo. 3. B.R. 1 *Black. Rep.* 417.

Where the aſſured do the beſt they can for the benefit of the inſurance, if nevertheleſs the goods are ultimately loſt, the under-writer is liable to pay after any length of time has elapſed between the accident, which was the original cauſe of the loſs, and the time when the demand was made on the inſurer.—On the trial of an action on a policy of inſurance, a verdict was taken for the plaintiffs for 60l. 13s. 9d. ſubject to the opinion of the Court upon the following caſe: The plaintiffs were merchants at Geneva, and on their own account and riſk, by means of their agents at Marſeilles, were intereſted in bullion and goods and merchandize ſhipped there on board the ſhip *Duras*, conſigned to the plaintiff's correſpondents at Pondicherry, with directions to barter or ſell the ſame on their account, and to make the returns on the ſame to Europe in other goods, the produce or manufacture of India. The plaintiffs were alſo intereſted in the ſaid ſhip *Duras*. The ſhip *Duras* ſailed from France on the voyage inſured in June, 1776; *and in the outward-bound voyage was by bad weather totally loſt at the Iſles of France*, in April, 1777. The goods on board ſuſtained damage, but great part of the bullion, and a conſiderable part of the goods, were ſaved, and, without any authority from the under-writers, ſent forward Plantamour v. Staples, Mic. Ter. 22 Geo. 3. B.R. 1 *Ter. Rep.* 611. (n. *a.*)

in another ſhip to the plaintiffs' correſpondents at Pondicherry, who received and diſpoſed of the ſame, and under the plaintiffs' orders inveſted the produce in other goods, the produce or manufacture of India, and ſhipped the ſame on the plaintiffs' account on board a ſhip called the *Père de Famille*, bound to France. The *Père de Famille* ſailed from Pondicherry for France in Auguſt, 1778; and in the courſe of her voyage home, was condemned at the Iſles of France, as unfit to proceed to Europe; whereupon the plaintiffs' goods were put on board another ſhip, called the *Louiſa Elizabeth*, bound for France; which ſhip, with the plaintiffs' goods ſo on board, ſailed for France, and was afterwards taken by an Engliſh privateer, and has ſince, with all her cargo, been condemned. On the 29th of Auguſt, 1778, ſeveral of the under-writers on the policy ſigned a memorandum thereon, whereby they agree to run the riſk on the goods ſaved as aforeſaid in any other ſhip, until their ſafe arrival in France: but which agreement the defendant and ſeveral others of the under-writers refuſed to ſign, or give their conſent to. The defendant paid the whole of the average loſs, occaſioned by the loſs of the ſhip *Duras*, and by the damage of the plaintiffs' goods then on board. By the capture of the ſhip *Louiſa Elizabeth*, and of the goods, the plaintiffs ſuſtained a loſs of 12l. 2s. 9d. *per cent.* on the ſum ſubſcribed on the ſaid policy, which has been paid by all the under-writers who ſigned the memorandum of the 29th of Auguſt, 1778. The queſtion was, Whether the defendant was liable to pay the ſaid loſs of 12l. 2s. 9d. *per cent.* which the plaintiffs have ſo ſuſtained by the capture and condemnation of the ſhip *Louiſa Elizabeth*, and her cargo? or if not, whether the plaintiffs are entitled to any, and what return of premium? Lord MANSFIELD: The only queſtion is, Whether the ſhipping to Europe was neceſſary to the ſalvage? It is admitted that the defendant is liable upon the voyage to Pondicherry, though the goods were conveyed in another ſhip; therefore that circumſtance makes no difference. The ſale of the cargo is alſo admitted to have been neceſſary. Then how were the proceeds to be remitted to Europe? What was the beſt way of getting home the money for the benefit of the inſured and the inſurers? Beyond all doubt the beſt way was to inveſt it in other goods. Therefore, that being done which was the beſt that could be done, the under-writers are liable. WILLES and ASHHURST, Juſtices, were of the ſame opinion. BULLER, J. There is no caſe which expreſsly decides that the captain may inveſt the produce of the goods ſaved. But in *Mills* and *Fletcher* (1) it was decided that the captain has a general

(1) *Dougl.* 219.

power,

power, and is bound in duty to do the beſt for all concerned.—Poſtea to the plaintiffs.

Kulen Kemp v. Vigne, Tr Ter. 26 Geo. 3. B R. 1 *Ter. Rep.* 304.

In an action on a policy of inſurance the plaintiff muſt prove that a loſs has happened, and that by the very means ſtated in the declaration. This was an action on a policy of inſurance, which came on to be tried before Mr. Juſtice *Buller*, who nonſuited the plaintiff. Upon a motion to ſet aſide that nonſuit, the following report was made by the learned judge. The inſurance was upon goods on board the ſhip *Emanuel*, at and from Falmouth to Marſeilles, warranted a Daniſh ſhip; and on the policy was this memorandum: "The following inſurance is declared to be on money ex-"pended for reclaiming the ſhip and cargo valued at the ſum, "which ſhall be declared hereafter. The loſs to be paid, in "caſe the ſhip does not arrive at Marſeilles, and without "further proof of intereſt than this policy; warranted free "from all average, and without the benefit of ſalvage." It appeared that the plaintiffs were proprietors of the cargo, but not of the ſhip. That the ſhip originally ſailed with the cargo on board from Riga to Marſeilles, and that an inſurance had been effected at Bremen upon the cargo for that voyage; in the courſe of which ſhe was taken, and brought into Falmouth, by an Engliſh privateer. That a ſentence of condemnation had been there obtained, which was afterwards reverſed upon the prize having been proved to be a neutral ſhip, but the expences of procuring that reverſal were ordered by the admiralty court to be a charge upon the cargo. The plaintiff's agents accordingly paid the ſum of 1031l. 14s. for the expences of reclaiming the ſhip and cargo; and immediately procured the policy in queſtion to be effected in January, 1781, according to the purport of the memorandum. In the February following, the ſhip ſet ſail from Falmouth with the original cargo on board, in the proſecution of her voyage to Marſeilles: but on the 26th of the ſame month, before her arrival there, was captured by a Spaniſh ſhip, and carried into Ceuta in Spain, where ſhe was again condemned. An appeal was brought in the ſuperior court of Madrid, which promiſing to be of long continuance, the cargo, which was of a periſhable nature, was ordered to be ſold, and the proceeds to be brought into court, to wait the event of the ſuit. In May, 1783, the veſſel was reſtored by ſentence of the court, and the ſurplus of the proceeds, which aroſe from the ſale of the cargo, was paid to the owners, deducting the expences incurred in Spain in proſecuting the appeal. After all the charges paid, there only remained twenty-ſix rix-dollars. As ſoon as the ſhip was liberated, ſhe ſailed from Ceuta to Malaga, in order to refit, and having there made the neceſſary repairs, ſet ſail for Bremen, and in that voyage was loſt. The inſurance made upon the cargo

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at Bremen has been paid. The declaration averred, that "whilſt the ſhip was proceeding in her ſaid voyage from "Falmouth to Marſeilles, and before ſhe could arrive at "Marſeilles, ſhe was captured by the Spaniards, and thereby "the ſaid ſhip, and alſo the goods and merchandizes on board "her, were totally loſt to the plaintiffs." At the trial, it was objected on the part of the defendant, 1ſt, That this was not an inſurable intereſt; and 2dly, That the plaintiffs could not recover upon the policy in this form of declaring, for they ſtated the loſs to have happened by capture; whereas, though the veſſel was captured, yet, having been afterwards reſtored, ſhe might have reached her deſtined port, notwithſtanding the capture, in which caſe the under-writers would have been diſcharged by the terms of the memorandum. The judge being of that opinion, and upon the laſt ground, nonſuited the plaintiffs. The caſe was very fully argued. Lord MANSFIELD, Ch. J. A loſs accrued upon the cargo in the voyage: the under-writer is ſued, and the loſs is averred in the declaration to be by capture. The fact of the caſe is, that the ſhip was taken by a Spaniſh privateer, but was afterwards reſtored, and in a condition to purſue the voyage, and was afterwards loſt in another voyage. The anſwers to this caſe are deciſive. *Firſt*, this is a wagering policy, and it is juſt the ſame as if the event inſured had been the arrival of any other ſhip at Marſeilles. The loſs or ſafe arrival of the ſhip did not alter the ſecurity. The parties were intereſted in the cargo alone, but the event inſured was the arrival of the ſhip, and not of the cargo. A neceſſary conſequence of this being a wagering policy is, that the inſured cannot abandon: but, even ſuppoſing it to be a policy on intereſt, it is enough to ſay, that in this caſe the parties never did abandon. In effect, there was only a temporary capture, and though by conſtruction a temporary capture is ſuch a loſs, as that an aſſured upon intereſt is warranted in abandoning at the time, if he pleaſe, yet we muſt conſider what the truth of the caſe was between theſe parties: now this was a wagering policy, and in ſuch caſe there can be no abandonment. But what alone is a fatal objection to the plaintiff's claim is, that they did not attempt to purſue the voyage to Marſeilles, which it was in their power to do after they left Ceuta. The circumſtance of the ſhip's having been captured and detained for a time, did not prevent her from proſecuting her voyage after ſhe was liberated; nor is it any excuſe, that the plaintiffs could no longer control her deſtination; for in wagering policies the aſſured take upon them to perform all that the owners themſelves of the veſſel could have done in the ſame ſituation. Therefore, in every point of view, the plaintiffs are precluded from recovering. WILLES, J. confined himſelf to the formal objection. It is clear that the plaintiff cannot

not recover. In the firſt place, there was certainly a deviation, for the ſhip ſet ſail for Malaga, inſtead of proceeding to Marſeilles. Secondly, The plaintiff has declared for a loſs by capture: but after the capture, the policy might ſtill have been complied with by the ſhip's going to Marſeilles; and therefore the loſs cannot be ſaid to have happened by that circumſtance. ASHHURST, J. I am of the ſame opinion with my Lord upon both points. In the firſt place, this is to be conſidered as a wagering policy; and in ſuch caſe, the party inſured takes upon himſelf to do every thing which the owners of the ſhip might have done; and they might have directed the ſhip to Marſeilles. It is alſo certain that the party inſuring a ſhip to any place muſt uſe all due diligence to further her voyage thither, which not having been done in this caſe, upon that ground alſo the nonſuit ought to ſtand. BULLER, J. It would be a ſufficient objection in this caſe, that the loſs is averred to be by capture; but as the merits have been gone into, I ſhall give my reaſons for ſupporting the nonſuit upon theſe grounds alſo. Policies of inſurance are of two ſorts; either upon intereſt, or by way of wager. Where it is upon intereſt, it has been ſolemnly determined that it is merely a contract of indemnity, and therefore ought to be ſo framed that the party can only recover in caſe of a loſs really ſuſtained, and to the preciſe amount of that loſs. My opinion at the trial was, that the parties had it in view to inſure a real intereſt, and protect themſelves by the policy. But whatever their intentions might have been, the Court is bound to look to the inſtrument, and ſee what they have done; and if they have not expreſſed their intentions upon the policy, the Court cannot help them, and they muſt remain bound by their contract. The circumſtances of this caſe are, that the plaintiffs were owners of the cargo, but were not intereſted in the ſhip. They laid out the money which is the ſubject of the inſurance in reclaiming both after a capture and condemnation; and although they were in no degree intereſted in the ſhip, yet the event which they inſured, is the ſafe arrival of the ſhip at Marſeilles. Theſe parties therefore, who were intereſted in the cargo alone, did not inſure that, but ſomething elſe with which they had no concern. The goods might all have arrived ſafe, and the ſhip have been loſt; and yet they would have been entitled to recover on this policy as for a total loſs. And on the other hand, if the ſhip had arrived, and the goods had been loſt, they could not have recovered, even though they would have really ſuſtained a damage. The policy is not adapted to the real truth of the caſe. This then is a wagering policy, and that circumſtance alone is deciſive upon the ground of merits. The caſes of wagering policies, and policies upon intereſt, have been confounded in the argument. In the latter caſe, if the voyage be loſt, it is not neceſſary for the

the aſſured to proceed on with the hulk of the ſhip; for they are at liberty to abandon; but then there muſt be an abandonment in point of fact. Therefore, in this caſe, it is enough to ſay, that even if the parties could have abandoned, they have not done it. The plaintiffs have no ground for maintaining this action, either upon the merits, or upon the formal objection.—Rule diſcharged.

Law *v.* Hollingſworth, Hil. Ter. 37 Geo. 3. E.R. 7 *Ter. Rep.* 160.

A ſhip homeward-bound to the port of London received a pilot at Orfordneſs, as directed by 5 *Geo.* 2. c. 20. and dropped him before ſhe reached her moorings in the river Thames; after which, before ſhe was ſafely moored, an accident happened, and the veſſel was ſunk: the under-writer on the ſhip and cargo was held diſcharged from his liability on account of there not being any pilot on board at that time; though it did not appear that the loſs was directly imputable to want of ſkill in thoſe who navigated the veſſel.—Action on a policy of inſurance on ſhips and goods from Stetten to London, in which the plaintiff declared upon a loſs by reaſon of the veſſel's ſinking before ſhe had been moored twenty-four hours in conſequence of an anchor's having been driven into her. It appeared that the captain had taken a pilot on board at Orfordneſs on entering the river Thames, who quitted her at Halfway Reach; after which and before ſhe had come to her moorings higher up the river the accident happened, which occaſioned the loſs, and in conſequence of which the veſſel filled with water before ſhe had been moored twenty-four hours. But the preciſe time at which the damage was ſuſtained within thoſe limits, or by what particular default, was not aſcertained. The captain had alſo left the ſhip before the time of the actual loſs. It further appeared that the pilot taken in at Orfordneſs was not properly qualified at the time according to the proviſions of the 5 *Geo.* 2. c. 20. for the regulation of pilots on the river Thames: but it did not appear that this was known to the captain; and ſince that time the pilot had received his regular qualification. The plaintiff obtained a verdict, to ſet aſide which a rule to ſhew cauſe was obtained on a former day upon two grounds; 1ſt, That the requiſitions of the ſtatute not having been complied with, the plaintiff was not entitled to recover in point of law, it being an implied condition in every policy that the ſhip ſhall be navigated according to law. 2dly, That the under-writer was diſcharged on the ground of actual negligence in the management of the ſhip, by not keeping the pilot on board till the ſhip had been moored in ſafety. Per Curiam. The principle on which this caſe muſt be determined ſeems to be admitted on all hands, namely, that *the aſſured cannot recover on a policy of aſſurance, unleſs they equip the ſhip with every thing neceſſary to her navigation during the voyage; the ſhip herſelf muſt be ſea-worthy, ſhe muſt have a ſufficient*

ficient crew, and a captain and pilot of competent ſkill. We are not bound in this caſe to decide whether or not it be neceſſary that there ſhould be on board the veſſel a pilot qualified according to the act of parliament referred to. This caſe may be diſpoſed of without deciding that queſtion. It might be contended, that if the captain had taken a pilot who repreſented himſelf to be duly qualified, and whom the captain believed to be ſo, but who in fact had not a qualification, the captain would have diſcharged his duty, and the underwriters would have been anſwerable for any loſs that had happened. But in this caſe the captain did not perform his duty; for he had no pilot on board at the time when the accident happened; and it is one of the things implied in contracts of this kind that there ſhall be ſome perſon on board the ſhip apparently qualified to navigate her. If the underwriters had been previouſly informed that there would be no pilot on board during the ſhip's ſailing up the river Thames, probably they would not have undertaken the riſk. On the ground therefore that there was no pilot on board the veſſel when the accident happened, there muſt be judgment of nonſuit.—Rule abſolute.

Upon an inſurance on ſlaves againſt perils of the ſea, their death by failure of ſufficient and ſuitable proviſion occaſioned by extraordinary delay in the voyage from bad weather is not a loſs within the policy, but a loſs by natural death which cannot be inſured againſt ſince the 30 *Geo.* 3. c. 33. ſ. 8. and 34 *Geo.* 3. c. 80.—This was an action upon a policy on the ſhip and goods at and from Liverpool to the coaſt of Africa, during her ſtay and trade there, and from thence to her port and ports of diſcharge, ſale, and final deſtination in the Weſt Indies and America, &c. The cargo conſiſted chiefly of ſlaves; and the plaintiff declared that the ſhip with her cargo, after her departure from the coaſt of Africa upon the voyage inſured, and before her arrival at any of her ports of deſtination, &c. was by tempeſtuous weather, and through the mere perils and dangers of the ſea, greatly retarded and delayed in her ſaid voyage, by reaſon whereof and from a failure and want of proper and ſufficient food and ſuſtenance for the ſaid ſlaves, occaſioned by the ſaid ſhip being in her ſaid voyage ſo delayed as aforeſaid, divers of the ſaid ſlaves became diſtempered and died; and that afterwards in the courſe of the voyage the ſhip was loſt, with the reſidue of the ſlaves and the reſt of the cargo. It appeared in evidence that the voyage was from the river Cameroon on the coaſt of Africa to Grenada; that while ſhe was at Bilbay, on the coaſt, there was a ground ſwell, by reaſon of which the ſhip ſtruck ſeveral times on the ground, and was nearly wrecked; from thenceforth ſhe became leaky, her rudder was rendered almoſt uſeleſs, and the veſſel was unmanageable. The cargo of ſlaves was reduced in the courſe of the voyage from 168 to 40 by hardſhips in the

Tatham v. Hodgſon, Ea. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 656.

the delay of the voyage, by reaſon of which the ſlaves were obliged to be fed with Indian corn, which was an improper food for them. All poſſible care had been taken to proviſion the ſhip as well with European proviſions as with ſuch as the coaſt furniſhed for the uſe of the ſlaves. But inſtead of the ordinary voyage, which is from ſix to nine weeks, they did not arrive at Barbadoes till after a voyage of ſix months and eight days. And the captain put into Barbadoes inſtead of going on to Grenada, which would have been a fail of 36 hours longer, by the advice of his officers and crew, for the preſervation of the ſurviving ſlaves, who were in a perilous condition. HEATH, J. before whom this cauſe was tried, was of opinion that the plaintiff was barred by the late ſtatutes (1) from recovering the value of the ſlaves, they having died natural deaths; but he reſerved that point for the conſideration of this Court. The jury found a verdict for the plaintiff; and the verdict was taken generally for the whole amount, the value of the ſlaves being adjuſted by conſent of both parties. On a motion to ſet the verdict aſide, the ſingle point for conſideration was, WHETHER the loſs which had happened, as far as reſpected the ſlaves, could be attributed to the perils of the ſea within the meaning of the act? PER CURIAM: This act of parliament being founded in humanity, we ought not on any account to put ſuch a conſtruction on it as to render it uſeleſs even if its expreſſions were doubtful: but no fair doubt can be raiſed on the words of it. The act prohibits the owners recovering on account of the mortality of ſlaves by natural death: but it is argued that if a captain will take a number of ſlaves diſproportioned to the quantity of proviſions on board, in conſequence of which they die, the owners ſhall notwithſtanding recover; that would repeal the act of parliament, which meant that every perſon going on this voyage ſhould find his intereſt combined with his duty, and that he ſhould take all poſſible care that the ſlaves ſhould be well fed. A captain, who knows the poſſible length of the voyage, does not diſcharge his duty, if he take an inſufficient quantity of proviſions. There was a caſe (2), where a ſhip miſtook Jamaica for Domingo, and it was decided not to be a loſs within the perils of the ſeas. In this caſe it is impoſſible to

(1) The 30 *Geo.* 3. c. 33. ſ. 8. enacts that it ſhall not be lawful for any owner of a veſſel to inſure any cargo of ſlaves againſt any loſs or damage, except the perils of the ſea, piracy, inſurrection, or capture by the king's enemies, barratry by the maſter or crew, and deſtruction by fire: and the 34 *Geo.* 3 c. 80. ſ. 10. which recites the former act, provides "That no loſs or damage ſhall be recoverable on account of the mortality "of ſlaves by natural death, or ill treatment, or againſt loſs by throwing "overboard of ſlaves on any account whatſoever," &c.

(2) Vid. *Gregſon* v. *Gilbert*, *Park* on Inſur. 69.

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decide that the plaintiff can recover, without ſaying that the ſlaves did not die natural deaths. If they had died of fevers or other illneſs occaſioned by the length of the voyage, the plaintiff certainly could not have recovered. Now the length of the voyage occaſioned the want of proviſions, and that occaſioned the illneſs of which they died: but that is a natural death within the meaning of this act of parliament. The rule for a new trial was diſcharged, the plaintiff undertaking not to include in the ſum received the value of the ſlaves that died on the voyage.

Farmer. v. Legg, Ea. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 186.

By 31 *Geo.* 3. c. 54. ſ. 7. for regulating the African ſlave trade it is neceſſary that the certificate of the captain's having ſerved as that act requires ſhould be atteſted by the owner or owners of the ſhip or ſhips in which the ſervice was performed.—This was an action on a policy of inſurance on "the *Cadiz Diſpatch*," an African ſhip engaged in the ſlave trade, "*at and from London to the coaſt of Africa, during her ſtay there, and from thence to her port of diſcharge in the Weſt Indies.*" The loſs happened in conſequence of an inſurrection of the ſlaves. The principal queſtion was, Whether the ſhip had been navigated in the manner preſcribed by the 31 *Geo.* 3. c. 54.? the 7th ſect. of which enacts, "that it ſhall not be lawful for any perſon to become a maſter, or take or have the command or charge of any ſuch ſhip or veſſel at the time he ſhall clear out from any port of Great Britain for purchaſing and carrying ſlaves from the coaſt of Africa, unleſs ſuch maſter or perſon taking or having the charge or command of any ſuch ſhip or veſſel ſhall have made oath, and delivered in to the collector or other chief officer of the cuſtoms, at the port where ſuch ſhip or veſſel ſhall clear out, *a certificate atteſted by the reſpective owner or owners* that he has already ſerved in ſuch capacity during one voyage, or ſhall have ſerved as chief mate or ſurgeon during the whole of two voyages, or either as chief or other mate during three voyages, in purchaſing and carrying ſlaves from the coaſt of Africa; under pain that ſuch maſter or other perſon taking or having the charge or command of any ſuch ſhip or veſſel, and alſo the owner or owners who ſhall hire or employ ſuch perſon, ſhall for every ſuch offence reſpectively forfeit and pay the ſum of 500l." THE QUESTION was, Whether the certificate therein required ought to be atteſted by the owner of the ſhip upon the voyage inſured, or by the owner or owners of the ſhips during the reſpective voyages out of which the qualification aroſe? In the preſent inſtance the captain had made oath that he had been two voyages as chief mate in the ſhip *Sally* engaged in the ſlave trade, and the preſent plaintiff (the owner in the voyage inſured) had certified that that was true to the beſt of his knowledge and belief. And

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Lord *Kenyon*, being of opinion at the trial that ſuch certificate did not anſwer the requiſition of the ſtatute, nonſuited the plaintiff. A rule *niſi* having been granted for ſetting aſide the nonſuit on the ground of a miſconſtruction of the act of parliament; cauſe was ſhewn againſt it.—PER CURIAM: Lord KENYON, Ch. J. The merchants in the different trading towns in this kingdom have put different conſtructions on this act; it now appears that thoſe at London and Liverpool have been divided on the ſubject, while thoſe at Briſtol have thought it neceſſary that the captain ſhould have a certificate from the owners of the ſhips in which the qualification was obtained. But it now becomes our duty, for the firſt time, to put a legal conſtruction on this act of parliament. The act was paſſed for the moſt humane purpoſes, the object of the legiſlature being to meliorate the condition of the ſlaves during the voyage; then let us conſider on the broad view of the act which of the two conſtructions will moſt probably attain that end. If the legiſlature had thought that the oath of the captain alone would have been ſufficient, they would have required nothing more; but they have ſuperadded a certificate to ſuch oath. Now a certificate *ex vi termini* imports that the party certifying knows the facts that he certifies. This is like a character of a ſervant: if you wiſh to have any information beſides the teſtimony of the ſervant himſelf, to whom would you apply? To the new maſter who is ignorant upon the ſubject, or to the maſter whom he laſt ſerved? The latter knows the fact which he certifies, but the former cannot. So here the owners of the ſhips in which the captain formerly ſerved might have certified from their own knowledge, but the owners of the ſhip in queſtion could not. It is true that the caſe is not without doubt; but after the beſt conſideration that I have been able to give, I am of opinion that the certificate which was obtained in this caſe was not ſufficient, becauſe the legiſlature meant that there ſhould be the beſt aſſurance of the captain's qualification that could reaſonably be expected, and the certificate by the new owners, who do not of themſelves know the capacity of the captain, adds no weight to the teſtimony of the captain himſelf.—ASHHURST, J. In a caſe where the words of an act of parliament are doubtful, we muſt ſee what were the miſchiefs againſt which the legiſlature meant to guard, and endeavour to find out the moſt probable means of effecting that purpoſe. It was undoubtedly the intention of the legiſlature to put a check to the miſchievous and improvident manner of carrying the ſlaves to the Weſt Indies: it was intended that the ſlaves ſhould have as much indulgence as their ſituation would permit, and for that purpoſe it was, amongſt other things, enacted, that the captain of every ſlave

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ſhip ſhould have a certain qualification gained by his experience in the trade, of which the captain is to make oath, and which oath is to be corroborated by the certificate of the owners. Now who can certify but thoſe who are ſuppoſed to be cognizant of the fact to be certified? and who are thoſe but the owners of the ſhips in which the captain has performed the ſervices out of which the qualification ariſes? It is therefore a more rational conſtruction of this act of parliament that the owners of the reſpective ſhips in which the captain has gained this qualification ſhould certify that he has ſo ſerved, than that the owners of the ſhip in which he is about to be engaged ſhould certify a fact, the truth of which they cannot know. With regard to the ſuppoſed refuſal of the former owners to certify; moſt probably they will in all caſes certify unleſs there be ſome real objection to the captain; and if there be ſuch an objection, he has no reaſon to complain.—GROSE, J. In conſidering this queſtion great doubts have occurred in my mind. We muſt decide according to the intention of the legiſlature, which is to be collected from the general object of the act, and from the particular words uſed in it. The object of it was the benefit and melioration of the ſituation of the ſlaves, as well as the benefit of the owners of the ſlave ſhips. There are different regulations in the act as applied to the ſlaves, the maſter, and the owners. For the benefit of the ſlaves and the owners, it requires that the captain ſhall be a perſon of experience in the trade; that he ſhall have either ſerved one voyage as captain, two voyages as ſurgeon, or three as chief mate; and the act ſays, that the voyage ſhall not be undertaken unleſs the captain ſhall make oath of that fact, and unleſs a certificate be obtained atteſted by the reſpective owner or owners. In ſtrict grammatical conſtruction this certificate muſt be given by the owner of the *then ſhip*, for that is the only ſhip that had been before mentioned in that clauſe: but it is abſurd to require the certificate of a perſon who cannot know the truth of any part of that which he certifies. But in order to make the clauſe intelligible, I tranſpoſe the words thus "unleſs ſuch maſter, &c. ſhall have made oath that he has already ſerved in ſuch capacity during one voyage, or ſhall have ſerved as chief mate or ſurgeon during the whole of two voyages, or either as chief or other mate during three voyages, and delivered in to the collector a certificate atteſted by the *reſpective* owner or owners;" then the whole is conſiſtent with the argument uſed on behalf of the defendant, and the word "reſpective" may be applied to the owners of the different ſhips in which the captain has ſerved. This is the conſtruction which I conceive will beſt effect the purpoſes of the legiſlature, and

will be moſt conducive to the benefit of the owners and the ſlaves. And this is ſtrengthened by conſidering, that if the legiſlature had intended that the owner of the ſhip in which the captain was about to be employed ſhould certify, they would not have inſerted the word "reſpective." On the whole therefore, though this caſe is not free from doubt, I think that this is the true conſtruction of this act of parliament.—LAWRENCE, J. My opinion has fluctuated during the courſe of this argument. The clauſe on which the queſtion ariſes is very inaccurately drawn. The argument as to the hardſhip of the caſe had great weight with me; the act is to receive the ſame conſtruction now as if the queſtion had ariſen ſoon after the paſſing of the act, and no prudence on the part of the maſter could have guarded againſt the inconvenience that has been pointed out, of the owner of the ſhip dying before the certificate could be obtained: but however we might wiſh to provide for every hardſhip that may occur, we are bound to put that conſtruction on the act that the legiſlature intended. And on the whole I am of opinion that the conſtruction that the Court has put on this act is the true one. No ſatisfactory anſwer has been given to the defendant's obſervation on the word "reſpective." For though this is a general regulation of the ſlave ſhips, the word "ſhips" in the plural number is not uſed in the prior part of this clauſe; if it had occurred, the word "reſpective" might have been referred to thoſe ſhips: but the word "ſhip" is there inſerted, and to that "reſpective" is inapplicable; but if the word "reſpective" be applied to the owners of the different ſhips in which the captain has before ſerved, then it has an appropriate meaning. Some reliance however was made by the plaintiff's counſel on the words "a certificate" in the ſingular number: but that muſt be taken with reference to every part of the ſection; for all the three atteſtations together may form but one certificate of the captain's having ſerved three voyages, in the caſe where thoſe three atteſtations are neceſſary. Then with regard to the penalty: if the plaintiff's conſtruction were to prevail the penalty could never be recovered, for the owner who was about to employ the captain would of courſe give him a certificate in order to protect himſelf from the penalty of the act, and ſuch a certificate would be no additional teſt of the captain's qualification; whereas the owners of the ſhips in which the captain has ſerved are not intereſted in giving a falſe certificate, and they have an opportunity of knowing the truth of the facts contained in the certificate. Therefore I am of opinion that the nonſuit ought not to be ſet aſide.—Rule diſcharged.

Afterwards as this was a caſe of conſiderable importance,

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it was agreed that a special verdict should be drawn up in order that a writ of error might be brought.

This was an action against the defendant as an under-writer upon a policy of insurance on a ship and cargo from Liverpool to Oporto, dated the 2d of February, 1793. On the 12th of February the insured were desirous of putting guns on board the vessel, and taking out a letter of marque for her; but a difficulty occurring to some of them, whether this would not vacate the policy, it was agreed to ask the permission of the under-writers, and a negotiation was that day set on foot for the purpose; which ended finally in a permission on the part of the under-writers to put guns on board for defence of the ship, but a peremptory denial of the liberty of taking a letter of marque. Notwithstanding which on the 15th of March a general letter of marque was obtained for the ship; with which she afterwards sailed on the 17th. The vessel was taken in the course of her voyage by a French privateer.—At the trial the jury found a verdict for the plaintiff. A rule was obtained to set the verdict aside on the ground of its being against law and evidence; the nature of the contract and of the risk having been materially altered by the circumstance of the ship's having sailed with a letter of marque; more especially as the under-writers when applied to for their consent expressly refused it in that particular.—PER CURIAM: The question turns on the intention of the parties to the contract; and therefore it is material to consider what was intended to be insured. The risk of insuring a mere trading ship is very different from that of one carrying letters of marque: the premium is certainly higher in the latter than in the former case. Now this vessel was insured merely as a trading ship from Liverpool to Oporto, and afterwards the idea first occurred of her taking in guns and carrying a letter of marque. A long correspondence ensued upon the subject between the assured and the under-writers, and the latter were pressed to agree to the proposed alteration of circumstances. The answer they made was, That they had no objection to the vessel's taking in guns, but they would on no account consent to her having a letter of marque; because they thought, and thought reasonably, that it would hold out a temptation to the captain to deviate in quest of prize. This shews plainly what was the opinion of the parties themselves upon the business. But, notwithstanding this, the assured persisted in taking out a general letter of marque without the privity and consent of the under-writers. This therefore was a direct departure from the nature of the contract, as understood between the parties. But it is alleged in answer by the plaintiff, that in truth and substance the vessel could not be considered as having a

Denison *v.* Modigliani, Ea Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 580.

letter of marque; for that not being intended to be made uſe of, and not having been acted upon in the voyage out, it was a mere dead letter. But that does not get rid of the objection, for though no uſe were made of it, yet being a general letter of marque the captain had power to make uſe of it if he pleaſed; and it certainly held out a temptation which was altogether repugnant to the nature of the contract entered into, and contrary to the profeſſed underſtanding of the contracting parties.—Rule abſolute.

Moſs *et al v.* Byrom, Tr. Ter. 35 *Geo.* 3. B. R 6 *Ter. Rep.* 379.

But when the aſſured upon a trading voyage took out a letter of marque (but without a certificate, which is neceſſary to its validity) unknown to the under-writers, ſolely with a view to encourage ſeamen to enter, and without any intention of uſing it for the purpoſe of cruizing, though the veſſel was armed for ſelf defence, this was held not ſuch an alteration of circumſtances as to avoid the policy.

Alſo if the captain, contrary to the inſtructions of his owner, cruize for and take a prize, and the veſſel is afterwards loſt in conſequence of it, it is an act of barratry, upon which the aſſured may recover againſt the under-writers, although the captain libelled the prize for the benefit of his owner as well as himſelf.

This was an action on two policies of inſurance in the common form on goods from the Bahama iſlands to Liverpool. The veſſel on board of which the goods were ſhipped belonged to one *Edward Caley*, whoſe agent chartered her to the plaintiffs for a trading voyage from Liverpool to the Bahama iſlands, and back again to Liverpool. The firſt of theſe policies was effected on the 15th of May, 1793, and the other on the 30th of October following, in conſequence of inſtructions received by one of the plaintiffs reſiding at Liverpool from the others at one of the Bahama iſlands. About the middle of May, 1793, the veſſel, then at the Bahamas, had completed her lading, and had taken in guns and ammunition for the purpoſe of defence, and was to have ſailed on the 20th of that month; but being found to be leaky ſhe was unloaded and repaired, and was completely laden again by the 14th of September following. Previous to this the aſſured endeavoured to procure ſeamen for the voyage; but could not procure any to enter, in conſequence of a notion prevailing amongſt them that the enemy had threatened to treat as pirates the crews of every veſſel who made any reſiſtance to them, unleſs they were furniſhed with letters of marque; and it was known amongſt them that this veſſel had guns on board for the purpoſe of defence. The time preſſing much for the departure of the veſſel, the plaintiffs at the Bahamas, in order to quiet the apprehenſions of the ſeamen, and induce them

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to enter, agreed to procure letters of marque, which was accordingly done; but without any intention on the part of the plaintiffs to make uſe of ſuch a commiſſion for the purpoſe of cruizing or making repriſals. And when in conſequence of this the ſeamen entered, the ſame agreement was made with them as in ordinary caſes of trading voyages. It alſo appeared that no certificate of clearance was taken out, ſuch as is required by the 33 *Geo.* 3. c. 66. ſ. 15. without which the letter of marque is declared void, and the commander ſubjected to a penalty of 1000l. for departing without it: (the taking out of theſe certificates was ſtated to have been required by previous ſtatutes in time of war, and to have been the uſage in theſe caſes). It alſo appeared to have been part of the written inſtructions of the plaintiffs to the captain before he ſailed, to proceed to Liverpool with all expedition, and deliver his cargo there agreeably to the charter-party, and the ſame was verbally repeated to him juſt before he ſailed; and no mention was made in thoſe inſtructions of the letter of marque. The veſſel was deeply laden with merchandize to the amount of about 10,000l. on account of the plaintiffs. A few days after the veſſel ſailed on her voyage homewards, the captain intimated his intention to cruize for prizes; ſome of the ſeamen objected to it, as not coming within the ſcope of their engagement; the majority of them however agreed to it, and they ſoon fell in with an American ſhip, which they boarded and plundered, and afterwards releaſed. They then cruized for ſome days longer out of the courſe of the voyage inſured, and chaſed and captured a veſſel of the enemy, which the captain ſent into Bermudas and followed there himſelf, and libelled his prize in the proper court in the name of himſelf and his owner, and ſhortly after, during his ſtay there, his own veſſel was driven on ſhore in a ſtorm, and the cargo was loſt. In the courſe of his cruizing he directed that no mention ſhould be made of it in the log book. At the trial the jury found a verdict for the plaintiffs *on the ground of a loſs by the barratry of the maſter*; to ſet aſide which a rule *niſi* was obtained on TWO OBJECTIONS: 1ſt, That this was not *barratry*. 2dly, That the taking of a letter of marque on board without the knowledge or conſent of the underwriter, varied the riſk and avoided the policy. — Lord KENYON, Ch. J. [*Groſe*, J. and *Lawrence*, J. *concurring in opinion*]: The caſe of *Deniſon* v. *Modigliani*, which was decided on principles that were new, and which went to the extreme verge, has been much preſſed upon us in the argument of the preſent caſe as deciding it: but that caſe ought not to be extended farther, and the preſent is certainly diſtinguiſhable from it. I confeſs I wiſh that caſe had appeared on a ſpecial verdict, in order that the parties might,

if they had pleaſed, have carried the record to the dernier reſort; for I underſtand that the deciſion has ſince been doubted; though on a review of that caſe I do not know that it was improperly decided. In that caſe legal letters of marque were taken out for the ſhip, and though the underwriters expreſsly refuſed their conſent, the aſſured nevertheleſs obtained them; and they could have been obtained for no other purpoſe but that of empowering the ſhip to make captures: whereas here no legal letters of marque were taken out, for it appeared that no certificate was obtained, without which the letters of marque were void, and it appeared that they were only taken out for the purpoſe of procuring ſeamen. In the one caſe, letters of marque empowering the captain to make prizes were taken out, in the other only illegal letters of marque were taken out; and therefore in this reſpect the two caſes are unlike. But it is argued that an act was done by the captain of this veſſel that put an end to the policy before any loſs happened for which the under-writers are liable, for that he ſtopped the American ſhip to take the dollars out of her: but, in anſwer, I ſay that that very act was a barratrous taking; and that, if the captain had not afterwards taken the prize, that act in itſelf was barratry in the captain, becauſe it was contrary to his duty to, and to the prejudice of, his owners, becauſe they ſtipulated by the charter-party that the ſhip ſhould ſail directly to Liverpool; and therefore they were liable to the freighters for any damage that might happen in conſequence of that deviation.—Rule diſcharged.

Adjuſtment of partial Loſſes.

Lewis *et al.* v. Rucker, Ea. Ter 1 Geo 3. B.R. 2 *Burr.* 1167.

A VALUED policy of inſurance is not to be conſidered as a wager policy.—A rule having been obtained by the plaintiffs (the inſured) for the defendant (the inſurer) to ſhew cauſe why a verdict given for the defendant ſhould not be ſet aſide, and a new trial had. THE COURT after argument took time to conſider.—And Lord MANSFIELD, Ch. J. now delivered their opinion. This was an action brought upon a policy by the plaintiffs, for Mr. *James Bourdieu*, upon the goods aboard a ſhip call d the *Vrow Martha*, at and from St. Thomas Iſland to Hamburgh, from the loading at St. Thomas Iſland, till the ſhip ſhould arrive and land the goods at Hamburgh. The goods (which conſiſted of ſugars, coffee, and indigo) were valued at 30l. *per* hogſhead, the clayed ſugars, and 20l. *per* hogſhead, the Muſcavado ſugars: and the coffee and indigo were likewiſe reſpectively valued. The ſugars were warranted free from average under 5l. *per cent.*; and all other goods, free from average under 3l. *per cent.* unleſs general, or the ſhip be ſtranded.

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In the courſe of the voyage the ſea-water got in; and when the ſhip arrived at Hamburgh, it appeared that every hogſhead of ſugar was damaged. The damage the ſugars had ſuſtained made it neceſſary to ſell them immediately; and they were accordingly ſold: and the difference between the price which they brought by reaſon of the damage, and that which they might then have ſold for at Hamburgh, if they had been ſound, was as 20l. 0s. 8d. *per* hogſhead, is to 23l. 7s. 8d. *per* hogſhead; (*i.e.* if ſound, they would have been worth 23l. 7s. 8d. *per* hogſhead; as damaged they were only worth 20l. 0s. 8d. a hogſhead). The defendant paid money into Court, by the following rule of eſtimating the damage: he paid the like proportion of the ſum at which the ſugars were *valued in the policy*, as the price of the damaged ſugars bore to ſound ſugars at Hamburgh (the port of delivery). All this was admitted at the trial; though perhaps upon an accurate computation there may be a miſtake of about 17s. upon the money paid in. But no advantage was attempted to be taken of this ſlip at the trial: it was admitted, that the money paid in was ſufficient, *if* the *rule* by which the defendant eſtimated the loſs was *right*; and the only queſtion at the trial was, "By *what* meaſure "or rule the damage (upon all the circumſtances of this "caſe) ought to be eſtimated?" To diſtinguiſh this caſe, under its *particular circumſtances*, out of any *general* rule, the plaintiff's counſel called Mr. *Samuel Chollett*, clerk to Mr. *Bourdieu*: who proved, that, upon the 15th of February (the time of the inſurance), ſugars were worth at London and Hamburgh 35l. a hogſhead; that the propoſal of a congreſs to be holden, and the expectation of a peace, had on a ſudden ſunk the price of ſugars; that before the ſhip arrived at Hamburgh, and before he could know that the ſugars had received any damage, Mr. *Bourdieu* had ſent orders, "that the ſugars ſhould be houſed at Hamburgh, and "*kept* till the price ſhould riſe above 30l. a hogſhead;" that he had many hundred hogſheads of ſugar lying at Amſterdam, to which place he ſent the like orders; that, in fact, the congreſs not taking place, ſugars aroſe 25l. *per cent*. That what he ſold of the ſugars he had at Amſterdam, brought 30l. *per* hogſhead and upwards; that he *might* have ſold theſe ſugars at the ſame price, if they had been *kept* according to his orders; and the only reaſon why they were not kept was, becauſe they were rendered periſhable from the ſea-water which had got in. Therefore, ſaid they, the neceſſity of an immediate ſale, and the conſequence thereof, ought to be *computed into the damage*. The ſpecial jury (amongſt whom there were many knowing and conſiderable merchants), found the *defendant*'s rule of eſtimation to be right, and gave their verdict for him. They underſtood the queſtion very well, and knew more of the ſub-

ject of it than any body elſe preſent; and formed their judgment from their own notions and experience, without much aſſiſtance from any thing that paſſed. No fact is diſputed: the only queſtion is, "Whether (all the facts being agreed) "the jury have eſtimated the damages by a *proper meaſure?*" To make the matter more intelligible, I will firſt ſtate the rule by which the defendant and jury have gone; and then I will examine whether the plaintiff has ſhewn a better. The defendant takes the PROPORTION of the difference between ſound and damaged at the port of delivery, and pays *that proportion* upon the *value* of the goods *ſpecified in the policy*; and has *no regard to the price in money*, which either the ſound or damaged goods bore in the port of delivery. He ſays, the proportion of the difference is *equally* the rule, whether the goods come to a *riſing* or a *falling* market. For inſtance, ſuppoſe the value in the policy 30l.—they are damaged, but ſell for 40l; if they had been ſound, they would have ſold for 50l.—the difference is a fifth: the inſurer then muſt pay a fifth of the *prime coſt*, or *value in the policy* (that is 6l.). *E converſo*;—if they come to a loſing market, and ſell for 10l. being damaged, but would have ſold for 30l. if ſound, the difference is one half: the inſurer muſt pay half the *prime coſt, or value in the policy* (that is 15l.). To this rule two objections have been made. 1ſt objection. That it is going by a *different meaſure* in the caſe of a *partial*, from that which governs in the caſe of a *total* loſs: for, upon a total loſs, the prime coſt, or value in the policy, muſt be paid. Anſwer. The diſtinction is founded in the nature of the thing. Inſurance is a contract of indemnity againſt the perils of the voyage: the inſurer engages, ſo far as the amount of the prime coſt, or value in the policy, "that the "thing ſhall come ſafe;" he has nothing to do with the market; he has no concern in any profit or loſs which may ariſe to the merchant from the goods; if they be *totally* loſt, he muſt pay the prime coſt, that is, the value of the thing he inſured at the *outſet*; he has no concern in any *ſubſequent* value. So likewiſe, if part of the cargo, capable of a ſeveral and diſtinct valuation at the outſet, be *totally* loſt; as if there be 100 hogſheads of ſugar, and ten happen to be loſt, the inſurer muſt pay the *prime* coſt of thoſe 10 hogſheads, without any regard to the price for which the other 90 may be ſold. But where an entire individual, as one hogſhead, happens to be *ſpoiled*, no meaſure can be taken from the prime coſt to aſcertain the quantity of *ſuch* damage: but if you can fix whether it be a 3d, 4th, or 5th, worſe, the damage is fixed to a mathematical certainty. How is this to be found out? Not by any price at the *outſet* port; but it muſt be at the port of *delivery*, where the voyage is completed, and the whole damage known. Whether the price there be high or low, in either caſe it *equally* ſhews whether the

the damaged goods are a third, a fourth, or a fifth, worse than if they had come sound; consequently, whether the injury sustained be a third, fourth, or fifth, of the value of the thing: and, as the insurer pays the *whole prime cost*, if the thing be *wholly lost*; so, if it be only a 3d, 4th, or 5th, *worse*, he pays a 3d, 4th, or 5th, of the *value* of the goods so *damaged*. 2d objection. The next objection with which this case has been much intangled, is taken from this being a *valued* policy. I am a little at a loss to apply the arguments drawn from thence. It is said, "that a *valued* is a "*wager* policy (like interest or no interest). if so, there can "be *no average* loss, and the insured can only recover as for "a *total*, abandoning what is saved, because the value spe-"cified is fictitious." Answ. A valued policy is *not* to be considered as a wager policy, or like "interest or no interest:" if it was, it would be void by the act of 19 *Geo.* 2. c. 37. The only effect of the valuation is *fixing the amount of the prime cost*; just as if the parties *admitted* it at the trial: but in every argument, and for every other purpose, it must be taken that the value was fixed in *such a manner* as that the insured meant only to have an indemnity. If it be under-valued, the merchant himself stands insurer of the surplus. If it be *much over-valued*, it must be done with a bad view, either to gain, contrary to the 19th of the late king, or with some view to a fraudulent loss; therefore the insured never can be allowed in a court of justice to plead that he has *greatly* over-valued, or that his interest was a *trifle* only. It is settled, "that upon valued policies, the "merchant need only prove *some* interest, to take it out of "19 *Geo.* 2. because the adverse party has *admitted* the "value; and if more was required, the agreed valuation "would signify nothing." But if it should come out in proof, that a man had insured 2000l. and had interest on board to the value of a cable only, there never has been, and I believe there never will be, a determination, that by such an *evasion* the act of parliament may be defeated. There are many conveniences from allowing valued policies; but where they are used merely as a *cover* to a wager, they would be considered as an *evasion*. The effect of the valuation is only fixing, conclusively, the prime cost. If it be an open policy, the prime cost must be proved: in a valued policy, it is *agreed*. To argue "that there can be "no adjustment of an average loss upon a valued policy," is directly contrary to the very terms of the policy itself. It is expressly subject to average, if the loss upon sugars exceed 5l. *per cent.*, if it was not, the consequence would not be, that every partial loss must thereby become total: but the event, to entitle the insured to recover, would not happen, unless there was a total loss. Consequently, the plaintiffs in this case would not be entitled to recover at all: for there is no colour

colour to ſay this was a total loſs. Beſides, the plaintiffs have taken to the goods, and ſold them. In oppoſition to the meaſure the jury have gone by, the plaintiffs contend, that they ought to be paid the whole value in the policy, upon one of two grounds. 1ſt, Becauſe the general rule of eſtimating ſhould be the difference between the price the damaged goods ſells for, and the prime coſt (or value in the policy). Here, the damaged ſold at 20l. os. 8d. per hogſhead: and the underwriter ſhould make it up 30l. Anſw. It is impoſſible this ſhould be the rule. It would involve the under-writer in the riſe or fall of the market: it would ſubject him, in ſome caſes, to pay vaſtly more than the loſs; in others, it would deprive the inſured of any ſatisfaction, though there was a leaſe. For inſtance:—Suppoſe the prime coſt or value in the policy 30l. per hogſhead; the ſugars are injured; the price of the beſt is 20l. a hogſhead; the price of the damaged is 19l. 10s.—The loſs is about a fortieth, and the inſurer would be to pay above a third. Suppoſe they come to a riſing market, and the ſound ſugars ſell for 40l. a hogſhead, and the damaged for 35l. the loſs is an eighth; yet the inſurer would be to pay nothing. The 2d ground upon which the plaintiff contends that the 30l. ſhould be made up, is, that it appears the ſugars would have ſold for that price, if the damage from the ſea-water had not made an immediate ſale neceſſary. The moment the jury brought in their verdict, I was ſatisfied that they did right, in totally diſregarding the particular circumſtances of this caſe: and I wrote a memorandum, at Guildhall, in my note-book, "that the verdict ſeemed to me to be "right." As I expected the other cauſe would be tried, I thought a good deal of the point, and endeavoured to get what aſſiſtance I could by converſing with ſome gentlemen of experience in adjuſtments. The point has now been very fully argued at the bar; and the more I have thought, the more I have heard, upon the ſubject, the more I am convinced that the jury did right to pay no regard to theſe circumſtances. The nature of the contract is, "that the goods "ſhall come ſafe to the port of delivery; or if they do not, to "indemnify the plaintiff to the amount of the prime coſt, or "value in the policy." If they arrive, but leſſened in value, through damages received at ſea, the nature of an indemnity ſpeaks demonſtrably, that it muſt be by putting the merchant in the ſame condition (relation being had to the prime coſt or value in the policy), which he would have been in if the goods had arrived free from damage; that is, by paying ſuch proportion, or aliquot part of the prime coſt, or value in the policy, as correſponds with the proportion, or aliquot part of the diminution in value occaſioned by the damage. The duty accrues upon the ſhip's arrival and landing her cargo at the port of delivery: the inſured has then a right to demand ſatisfaction. The adjuſtment never can depend upon future events

events or ſpeculations. How long are they to wait? A week, a month, or a year? In this caſe, the price roſe: but if the congreſs had taken place, or a peace had been made, the price would have fallen. The defendant did not inſure "that "there ſhould be no congreſs or peace." It is true, Mr. *Bourdieu* acted upon political ſpeculation, and ordered the ſugars to be kept till the price ſhould be 30l. or upwards: but no private ſcheme or project of trade of the inſured can affect the inſurer; he knew nothing of it. The defendant did not undertake that the ſugars ſhould bear a price of 30l. a hogſhead. If ſpeculative deſtinations of the merchant, and the ſucceſs of ſuch ſpeculations, were to be regarded, it would introduce the greateſt injuſtice and inconvenience. The underwriter knows nothing of them. The orders here were given after the ſigning of the policy. But the deciſive anſwer is, that the under-writer has nothing to do with the price; and that the right of the inſured to a ſatisfaction, where goods are damaged, ariſes immediately upon their being landed at the port of delivery. We are of opinion that the plaintiffs are not entitled to have the price for which the damaged ſugars were ſold, made up 30l. per hogſhead: and it ſeems to us as plain as any propoſition in Euclid, that the rule by which the jury have gone is the right meaſure.—The Rule muſt be diſcharged.

Inſurance free from average, unleſs general, does not extend to damage received by the goods in a ſtorm.—This was an action on the caſe brought upon a policy of inſurance, for the recovery of 56l. 19s. and 8d. *per cent.* being the damage received by a cargo of wheat on board the *Boſcawen*, inſured at and from Lancaſter to Rotterdam: which wheat was valued, by agreement, at 30s. per quarter. The policy was in the ordinary form. The premium was five guineas *per cent.* and in caſe of loſs, the aſſured to abate 2 *per cent.* And the aſſurers to be free from average under three pounds *per cent.*; unleſs general, or the ſhip ſhall be ſtranded. The policy was thus under-written—"N. B. Corn and fiſh are "warranted free from average, unleſs general, or the ſhip be "ſtranded. Sugar, tobacco, hemp, flax, hides, and ſkins, "are warranted free from average under five pounds *per* "*cent.*; and all other goods free from average under three "pounds *per cent.*; unleſs general, or the ſhip be ſtranded." The ſhip, with her cargo, being wheat belonging to the plaintiffs, ſailed from Lancaſter the 21ſt of February, 1760; and on the 22d of February met with a violent ſtorm, and was obliged to cut away and leave her cable and anchor, for the ſafety of the ſhip and cargo; and to run to Liverpool to refit; the expence of which refitting amounted to 38l. 15s. *per cent.* The hatches were not opened at Liverpool: but afterwards at Rotterdam, upon unloading the wheat, it appeared that it had received damage by the ſaid ſtorm, to the amount of 56l. 19s. 8d.

Wilſon *et al.* v. Smith, Tr. Ter. 4 Geo. 3. B.R. 3 *Burr.* 1550. 1 *Bl. Rep.* 507.

8d. *per cent.* THE QUESTION was (upon the true conſtruction and meaning of the words "free from average, unleſs general, or the ſhip be ſtranded,") "Whether the "plaintiffs could, under the circumſtances of this caſe, recover in this action, for the damage of 56l. 19s. 8d. *per cent?*" (the 38l 15s. *per cent.* not being diſputed). After two arguments the caſe was ordered to ſtand over for the opinion of the Court. And Lord MANSFIELD, Ch. J. delivered it to the following effect:—The counſel for the plaintiff have argued "That the warranty to be free from average ought "only to take place, if neither of the two ſpecified events "ſhould happen: but if either of the two ſpecified events "ſhould happen (if either the ſhip ſhould be ſtranded, or "any thing ſhould happen which created a general average), "then the warranty to be free from average was thereby diſcharged." For it was argued and inſiſted upon, by them, that the words were in the natnre of a condition. But they are not to be conſtrued as a condition, in the ſenſe that the counſel for the plaintiffs would have it underſtood. Policies of inſurance, according to their preſent form, are very irregular and confuſed: an ambiguity ariſes in them from their uſing words in different ſenſes; particularly in the uſe of this word average. It is uſed to ſignify a contribution to a general loſs: and it is alſo uſed to ſignify a particular partial loſs. Sir Henry Spelman, in his gloſſary, under the word averagium, ſays, "It is *detrimentum, quod vehendis mercibus "accidit; ut fluxio vini, frumenti corruptio, mercium in tempeſtatibus ejectio: quibus adduntur vecturæ ſumptus, & neceſſariæ aliæ impenſæ. De averagiis merciam e navibus "projectarum, diſtribuendis, vetus habetur ſtatutum, non impreſſum, cujus exemplar apud me extat.*" (For my own part, I never met with that ſtatute.) Whether it be conſidered in one or other of theſe ſenſes, it will not ſerve the turn of the plaintiffs, in the preſent caſe. For, if it here ſignifies contribution, the inſurer is to be free from contributing, unleſs where the contribution is general. If it ſignifies loſs, then plainly it is warranted free from all particular loſſes. The inſurer is liable to all loſſes ariſing from the ſhip being ſtranded, and in all caſes where there is a general average: but all other partial loſſes are excluded by the expreſs terms of the policy. The London Aſſurance Company, do, in all their policies, leave out this clauſe about the ſhip's being ſtranded; and only ſay, "Free from average unleſs general." The word "unleſs" means the ſame as "except"; and is not to be conſtrued as a condition, in the ſenſe that the counſel for the plaintiffs would put upon the word "condition." The words "free from average unleſs general," can never mean to leave the inſurers liable to any particular average. It is clear that the plaintiffs ought not to recover; and that the judgment

judgment ought to be for the defendant.—Judgment for the defendant.

The insured is entitled to receive as for a total loss, upon a mixed policy of insurance, of a peculiar sort and valued policy, if a fair one, being within the exception of stat. 19 *Geo.* 2. c. 37.—This was an action on the case, for 200l. upon an *indebitatus assumpsit*, for so much money had and received to the use of the plaintiff. *Non assumpsit* was pleaded; and issue joined. It was brought by an INSURER against an INSUREE, to recover back what he had paid him. At the trial, a case was reserved—the facts were as follow: A policy was under-written by the plaintiff; being an insurance upon any of the packet-boats that should sail from Lisbon to Falmouth, or such other port in England as his majesty should direct his packets appointed between Lisbon and England, for one whole year, commencing the 1st of October, 1763, and to continue to the 1st of October, 1764, inclusive, upon any kind of goods and merchandizes whatsoever: and it was agreed that the goods and merchandizes should be valued at the sum insured on such packet-boat, without further proof of interest than the policy; and to make no return of premium for want of interest being on bullion or goods. And in case of loss or misfortune, the insured were to be at liberty to sue, labour, and travel for, in and about the defence, safeguard, and recovery, of the said goods and merchandizes, or any part thereof, without prejudice to the insurance; to the charges whereof the insurers were to contribute, each one according to the rate and quantity of his sum insured. The consideration paid by the insured was 10l. *per cent.*; and in case of loss, they were to abate nothing. The defendant, Mr. *Michael Firth*, who was one of the insured, had an interest in bullion on board the Hanover packet, being one of the king's packets between Lisbon and Falmouth. On the 2d of December, 1763, it was totally lost off Falmouth, in a voyage between Lisbon and Falmouth; and the loss was adjusted, in writing under the policy, in the words following—"Adjusted "a loss on this policy at 100l. *per cent.*; the Hanover packet, "Captain *Sherborn*, being totally lost at Falmouth. Should "any salvage hereafter be recovered, the insured promises to "refund to the insurers whatever he may so recover in such "proportion as the sum insured bears with the whole in- "terest. London, 23d of October, 1764, for *Richard Se-* "*ward—Michael Firth.*" The insurer paid the whole money insured. In April, 1765, the iron trunk, which contained all the bullion, was fished up; and thereby all the bullion recovered, without any loss or prejudice, and delivered to the defendant. The defendant's expence of salvage amounted to 63l. 8s. 2d. And, deducting that sum for salvage, the nett proportion of his share came to 206l. 11s. 9d. The plaintiff's proportion

Da Costa v. Firth, Mic. Ter. 7 Geo. 3. B.R. 4 *Burr.* 1966.

proportion thereof, in reſpect of his ſubſcription, amounted to 48l. 4s.; which was paid into court. THE QUESTION was, "Whether the plaintiff upon this caſe was not entitled "to recover in this action." The Court agreed that this was a policy of a peculiar ſort; and within the exception of the ſtatute of 19 *Geo.* 2. c. 37. It is a mixed policy; partly, a wager-policy; partly, an open one: and it is a valued policy, and fairly ſo, without fraud or miſrepreſentation. Therefore the loſs having happened, the inſured is entitled as for a total loſs. The inſurer agreed to the value; and is concluded to diſpute it. The inſured has received the money as for a total loſs: and there is no want of conſcience in retaining it. The caſes of *Lewis et al.* v. *Rucker*, *Hamilton* v. *Mendes*, and *Goſs et al.* v. *Withers*—were only "that where the ave-"rage-loſs appears before adjuſtment, the under-writer "ſhall pay only the real damage." And the reaſon is—That the inſured muſt ſhew the whole caſe, as it then ſtood. In the preſent caſe, there was a total loſs at the time of the adjuſtment. The adjuſtment in this caſe makes an end of the queſtion. Here is a ſolemn abandonment, and a ſolid agreement "that the inſurers ſhall be content with ſalvage "in ſuch proportion as the ſum inſured bears to the whole in-"tereſt." There was a total loſs at the time of the adjuſtment; (which is the ſame as if the damages had been then recovered on an action). Here is no ſort of fraud; nor any thing that is againſt any law; and to refund more than in that proportion would be contrary to the under-writer's own agreement. Therefore the net proportion only, in reſpect of the plaintiff's ſubſcription, after deduction of ſalvage, ought to be returned to him: and that is paid into court.—Poſtea to the defendant.

Burnet *v.* Kenſington, Ea. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 210.

If an inſurance be effected on fruit, and the policy contain the uſual memorandum, "corn, fruit, &c. warranted free from average unleſs general or the ſhip be ſtranded," and the ſhip be in fact ſtranded in the courſe of the voyage, the under-writers are liable for an average loſs ariſing from the perils of the ſeas, though no part of the loſs ariſe from the act of ſtranding.—This was an action by the aſſured againſt the under-writer on a policy of inſurance on fruit on board the ſhip Commerce at and from Malaga and Velez Malaga to Plymouth and Portſmouth; in which was contained the uſual memorandum, whereby corn, fiſh, ſalt, fruit, flour, and ſeed, were warranted free from average unleſs general or the ſhip ſhould be ſtranded, &c. The plaintiff by his declaration averred that the ſhip ſet ſail for Malaga on her intended voyage, but by the perils of the ſea was ſtranded, bulged, and deſtroyed, and the goods on board were wholly loſt to the plaintiff, &c. At the trial, the jury found a verdict for the plaintiff, ſubject to the opinion of the Court on the following

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ing caſe: The plaintiff on the 15th of January, 1795, cauſed the aſſurance in queſtion to be made upon a cargo of fruit on board the ſhip Commerce. The defendant ſubſcribed the ſame for 150l. The plaintiff was intereſted in the cargo beyond the amount of the ſum inſured, and the aſſurance was effected in his name, and for his benefit. On the 30th of November, 1794, the ſhip ſailed with convoy from Malaga with her cargo conſiſting of oranges and lemons to be delivered at Portſmouth and Plymouth, and afterwards parted with her convoy in a gale of wind. On the 29th of January, 1795, in the courſe of her voyage ſhe arrived off Scilly, and between the hours of ſeven and nine on the morning of that day ſtruck upon a ſunken rock about three leagues and a half from the land of Scilly; but ſhe did not remain on the rock, but in conſequence of the ſtriking thereon ſeveral of her planks were ſtarted, and the water immediately after flowed into the hold and over the cargo, and continued to increaſe in the hold for about three hours and a half. About twelve o'clock on the ſame day the ſhip was ſtranded upon the beach at Scilly. She was ſo ſtranded by the captain under the directions of a pilot, who had come on board her from the ſhore, in order to ſave the ſhip and cargo. The ſhip continued ſome time upon the beach, during which the water again flowed in and over part of the cargo at the return of the tide. The ſhip afterwards proceeded on her voyage, and arrived at Plymouth on the 24th of February following with the greateſt part of her cargo. The cargo of fruit was very much damaged, and a ſmall part thereof left at Scilly, being entirely unfit for uſe. The ſhip received no damage in conſequence of the ſtranding. The damage ſhe received was entirely from the rock on which ſhe ſtruck: part of the damage the cargo received was occaſioned by the water flowing into the ſhip previous to her being laid on the beach, and part was occaſioned by the water that flowed in ſubſequent to the time of her being laid on the beach. But the cauſe of the water flowing in aroſe entirely from the ſhip ſtriking on the rock, and not from any miſchief done to the ſhip by the ſtranding. THE QUESTIONS were, FIRST, Whether the plaintiff were entitled to recover for all the damage received by the cargo? If he were, then the verdict was to ſtand; OR SECONDLY, Whether the plaintiff were entitled to receive for ſuch part only of the damage as was occaſioned to the cargo by the water that flowed in ſubſequent to the time of the ſhip being laid on the beach?—In that caſe a verdict was to be entered for ——l. But if the Court ſhould be of opinion that the plaintiff was not entitled to recover any thing, then a verdict was to be entered for the defendant. Lord KENYON, Ch. J. When this queſtion aroſe and was judicially decided in 1754, I wiſh, if any doubt had then

then ariſen on the opinion which was then formed by a jury of merchants under the directions of Lord Ch. J. *Ryder*, that inſtead of ſilently acquieſcing in that deciſion, the defendant had reſiſted it by a motion for a new trial, or that all the under-writers had corrected the ambiguous terms of this memorandum. But that opinion was acquieſced in by the parties to that cauſe; and it appears that the great inſurance companies in London have ſince left out the words in the memorandum "unleſs the ſhip be ſtranded." The words of this policy are in general terms, including all caſes: then comes this memorandum, "corn, fiſh, ſalt, fruit, flour, and ſeed, "warranted free from average, unleſs general or the ſhip be "ſtranded." This therefore lets in a general average; and I do not know how to conſtrue the words grammatically, but by ſaying that if the ſhip be ſtranded, then it deſtroys the exception and lets in the general words of the policy. If a general proviſion be made in any deed or inſtrument, and it is there ſaid that certain things ſhall be excepted unleſs another thing happen which gives effect to the general operation of the deed, if that other thing does happen it deſtroys the exception altogether. My two opinions that have been referred to, the one in the *niſi prius* caſe, of *Bowring* v. *Elmſley* (1), and

(1) This was an action upon a policy of aſſurance on fiſh on board the ſhip Nymph from Chaleur Bay to her port or ports of diſcharge in England, Ireland, Portugal, Spain, or Italy, warranted to ſail on or before the 20th of September, 1783. The uſual memorandum, by which fiſh, &c. was warranted free from average, unleſs general, or the ſhip were ſtranded, was added. The action was brought to recover an average loſs ſuſtained by the fiſh, the ſhip having been, as the plaintiff alleged, ſtranded; that is, ſhe was in ſuch a leaky condition that the captain and crew thought it neceſſary to run her aſhore off Malaga for their own preſervation, thinking it would be impoſſible to get her into port. For the defendant it was contended that there was no neceſſity for running the ſhip on ſhore, but that it had been done with a fraudulent intention. Secondly, that ſuppoſing the ſhip to have been unavoidably ſtranded, the greater part of the damage ſuſtained by the fiſh was occaſioned by its having been too long on board and not by any defect in or the ſtranding of the ſhip. Lord *Kenyon*, Ch. J. ſummed up thus to the jury. The queſtion in the cauſe is, Whether a partial average can be recovered? and this in the firſt place depends upon the opinion you ſhall be of with reſpect to the ſhip's having been ſtranded. I think that the ſhip being on ſhore in the manner ſhe is repreſented to have been would be a ſtranding within the meaning of the memorandum. But the doubt is, whether the running her on ſhore was done for the beſt, or in execution of a fraudulent deſign. The plaintiff's witneſſes ſtate it to have been of neceſſity; but on the other hand it appears that there was not any probable ground for apprehending ſerious danger. There were not more than five inches water in the hold, and the pumps were all in order; it was in open day, and but little wind; however it is for you to decide upon the whole of the evidence whether the captain and the crew acted *bona fide* and ran the ſhip on ſhore becauſe they really thought ſhe could not ſafely be got into Malaga. If you think that they did, then ariſes a further queſtion upon the

and the other in *Neſbitt* v. *Luſhington*, have no weight with me as judicial authorities, though I confeſs I have not been able to extricate my mind from the reaſoning that led me to the concluſion in thoſe caſes. Without enquiring into the reaſons for introducing this exception, on the grammatical conſtruction of the whole I have no doubt. But let us alſo conſider ſome of the caſes decided on this ſubject. That of *Cantillon* v. *The London Aſſurance Company* I take from a better authority than that of *Magens*; I take it from 3 *Burr. Rep.* 1553. as it was cited by Sir *F. Norton*, who being in poſſeſſion of a great portion of *niſi prius* buſineſs at that time was probably counſel in the cauſe, and who cited it in the preſence of many perſons who could have corrected him if he miſrepreſented it. Sir *F. Norton* ſtated that the ſhip being ſtranded (and not merely touching the ground as ſuppoſed by *Magens*), the inſured recovered an average loſs; for (he ſaid) Lord Ch. J. *Ryder* and a ſpecial jury conſidered it as a condition, "and that by the ſhip's being ſtranded the in-"ſurer was let in to claim his whole partial average loſs." Now that is a judicial deciſion on the very point by a ſpecial jury of merchants under the directions of a learned judge, acquieſced in at the time by every perſon, and the great aſſurance companies in London altering the form of their policies in conſequence of it. Probably the private underwriters were aware of it; but they choſe to continue their policies in the old form, in order to run away with the inſurance buſineſs from the great companies; for if they did not intend to be anſwerable for ſuch a loſs, they would have altered the terms of this memorandum. Generally ſpeaking, if I were bound to decide between the opinions of Lord *Mansfield* and Lord Ch. J. *Ryder*, perhaps I ſhould be guided by the former in preferance to the latter: but what fell from him in the caſe of *Wilſon* v. *Smith* was only an *obiter*

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the conſtruction of the memorandum at the foot of the policy. This like the policy itſelf muſt be interpreted by the uſage of merchants. [The merchants in court here ſignified to his lordſhip that there was no uſage upon the ſubject; the queſtion had not before occurred, and was now for his deciſion.] His lordſhip then obſerved that the general mode of conſtruing deeds to which there are exceptions, is to let the exception control the inſtrument as far as the words of it extend and no further; and then upon the caſe being taken out of the letter of the exception, the deed operates in full force. That agreeably to this rule it ſeemed to him that the ſtranding of the ſhip put fiſh in the ſame condition as any other commodity not mentioned in the memorandum; and the under-writers were liable for all damage ſuſtained by it; for otherwiſe there would be very conſiderable difficulty in aſcertaining how much of the loſs aroſe by the perils inſured againſt, and how much by the periſhable nature of the commodity, which was the very thing that the memorandum was intended to prevent. A verdict was given for the defendant upon the ground of the ſhip having been run on ſhore fraudulently.

dictum; and I confeſs it does not bring conviction to my mind. With regard to *Cocking* v. *Fraſer*, *Park* on inſur. 22. 129. it is ſufficient to ſay that there was no ſtranding in that caſe: what was there ſaid likewiſe was only an *obiter dictum*, and I cannot ſubſcribe to the opinion there given; it was there ſaid "if the commodity ſpecifically remains, the "under-writer is diſcharged:" but if fiſh be deteriorated by the accident of ſtranding, I take it that the under-writers would be anſwerable though the article ſpecifically remained. If it had been intended that the under-writers ſhould only be anſwerable for the damage that ariſes in conſequence of the ſtranding, a ſmall variation of expreſſion would have removed all difficulty; they would have ſaid "unleſs for loſſes "ariſing by ſtranding." But in the body of the policy they have inſured againſt all loſſes from the cauſes there enumerated, which include ſtranding; and then follows this memorandum, the evident meaning of which is "free from "average unleſs general, or unleſs the ſhip be ſtranded;" ſo that if the ſhip be ſtranded, the inſurers ſay they will be anſwerable for an average loſs. That appears to me to be the true ſenſe and the grammatical conſtruction of the policy; and thinking ſo, I am bound to give the ſame opinion I formerly gave, not becauſe I gave that opinion before, but becauſe I am convinced by the reaſoning that led to it. ASHHURST, J. This memorandum is certainly couched in doubtful words; and that being the caſe, the beſt conſtruction that can be put on them is that which will prevent litigation. As it is difficult to determine, when the ſhip has been ſtranded, whether or not the damage to the cargo aroſe from the ſtranding, or how much of the damage was owing to that cauſe, it ſeems as if this memorandum were introduced to avoid that enquiry, and that when the ſhip has been ſtranded the under-writers conſent to aſcribe the loſs to that cauſe. This conſtruction will prevent endleſs litigation, and it has already been put on the memorandum in the caſes of *Cantillon* v. *The London Aſſurance Company*, and *Neſbitt* v. *Luſhington*; and ſo well ſatisfied were the great aſſurance companies with the former of thoſe determinations that they ſtruck theſe words "or the ſhip be "ſtranded" out of their policies in conſequence of it. Then thoſe authorities having decided the point, there is now not only no reaſon to overſet them but a very ſtrong reaſon to induce us to ſupport them, namely, that this conſtruction of the policy will tend to prevent litigation. GROSE, J. This is an action for a loſs by the perils of the ſeas, for which the defendant ſays that he is not anſwerable becauſe it is an average loſs on fruit, and that fruit is within the memorandum; but the plaintiff replies that this caſe is within the exception, becauſe the ſhip was ſtranded. And that brings it to the true conſtruction of the memorandum and of the exception

ception to it, whether the under-writers be or be not liable for an average loſs when there is a ſtranding, though no part of the loſs ariſe from the ſtranding of the ſhip? I have had great difficulties in bringing my mind to decide this, becauſe the conſequence of conſidering this as an exception to the memorandum, as the words import, is this, that if a ſhip be ſtranded and the cargo ſuffers no damage whatever and afterwards the ſhip meets with bad weather and the cargo ſuſtains an average loſs of 90 *per cent.*, the under-writers are anſwerable for the whole of that average loſs when it is admitted that no part of it happened in conſequence of the ſtranding. Then it becomes neceſſary to conſider the words of the policy, the intention of the parties in introducing thoſe words, and the decided caſes. On the words no doubt can be raiſed; they are clear; the inſurers engage that certain articles, of which fruit is one, ſhall be free from average except in two caſes, one if it be a general average, the other if the ſhip be ſtranded: but if either of theſe happen, then thoſe articles are not to be free from average. Here the ſhip was ſtranded, and then according to the words this caſe comes within one of the exceptions. Next let us conſider the reaſon for introducing the exception: all the articles there enumerated are of a periſhable nature; and as it is difficult to aſcertain whether any damage happening to them aroſe from the ſtranding or from the periſhable nature of the articles, the parties ſeem to have agreed that there ſhall be no partial average unleſs the ſhip be ſtranded; that is, as was ſaid by Lord *Kenyon* in *Neſbitt* v. *Luſhington*, in order to avoid a difficult enquiry they agreed to conſider the loſs to have happened in conſequence of the ſtranding. If we were to determine that the aſſured could only recover for the loſs that happened by the ſtranding, it would introduce all that doubt and difficulty that the memorandum intended to remove. Therefore it ſeems to me beſt to decide this caſe on the plain import of the words, notwithſtanding the abſurdity which I at firſt pointed out will follow. Beſides, if the parties had intended that the inſurers ſhould not be liable to the average loſs unleſs part of the loſs happened by the ſtranding, they would have added words to this effect "unleſs part of the loſs happen by the ſtranding;" and the omiſſion of ſuch words ſtrongly induces me to determine ſtrictly according to the words that are inſerted in the memorandum. However this cauſe is not without a precedent. On examining the caſes that have been cited on both ſides, it appears that there is only one decided on the point, *Cantillon* v. *The London Aſſurance Company*; for with regard to that of *Wilſon* v. *Smith*, it is obſervable that the ſhip was not ſtranded there. But the caſe of *Cantillon* v. *The London Aſſurance Company* is the more to be relied on, becauſe the great aſſurance companies have acted upon it ever ſince.

Therefore, though I ſhould have had great doubts if the queſtion had never been determined, I think it is better to decide according to the words of the policy, eſpecially as that conſtruction is ſupported by the above caſe, though it is open to the inconvenience to which I at firſt alluded. LAWRENCE, J. Although the jury found that part of the damage happened after the ſtranding, it is alſo found as a fact that the ſhip received no damage in conſequence of the ſtranding; and if the ſhip had not been ſtranded, both the ſhip and cargo would have been totally loſt. The queſtion therefore is, Whether an average loſs is payable to any amount, however great, from whatever cauſe the loſs may ariſe, if the ſhip happen to be ſtranded? Now conſidering how extremely inaccurate a policy of inſurance is penned, I think that too great ſtreſs ought not to be laid on the preciſe words uſed in it. If the exception in the memorandum be confined to loſſes ariſing from the ſtranding, it muſt be from this conſideration, that otherwiſe it would be a temptation to the maſter to ſtrand the ſhip, if any trifling damage were done to the cargo, to enable the aſſured to recover. On the other hand, if nothing can be recovered from the inſurers but for damage ariſing from the ſtranding, it would be the intereſt of the maſter to deſert the ſhip whenever a ſtranding happened, and then there would be a total loſs. However in a caſe where the words of the policy are inaccurate, and where there are inconveniences attending each conſtruction, if the caſe has ever been decided I think that we ought to be guided by it. In the caſe of *Wilſon* v. *Smith*, which was principally relied on for the defendant, Lord *Mansfield* ſeemed to conſider that the word "unleſs" did not create a condition; but that the meaning of the exception was, that the under-writers ſhould only be liable for an average loſs in two caſes, one where there is a general average, the other where the damage ariſes from the ſtranding. But in ſo conſidering it Lord *Mansfield* went beyond the facts of the caſe then before the Court; for there the queſtion was, Whether the aſſured was entitled to recover a partial average from the circumſtance of his being entitled to recover a general average; now the words of the exception are not warranted free from average "unleſs there be a general average, or unleſs the ſhip be ſtranded;" but warranted free from average "unleſs general, or the ſhip be ſtranded;" therefore, as there is a difference in the expreſſion of theſe two exceptions, perhaps it may be conſidered as a condition as applied to the ſtranding, though it be not a condition as applied to the general average. If ſo, then there is only one authority in point, that of *Cantillon*, v. *The London Aſſurance Company*, in which caſe, according to the report of it in Burrows, it was conſidered that the ſtranding was a condition, and that the under-writers were

were liable on the happening of that condition. Therefore as the very question has been once decided, I think it ought to govern our decision in this case, especially as the question arises on the construction of an instrument so inaccurately penned as a policy of assurance.—Postea to the plaintiff.

In an action on a policy of insurance for an average loss, if the account is so complicated that it cannot be adjusted in court, the jury, by consent of the parties, may find for a total loss, the plaintiff entering into a rule to account upon oath for what part of the insured property he may recover. In this case the plaintiff had entered into such rule, and it was moved for a new trial, on the ground that the evidence did not go to a total but only to an average loss. The plaintiff was a bankrupt, and it was said, as an argument for making the rule absolute, that his assignees were not bound, and that the rule could not be inforced by attachment against them. Lord MANSFIELD said, that if the plaintiff, or his assignees, should not comply with the rule by which they undertook to account, the defendant might apply to the Court to stay execution.—Rule discharged.

Barber *v.* French, Mic. Ter. 20 Geo. 3. B.R. 1 *Doug.* 293, 294.

It was ruled by Lord *Mansfield*, Chief Justice, and agreed to be the course of practice, That upon a double insurance, though the insured is not entitled to two satisfactions; yet, upon the first action he may recover the whole sum insured, and may leave the defendant therein to recover a ratable satisfaction from the other insurers.

Newby *v.* Reed, Ea. Ter. 3 Geo. 3. B.R. 1 *Black.* 416.

The assured upon a valued policy, are entitled to recover the whole amount, though part of the cargo only be on board when the accident happens, if the rest be ready to be shipped. This was an action brought by the assured on a policy on freight, valued at fifteen hundred pounds: in fact only five hundred pounds' worth of freight was on board when the ship was driven from her moorings and lost: but goods to the amount of the rest of the freight were ready to be shipped, and were lying on the quay for that purpose at the time. Lord *Kenyon*, Chief Justice, before whom the cause was tried, told the jury, that the question for their consideration was, Whether this was a mere colourable insurance and a gaming policy, or whether it was a *bonâ fide* transaction? if the latter, the assured was entitled to recover for the whole value in the policy. The jury found the whole sum. The defendant's counsel obtained a rule for a new trial, which he afterwards abandoned, the Court being strongly of opinion against him.

Montgomery *v.* Egginton, Tr. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 362.

Abandonment.

A SHIP and goods being insured for a voyage, if the ship is taken and recaptured, and after the recapture the captain acting

Mills *v.* Fletcher, Tr. Ter. 19 Geo. 3. B.R. 1 *Doug.* 231.

acting fairly for the benefit of his employers ſells the ſhip and cargo, and thereby puts an end to the voyage, the inſured may abandon and recover as for a total loſs.—This was an action on a policy of inſurance on the ſhip the Hope and her freight from Montſerrat to London. The plaintiff went for a total loſs. The defendant inſiſted, that he was only entitled to recover for an average loſs. The jury found a verdict for a total loſs, and upon a motion for a new trial the facts of the caſe appeared to be as follows: The ſhip, when proceeding on her voyage, was captured on the 23d of May, by two American privateers, who took the captain and all the crew, and part of the cargo, which conſiſted of ſugars, out of her. The rigging was alſo taken away. She was afterwards retaken, and carried into New York, where the captain arrived on the 23d of June, and, taking poſſeſſion of her, found that part of what had been left of the cargo was waſhed overboard, that fifty-ſeven hogſheads of what remained were damaged, and that the ſhip was leaky, and in ſuch a ſtate that ſhe could not be repaired without unloading her entirely. The owners had no ſtorehouſes at New York, in which the ſugars could have been put, while the ſhip was repairing, nor any agent there to adviſe or direct the captain. No ſailors were to be had. *The only method he had of paying the ſalvage, which amounted to the value of forty hogſheads of ſugar, was by ſale of part of the cargo, or the ſhip.* The captain did not know of the inſurance. If he had repaired the ſhip, his expences would have exceeded the freight more than 100l. There was an embargo on all veſſels at New York till the 27th of December; and by the deſtination of his ſhip, ſhe was to have arrived at London in July. Under theſe circumſtances he conſulted with his friends at New York, and reſolved, upon their opinion and his own, to ſell the ſhip and cargo, as the moſt prudent ſtep for the intereſt of his employers. The cargo was accordingly ſold and paid for. The ſhip was alſo contracted for, but the perſon who had agreed to buy her ran away, and the captain left her in a creek near New York and returned to England, where he arrived in the February following, and gave the plaintiff notice of what had been done, which was the firſt information he received of it, and the plaintiff immediately claimed as for a total loſs from the under-writers, and offered to abandon. Lord MANSFIELD, Ch. J. told the jury, that if they were ſatisfied the captain had done what was beſt for the benefit of all concerned, they muſt find as for a total loſs, which they accordingly did. And upon the motion for a new trial, the unanimous opinion of the Court was delivered by Lord MANSFIELD: The great object in every branch of the law, but eſpecially in mercantile law, is certainty, and that

the grounds of deciſion ſhould be preciſely known. I took great pains in delivering the opinion of the Court in the caſes of *Goſs* v. *Withers*, and *Hamilton* v. *Mendes*. And I think that from them, the whole law between inſurers and inſured, as to the conſequences of capture and recapture, may be collected. On the trial of this cauſe it did not appear to me, that there was any queſtion of law, and no caſe was aſked for. It was impoſſible to aſk for one till the facts were aſcertained; and when they were, it would have been impoſſible to ſtate them in any way, which could have left a doubt on the law. *It was not contended that a capture neceſſarily amounts to a total loſs between inſurer and inſured; nor, on the other hand, that on a capture and recapture, there may not be a total loſs, though there remain ſome material tangible part of the ſhip and cargo.* Neither was it contended, that the captain has an arbitrary power by his act, to make the loſs either partial or total as he pleaſes. A great deal has been ſaid about what the Admiralty could, or would have done, in ſuch a caſe, in order to pay the ſalvage. As to that, if no owner appeared they would condemn the whole; but if they ſaw, from the ſhip's papers, that there was one, they would not. If there were different claimants of the ſhip and cargo, they would leave it to them to ſay, what part ſhould be ſold, and if they differed in opinion, would order the ſale of ſuch part as would be attended with the ſmalleſt loſs. *But all that is foreign to the preſent queſtion, which is ſingly this, Whether the conſequences of the capture were ſuch as, notwithſtanding the recapture, occaſioned a total obſtruction of the voyage, or only a partial one,* as in the caſe of *Hamilton* v. *Mendes?* In that caſe, and in *Goſs* v. *Withers*, great ſtreſs was laid on the ſituation of the ſhip and cargo, at the time when the inſured had notice at the time of the offer to abandon, and at the time when the action was brought. No caſes ſay, that the bare exiſtence of the hulk of the ſhip prevents the loſs being total. In *Hamilton* v. *Mendes* it is laid down, that "if the voyage s "loſt, or not worth purſuing, if the ſalvage is high, if "further expence is neceſſary, if the inſurer will not at all "events undertake to pay that expence, &c. the inſured "may abandon, notwithſtanding a recapture." Here, at the time of the capture, there were no hopes of a recovery; no friend's ſhip in ſight; no means of reſiſtance; all the crew was taken out, and part of the cargo; and the rigging alſo taken away. Afterwards the ſhip was retaken, and brought into New York. When ſhe was brought there, it ſtill continued a total loſs. Neither the inſured, nor the inſurers, had any agent in the place. The court of Admiralty muſt have proceeded *ſecundum æquum & bonum*, and might have ſold her for the benefit of thoſe concerned. When the inſured firſt had notice, and offered to abandon (which was

when the captain came to England), and when the action was brought, it was ſtill a total loſs. The voyage was abandoned, the cargo ſold, and the ſhip left to be ſold. The only anſwer the defendant makes, or can make to this is, that the loſs was total indeed, but that the captain made it ſo by his improper conduct, for that, on his taking poſſeſſion of the ſhip, the loſs became partial, and that he ought to have purſued the voyage. But is this defence true in fact? The captain, when he came to New York, had no expreſs order, but he had an implied authority from both ſides to do what was right and fit to be done, as none of them had agents in the place; and whatever it was right for him to have done, if it had been his own ſhip and cargo, the under-writer muſt anſwer for the conſequences of, becauſe this is within his contract of indemnity. Suppoſe there had been no inſurance, what ought the captain to have done? 1. As to the cargo, according to the courſe of the voyage, the ſhip ſhould have arrived at London in July. On the capture, part had been taken out, ſome was waſhed overboard, 57 hogſheads damaged, and the whole, from the leakineſs of the veſſel, in a periſhable ſtate. There were no ſtore-houſes, nor could the ſhip proceed in the ſtate ſhe was in. The crew was gone, and an embargo laid on till December. What, ſhall a cargo which was intended to arrive at London in July, be kept in a periſhable ſtate at New York, in a leaky veſſel, till December? 2. As to the ſhip, it was certainly better to ſell her than bring her to London. There was no crew belonging to her, and ſhe had no cargo. Even if all the cargo had been left, the expence of repairs would have exceeded the freight. If ſhe had been brought home, the expence of bringing her might have been more than what ſhe would have ſold for in London. It has been ſaid, that the damage would not have fallen on the under-writers; but the argument drawn from thence is a fallacy, for that circumſtance goes to determine it to be the intereſt of the inſured to abandon the voyage. The point is, What did the owner ſuffer by the capture? and it appears that he ſuffered ſo much, that it was not worth while to purſue the voyage. The whole voyage was loſt. As the captain did not know of the inſurance, he had no temptation to give the turn of the ſcale to one ſide or the other. I left it to the jury to determine, whether what the captain had done, was for the benefit of the concerned. If they had found that it was in words, where would have been the queſtion of law?—Rule diſcharged.

Hamilton *v.* Mendes, Tr. Ter. 1 Geo. 3. B.R. 2 *Burr.* 1198. 1 *Black. Rep.* 276.

On a valued policy the inſured cannot recover more than the actual loſs which happened at the time when he choſe to abandon.—This was a ſpecial caſe reſerved at Guildhall, at the ſittings there before Lord *Manſfield* after Michaelmas Term, 1760, in an action brought againſt the defendant as one

one of the inſurers, upon a policy of *inſurance* from Virginia or Maryland to London, of A SHIP *called* the Selby, and of goods and merchandize therein, until ſhe ſhall have moored at anchor 24 hours in good ſafety. The caſe ſtated for the opinion of the Court was as follows: That the ſhip Selby, mentioned in the policy, being valued at 1200l. and the plaintiff having intereſt therein, cauſed the policy in queſtion to be made; and the ſame was accordingly made, in the name of *John Mackintoſh*, on behalf and for the uſe and benefit of the plaintiff, and which was ſubſcribed by the defendant for the ſum of 100l. That the ſhip was, on the 28th of March, 1760, in good ſafety at Virginia, where ſhe took on board 192 hogſheads of tobacco, to be delivered at London. That on the ſaid 28th day of March ſhe departed and ſet ſail from Virginia for London; and on the 6th day of May following, as ſhe was ſailing and proceeding in her ſaid voyage, was taken by a French privateer called the Aurora of Bayonne. That at the time of the capture, the Selby had nine men on board; and the captain of the ſaid privateer took out ſix, beſides the captain *Dorſdill*; leaving only the mate and one man on board. That the French put a prize-maſter and ſeveral men on board the ſaid ſhip Selby to carry her to France. That as the French were carrying the ſaid ſhip Selby towards France, on the 23d day of the ſaid May, ſhe was retaken off Bayonne by the Southampton, an Engliſh man-of-war, and ſent into Plymouth, where ſhe arrived the ſixth day of June following. That the plaintiff living at Hull, as ſoon as he was informed what had befallen his ſaid ſhip the Selby, wrote a letter on the 23d day of June to his agent *John Mackintoſh*, living in London, to acquaint the defendant, "That the plaintiff did "from thenceforth ABANDON to him his intereſt in the "ſaid ſhip, as to the ſaid one hundred pounds by the de-"fendant inſured." That the ſaid *John Mackintoſh*, on the 26th day of the ſaid June, acquainted the defendant with an offer to abandon the ſhip: to which the defendant ſaid, "*He did not think himſelf bound to take to the ſhip*; but was "ready to *pay* the ſalvage and all other loſſes and charges "that the plaintiff ſuſtained by the capture." That upon the 19th day of Auguſt the ſaid ſhip Selby was brought into the port of London, by the order of the owners of the cargo and the re-captors. That the ſaid ſhip Selby *ſuſtained* no damage from the capture. That the whole cargo of the ſaid ſhip Selby was delivered to the freighters at the port of London, who paid the freight to *Benjamin Vaughan*, without prejudice. THE QUESTION was, "Whether the plaintiff, on the 26th day of June, had a "right to ABANDON, and hath a right to recover as for "a *total* loſs?" After two arguments at the bar, THE COURT took time to conſider.—AND LORD MANSFIELD, Ch. J.

Ch. J. now delivered the resolution of the Court. The plaintiff has averred in his declaration, as the basis of his demand for a *total* loss, "that by the capture, the ship be-"came wholly lost *to him.*" THE GENERAL QUESTION IS, Whether the plaintiff, who at the time of his action brought, at the time of his offer to abandon, and at the time he was first apprised of any accident having happened, had only, in truth, sustained an average loss, ought to recover for a *total* one? In support of the affirmative, the counsel for the plaintiff insisted upon the four following points: 1st, That by this capture the *property was changed*, and therefore the loss total for ever. 2dly, If the property was not changed, yet the capture was a *total* loss. 3dly, That when the ship was brought into Plymouth, particularly on the 26th of June, the recovery was not such as, in truth, *changed* the totality of the loss into an average. 4thly, Supposing it did, yet, the loss having *once* been total, a right *vested* in the insured to recover the whole upon abandoning; which right could never afterwards be *divested or taken from him* by any subsequent event. As to the *first point*: If the change of property was at all material *as between the insurer and insured*, it would not be applicable to the present case; because, by the marine law received and practised in England, there is no change of property, in case of a capture, before *condemnation:* and now, by the act of parliament, in case of a re-capture, the *jus postliminii* continues for ever. I know, many writers argue, between the insurer and insured, from the distinction, "whether the property was or "was not changed by the capture, so as to transfer a com-"plete right from the enemy *to a recaptor* or *neutral vendee*, "against the former owner." But arbitrary notions concerning the change of property by a capture, as between the former owner and a re-captor or vendee, ought never to be the rule of decision, as between the *insurer* and *insured* upon a *contract of indemnity*, contrary to the real truth of the fact. And therefore I agree with the counsel for the plaintiff, upon their second point, "that by this capture, while it "continued, the ship was *totally* lost," though it be admitted "that the property, in case of a re-capture, never "was changed, but returned to the former owner." The third point depends, as every question of this kind must, upon the *particular circumstances*. It does not *necessarily* follow, that, because there is a re-capture, therefore the loss ceases to be a total. *If* the voyage is absolutely lost, or not worth pursuing; *if* the salvage is very high; *if* further expence is necessary; *if* the insurer will not engage, in all events, to bear that expence, though it should exceed the value, or fail of success: under these and many other like circumstances, the insured may disentangle himself and abandon, *notwithstanding* there has been a re-capture. The

Guidon,

Guidon, c. 7. ſ. 1. among other deſcriptions of a total loſs, where the inſured may abandon, inſtances, "if the damage "exceeds half the value of the thing; or if the voyage be loſt; "or ſo diſturbed, that the purſuit of it is not worth the freight." But in the preſent caſe, the voyage was ſo far from being loſt, that it had only met with a ſhort *temporary* obſtruction; the ſhip and cargo were both *entirely ſafe*; the expence incurred did not amount to *near* half the value; and upon the 26th of June, when the ſhip was at Plymouth, and the offer made to abandon, the inſurer *undertook to pay all charges and expences* the plaintiff ſhould be put to by the capture. The only argument to ſhew that the loſs had not then ceaſed to be total, was built upon a miſtaken ſuppoſition, "that the "re-captor had a right to demand a *ſale*, and to put a *ſtop* "to any further proſecution of the voyage." But that is not ſo. The property *returned* to the plaintiff, pledged to the re-captors for one-eighth of the value, as ſalvage for retaking and bringing the ſhip into an Engliſh port. Upon paying this, the owner was entitled to *reſtitution:* the re-captor had *no right to ſell* the ſhip. If they differed about the value, the court of Admiralty would have ordered a commiſſion of appraiſement. In this caſe it was the *intereſt* of the owner of the ſhip, the owners of the cargo, and the re-captor, that ſhe ſhould forthwith *proceed* upon her voyage from Plymouth to London. But, had the re-captor oppoſed it, or affected delay, the court of Admiralty would have made an *order* for bringing her immediately to London, her port of delivery, upon reaſonable terms. Therefore it is moſt clear, that upon the 26th of June the ſhip had ſuſtained no other loſs by reaſon of the capture, than a *ſhort temporary obſtruction*, and a charge which the defendant had *offered to pay* and ſatisfy. This brings the whole to the fourth and laſt point. The plaintiff's demand is for an *indemnity*. His action, then, muſt be founded upon the *nature of his damnification*, as it really is, at the *time* the action is brought. It is repugnant, upon a contract of *indemnity*, to recover as for a *total* loſs, when the final event has decided, that the damnification, in truth, is an *average*, or perhaps *no* loſs at all. Whatever undoes the damnification, in whole or in part, muſt operate upon the indemnity in the *ſame degree*. It is a contradiction in terms, to bring an action for indemnity, when, upon the whole event *no* damage has been ſuſtained. This reaſoning is ſo much founded in ſenſe and the nature of the thing, that the common law of England adopts it (though inclined to ſtrictneſs). The tenant is obliged to indemnify his landlord from *waſte:* but if the tenant do, or ſuffer waſte to be done, in houſes; yet, if he *repair before any action brought*, there lies no action of waſte againſt him: but he cannot plead "*non fecit vaſtum*;" but the ſpecial matter. The ſpecial matter ſhews, that the injury

jury being repaired *before* the action brought, the plaintiff had *no cauſe* of action: and whatever takes away the *cauſe*, takes away the *action*. Suppoſe a *ſurety*, ſued to judgment; and afterwards, *before* an action brought, the principal pays the debt and coſts, and procures ſatisfaction to be acknowledged upon record: the ſurety can have no action for indemnity; becauſe he is indemnified *before* any action brought. If the demand, or cauſe of action, does not ſubſiſt *at the time* the action is brought, the having exiſted at any *former* time can be of no avail. But, in the preſent caſe, the notion of a "*veſted* right in the plaintiff, to ſue as for a "total loſs before the re-capture," is *fictitious* only, and not "founded in truth. For the inſured is not *obliged* to abandon, in *any* caſe: he has an *election*. No right can *veſt as for a total* loſs, till he has *made* that election. He cannot elect before *advice is received* of the loſs: and if that advice ſhews the peril to be *over*, and the thing in *ſafety*, he *can not elect at all*; becauſe he has no right to abandon, when the thing is *ſafe*. Writers upon the marine law are apt to embarraſs general principles, with the poſitive regulations of their own country: but they ſeem all to agree, "that if the "thing is recovered *before* the money paid, the inſured can "only be entitled according to the *final* event." *Roccius*, who collects the opinions of all the authors before his time, and draws concluſions or maxims (ſolutions of queſtions) from them, which he calls *notabilia*, in the place cited at the bar (*fo.* 204. *not.* 50.) puts this queſtion—"Aſſecurator, "qui jam ſolvit æſtimationem mercium deperditarum, ſi "poſtea dictæ merces appareant, et recuperatæ ſint, an "poſſit cogere dominum ad accipiendas illas, et ad reddendum ſibi æſtimationem, quam dedit?" The anſwer is: "Diſtingue. Aut merces, vel aliqua pars ipſarum appareant, & reſtitui poſſint, *ante ſolutionem æſtimationis*: et "tunc tenetur dominus mercium illas *recipere*, & pro illâ "parte mercium apparentium *liberabitur* aſſecurator: nam "qui tenetur ad certam quantitatem reſpectu certæ ſpeciei, "dando illam, liberatur, ut ibi probatur. Et etiam (another, perhaps a better), quia contractus aſſecurationis eſt "conditionalis; ſcilicet, *ſi* merces *deperdantur*: NON autem "dicuntur deperditæ, ſi poſtea *reperiantur*. Verum ſi merces "non appareant in illa *priſtina bonitate*, aliter fit æſtimatio; "*non in totum*, ſed *prout hinc valent*." Aut vero *poſt* ſolutam æſtimationem ab aſſecuratore, compareant merces: "& hinc erit in electione mercium aſſecurati, vel recipere "merces, vel retinere pretium." In the caſe of *Spencer* v. *Franco*, before Lord *Hardwicke* at Guildhall in 1735, though upon a wager policy, the loſs was held *not* to be total, after the return of the ſhip Prince Frederick in ſafety; though ſhe had been *ſeized and long kept* by the king of Spain, in a time of actual war. In the caſe

caſe of *Pole* v. *Fitzgerald*, though upon a wager-policy, the majority of the judges and the houſe of lords held there was *no total* loſs, the ſhip having been *reſtored* before the end of the *four months*. The preſent attempt is the firſt that ever was made to charge the inſurer as for a total loſs, upon an intereſt-policy, after the thing was recovered. And it is ſaid, the judgment in the caſe of *Goſs* v. *Withers* gave riſe to it. It is admitted, that caſe was no way ſimilar. Before that action was brought, the whole ſhip and cargo were literally loſt; at the time of the offer to abandon, a fourth of the cargo had been thrown overboard; the voyage was entirely loſt; the remainder of the cargo was fiſh periſhing, and of no value at Milford Haven, where the ſhip was brought in; the ſhip ſo ſhattered, as to want great and expenſive repairs; the ſalvage was one half, and the inſurer did not engage to be at any expence; it did not appear that it was worth while to try to ſave any thing; and the recaptor (though entitled to one half, as well as the owner of the ſhip and cargo), left the whole to periſh, rather than be at any further trouble or expence. But it is ſaid, "though "the *caſe* was entirely different, ſome part of the *reaſoning* "warranted the propoſition now inferred by the plaintiff "from it." The great principle relied upon was, "That "as between the inſurer and inſured, the contract being an "indemnity, the *truth* of the fact ought to be regarded: and "therefore there might be a total loſs by a capture, which "could not operate a change of property; and a re-capture "ſhould not relate by fiction (like the *Roman jus poſtliminii*) "as if the capture had never happened, *unleſs* the loſs was "in truth recovered." This reaſoning proved *è converſo*, that if the thing, *in truth*, *was ſafe*, no artificial reaſoning ſhall be allowed to ſet up a total loſs. The *words* quoted at the bar were certainly uſed, "That there is no book, an-"cient or modern, which does not ſay, *That in caſe of the* "*ſhip being taken, the inſured may demand as for a total loſs,* "*and abandon.*" But the propoſition was *applied* to the ſubject-matter; and is certainly true, provided the capture, or the total loſs occaſioned thereby, *continue to the time of abandoning and bringing the action.* The caſe *then* before the Court did not make it neceſſary to *ſpecify all the reſtrictions.* But I will read to you, *verbatim*, from my notes of the judgment then delivered, what was ſaid; to prevent any inference being drawn beyond the caſe then determined. I ſaid: "In queſtions upon policies, the nature of the con-"tract, as an indemnity and nothing elſe, is always liberally "conſidered. There may be circumſtances under which a "capture would be but a *ſmall* temporary hindrance to the "voyage, perhaps *none* at all: as if a ſhip was taken, and "*in a few days eſcaped entirely*, and purſued her voyage.

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" There are circumſtances under which it would be deemed " an average-loſs: as if a ſhip ſhould be taken, and after- " wards ranſomed." And in another part, I ſaid—" I know " in later times, the privilege of abandoning has been re- " ſtrained. But there is no danger in the preſent caſe: the " loſs was total at the time it happened: it continued total, " as to the deſtruction of the voyage; a moiety muſt be paid " for ſalvage, beſides other great coſts and expences: what " could be ſaved of the goods might not be worth the freight, " for ſo much of the voyage as they had gone when they were " taken: the cargo, from its periſhable nature, muſt have been " ſold or thrown away where it was brought in: the ſhip, in " ſo ſhattered a condition as might make it only worth the " materials, to be ſold."—And more to the ſame effect. From this way of reaſoning, it did by no means follow, that if the ſhip and cargo had, by the re-capture, been brought ſafe to the port of delivery, without having ſuſtained any damage at all, that the inſured might abandon. But, without dwelling longer upon principles or authorities, the conſequences of the preſent queſtion are deciſive. It is impoſſible that any man ſhould deſire to abandon in a caſe circumſtanced like the preſent, but for one of two reaſons; viz. either becauſe he has over-valued; or becauſe the market has fallen below the original price. The only reaſons which can make it the intereſt of the party to deſire, are concluſive againſt allowing it. It is unjuſt to turn the fall of the market upon the inſurer; who has no concern in it, and who could never gain by the riſe. And an over-valuation is contrary to the general policy of the marine law; contrary to the ſpirit of the act of 19 *Geo.* 2.; a temptation to fraud; and a ſource of great abuſe: therefore no man ſhould be allowed to avail himſelf of having over-valued. If the valuation be true, the plaintiff is indemnified by being paid the charge he has been put to by the capture. If he has over-valued, he will be a gainer if he is permitted to abandon: and he can only deſire it, becauſe he has over-valued. This was avowed upon the firſt argument: and that very reaſon is concluſive againſt its being allowed. The inſurer, by the marine law, ought never to pay leſs, upon a contract of indemnity, than the value of the loſs: and the inſured ought never to gain more. Therefore if there was occaſion to reſort to that argument, the conſequence of the determination would alone be ſufficient upon the preſent occaſion. But, upon principles, this action could not be maintained as for a total loſs, if the queſtion was to be judged by the ſtricteſt rules of common law: much leſs can it be ſupported for a total loſs, as the queſtion ought to be decided, by the large principles of the marine law, according to the ſubſtantial intent of the contract, and the real truth of the fact. The daily negociations

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and property of merchants ought not to depend upon ſubtleties and niceties; but upon rules, eaſily learned and eaſily retained, becauſe they are the dictates of common ſenſe, drawn from the truth of the caſe. If the queſtion is to depend upon the fact, every man can judge of the nature of the loſs, before the money is paid: but if it is to depend upon ſpeculative refinements, from the law of nations, or the Roman *jus poſtliminii* concerning the change or re-veſting of property; no wonder merchants are in the dark, when doctors have differed upon the ſubject, from the beginning, and are not yet agreed. To obviate too large an inference being drawn from this determination, I deſire it may be underſtood, that the point here determined is, "That the plaintiff, upon a policy, "can only recover an indemnity according to the nature of "his caſe at the time of the action brought, or (at moſt) at "the time of his offer to abandon." We give no opinion, how it would be, in caſe the ſhip or goods be reſtored in ſafety, between the offer to abandon, and the action brought; or between the commencement of the action, and the verdict. And particularly I deſire, that no inference may be drawn, "that in caſe the ſhip or goods ſhould be reſtored after the "money paid as for a total loſs, the inſurer could compel the "inſured to refund the money, and take the ſhip or goods;" that caſe is totally different from the preſent, and depends, throughout, upon different reaſons and principles. Here, the event had fixed the loſs to be an average only, before the action brought; before the offer to abandon; and before the plaintiff had notice of any accident; conſequently before he could make an election. Therefore, under theſe circumſtances, we are of opinion, "that he cannot recover for a "total, but for an average loſs only;" the quantity of which is eſtimated and aſcertained by the jury.—The judgment muſt be entered up as for the average-loſs ſtated in the caſe.

Owners of ſhips are not entitled to abandon, unleſs at ſome period of the voyage there has been a total loſs. And where the jury have found only an average loſs occaſioned by the perils of the ſea, the Court are precluded from ſaying there has been a total loſs.—This was an action on a policy of inſurance upon the ſhip Friendſhip from Wyberg to Lynn, ſubſcribed by the defendant for the ſum of 100l. at two guineas *per cent.* The defendant pleaded a tender of 48l. which ſum was paid into court. On the trial of the cauſe the following caſe was reſerved for the opinion of the Court: "The "defendant under-wrote the policy. The damages ſuſtained "by the ſhip in the voyage inſured do not exceed 48l. *per* "*cent.* which ſum the defendant hath paid into court. When "the ſhip arrived at the port of Lynn ſhe was not worth re"pairing." THE QUESTION was, WHETHER the plaintiffs had a right to abandon? And two points were made,

Cazalet *et al.* *v.* St. Barbe, Ea. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 187.

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Firſt, That though a ſhip has gained her deſtined port, yet, if upon her arrival, ſhe is ſo much damaged as to be unfit for future ſervice, and not worth repairing, the inſured may abandon, as in caſe of a total loſs. Secondly, That under the circumſtances of this caſe the plaintiffs had a right to abandon as for a total loſs. WILLES, J. The queſtion is, Whether under theſe circumſtances the plaintiff had a right to abandon; or, in other words, whether the plaintiff can turn a partial into a total loſs? The finding of the jury in this caſe determines the queſtion, becauſe it is expreſsly found that the damage did not exceed 48l. *per cent.* The caſe then ſtates that the ſhip was not worth repairing, but no mention is made of what was her real worth; ſo that the remaining materials of the ſhip, if ſold, may make up the difference between 48l. and 100l. *per cent.* There has been no loſs either of the ſhip or of the voyage; but, being an old ſhip, ſhe ſuffered ſo much that ſhe was not worth repairing. I cannot now determine that there has been a total loſs, when the jury have already ſaid that there was only a loſs of 48l. *per cent.* ASHHURST, J. The facts found in this caſe preclude any queſtion, whether this can be conſtrued to be a total loſs. If the inſurers ſhould be held liable here, it would be making them inſure the goodneſs of the ſhip; and if the owners can recover as for a total loſs in this caſe, they might equally have recovered on account of the bad condition of the veſſel, though ſhe had not received much damage at ſea. It is not ſtated that this ſhip received her death's wound in the courſe of her voyage. When ſhe came into port it was found that ſhe was not worth repairing; but *non conſtat* that if ſhe had not received any damage during her voyage, ſhe would have been worth repairing. And though the veſſel was not in a ſound ſtate, yet ſhe had arrived in ſafety twenty-four hours; and the jury having exactly defined what degree of damage ſhe had ſuſtained, we cannot ſay that the plaintiffs ought to recover any more. BULLER, J. Nothing can be better eſtabliſhed than that the owner of a ſhip can only abandon in the caſe of a total loſs. But there is no inſtance where the owner can abandon, unleſs at ſome period or other of the voyage there has been a total loſs. No ſuch event has happened here: for the jury have expreſsly found that the loſs amounted only to 48l. *per cent.* Even allowing total loſs to be a technical expreſſion, yet the manner in which the plaintiff's counſel have ſtated it is rather too broad. It has been ſaid, that the inſurance muſt be taken to be on the ſhip as well as on the voyage: but the true way of conſidering it is this, it is an inſurance on the ſhip for the voyage. If either the ſhip or the voyage be loſt, that is a total loſs; but here neither is loſt. The caſe of *Hamilton* and *Mendez* is deciſive.—Judgment for the defendant.

A policy

A policy of aſſurance on a ſhip and ſtores "at and from "a port" in a foreign country, in the common form againſt arreſts of princes, people, &c. extends to an embargo laid on by the government of that country in the loading port. And if the embargo continue, the aſſured may abandon and recover as for a total loſs.—This action was brought to recover a loſs upon three ſeveral policies of inſurance, under-written by the defendant in November, 1792: the firſt for 100l. on one half the Adelaide, her ſtores, boats, proviſions, and fiſhing materials, valued at 1000l.; the ſecond for 100l. on one half the Adele, her ſtores, boats, proviſions, and fiſhing materials, valued at 1200l.; and the laſt for 150l. on one half the Victor, her ſtores, boats, fiſhing materials, valued at l. The inſurance both upon the Adelaide and Victor was at and from l'Orient, upon the Adele at and from and after her arrival at l'Orient; and on each of the three to all ports, ſeas, and places whatever beyond and on this ſide the capes of Good Hope and Horn on the ſouthern whale and ſeal fiſhery and trade, and until the ſhip's ſafe arrival back at l'Orient, with liberty to trade or take freight without prejudice to the inſurance, at a premium of 10 guineas *per cent.* ſubject to a return of 3l. *per cent.* if the ſhips ſhould arrive back at l'Orient within fourteen months from the time of ſailing. The policies were in the uſual printed form; inſuring (amongſt other perils) againſt *arreſts, reſtraints, and detainments, of all kings, princes, and people, of what nation, condition, or quality ſoever*, and againſt all other perils, loſſes, and misfortunes that ſhould come to the hurt, detriment, or damage of the ſaid ſhips. The declaration ſtated the loſſes to have happened by the ſhips and their ſtores, boats, &c. being by the authority of certain perſons exerciſing the powers of government there (that is, at Port Louis with reſpect to the Adelaide, and at l'Orient with reſpect to the two others), arreſted and reſtrained from further proſecuting their voyages; and that they had from thence hitherto been detained and prevented therefrom under and by virtue of ſuch reſtraint. The defendant pleaded the general iſſue, and paid the premiums into court. On the trial of the cauſe the jury found a verdict for the plaintiff, ſubject to the opinion of this Court on the following caſe. The defendant ſubſcribed the policies on the ſhips Adelaide, Victor, and Adele, in the declaration mentioned. The policies were effected by *Gairn, Young*, and Co. agents for the plaintiff in purſuance of orders for that purpoſe. The plaintiff and *J. J. Berard*, of l'Orient, in France, had each a half-concern and intereſt in the ſhips and their ſtores; and the plaintiff's intereſt in the Victor where the policy is not a valued one exceeded the money inſured upon it. The Adelaide ſailed from the port of l'Orient on the voyage inſured on the 27th of January, 1793, and through ſtreſs of

Rotch v. Edie, Mic. Ter. 36 Geo. 3. B R. 6 *Ter. Rep.* 413.

weather returned back, and put into port Louis, diſtant about two miles from l'Orient. Whilſt ſhe was lying at port Louis, and whilſt the ſhips Victor and Adele were preparing for the voyages in the policies mentioned, and before the uſual and neceſſary paſſports and clearances for the two laſt ſhips were obtained, viz. on the 5th of February, 1793, an embargo was laid on all French veſſels in the ports of l'Orient and Louis by the judge of the admiralty court at l'Orient, by virtue of and in obedience to a letter received by him from the miniſter of the French marine dated Paris, the 30th of January, 1793. The ſhip Adelaide was on the 12th of February brought by the order of *J. J. Berard* and the plaintiff from port Louis to l'Orient, and ſuch part of the ſtores of the ſaid veſſel as was periſhable was ſold at l'Orient by virtue of an order afterwards obtained for that purpoſe by the plaintiff and *J. J. Berard* from the commercial court of l'Orient. And the three veſſels and the remainder of the ſtores now remain at l'Orient. The Adele and Victor were ready for ſea when the embargo arrived. The Adele had finiſhed her coppering about the middle of January; and her water and boats were on board, and every thing elſe provided for the voyage and in the magazines. Every thing (except proviſions and ſome trifling ſtores) was on board the Adele and Victor, and thoſe proviſions and ſtores were actually provided and in the magazine cloſe to the ſea, and the crews were provided and had ſigned their names to the muſter roll previous to the embargo. When the ſhips were ſtopped by the embargo, and the mariners ſaw no proſpect of getting out upon their deſtined voyages, they left the ſhips. The Adele and Victor had entered outwards for the voyages inſured before the embargo came. The embargo alone prevented the ſhips ſailing, as in conſequence thereof the clearances and paſſports were not granted. The embargo remained in force upon all ſhips in the port of l'Orient and port Louis till the 18th of March, 1793, and has ever ſince that time continued in force upon all ſhips deſtined for long voyages; and no ſhips have been yet permitted to ſail but ſuch as were employed in the ſervice of the government, or ſuch as were engaged upon ſhort coaſting voyages. The ſtores continued to be put on board until the 11th of February; notice of abandonment was given to the under-writers on the 26th of February, 1793, and a total loſs claimed by the inſured; and the like notice and claim were repeated in Auguſt, 1793. The plaintiff offered to ſell the ſhips, and make the moſt of the property for the benefit of the inſurers. The plaintiff is a native of the iſland of Nantucket, in North America, and formerly reſided for ſeveral years in London, but for ſome years previous to the inſurances in queſtion the plaintiff dwelt at l'Orient, in France, and was jointly concerned in the ſouthern whale

fiſhery

fishery with Mr. *Berard*, who is a native of France, resident at l'Orient, and whose interest in the ships was insured by separate policies effected by *Herries* and *Co.* his separate agents. The plaintiff shortly before making his insurances came to England, and returned to France previous to the commencement of hostilities with Great Britain, and having remained there about four months returned again to England, and has resided in England ever since. It was argued for the plaintiff, First, That the plaintiff being a neutral subject has a right to recover his separate share insured against the underwriter, although connected in trade with a subject of France; and therefore does not fall within the prohibition which has been laid down by the Court in several late cases (1). Secondly, That the loss fell expressly within the words of the policy by which the ship is insured "at and from l'Orient, "against the arrest and detainment of princes, &c." And THE QUESTION was, Whether a detainment in the loading port is an exception implied in the nature of the contract? Lord KENYON, Ch. J. The plaintiff in this case is not under any disability to sue in an English court of justice; he is not an alien enemy, but a native of America, now resident in this country; and being the owner of a moiety of certain ships in a port of France, applied to some under-writers in this country to insure that property; the policies were effected, by which the under-writers engaged to indemnify him against certain enumerated perils, among which is that of "*arrests*, "*restraints, and detainments, of all kings, princes, and peo-*"*ple, of what nation, condition, or quality soever*;" and the insurance is "at and from l'Orient." The ships which were in the port of l'Orient at the time of the insurance have been detained there ever since, two or three years; on which the plaintiff says that he has lost his voyage and the use of his ships, and he desires to abandon to the under-writer, and to recover as for a total loss. He is now told that detention is not within the risks of the policy: but this answer is built on artificial reasoning only. Without being incumbered with foreign ordinances and foreign books, I am utterly at a loss to conceive where the difficulty lies. The plaintiff has in fact lost the voyage; the ships have been detained either by kings, princes, or people, the governing power of the country where she is; and the plaintiff now applies under the contract of indemnity made with the defendant to recover a satisfaction for the injury which he has actually received. In *Goss* v. *Withers*, 2 *Bur.* 696. Lord MANSFIELD said that the assured may abandon and recover as for a total loss in *the case of an arrest on an embargo by a prince not*

(1) *Brandon* v. *Nesbitt*, *ante*, vol. I. 570. *Briscow* v. *Towers*, *ante*, vol. I. p. 571.

an enemy. It ſeems therefore impoſſible to decide this caſe in favour of the defendant in oppoſition to all theſe authorities, and to the plain and obvious meaning of the words of the policy. The defendant's argument would extend much beyond this preciſe caſe; for according to that if a ſhip were loading in a foreign port and captured there as a prize on a declaration of war, the under-writers would not be reſponſible; which is abſurd: many other inſtances of the ſame kind might be put, to ſhew the fallacy of that argument. The words of the policy are in favour of the plaintiff; and the opinions of eminent lawyers in this country and of foreign writers all lead to the ſame concluſion, namely, that this is a loſs within the meaning of the policy, which extends to loſſes in general, and without exception, in the loading port; and therefore the defendant is bound to make good that loſs. ASHHURST J. The very words of the policy are ſufficiently extenſive to include this caſe; and the parties muſt be governed by their general meaning, unleſs they can ſhew ſome law or ſome uſage to reſtrain their general operation. GROSE J. It has been argued, on behalf of the defendant, that an embargo at the loading port is not a riſk within the meaning of the policy; in anſwer to which I refer to the words of the policy, which are "at and from." The engagement by the aſſurer too is againſt arreſts, reſtraints, and detainments, by kings, princes, and people; and that, which has happened in this caſe, comes directly within the words and meaning of the policy. If ſo, then let us conſider what there is on the ſcore of policy and good ſenſe to prevent the plaintiff's recovering. It has been ſaid, that the words of the policy are levelled at the hoſtile operations of a foreign ſtate: but the plaintiff is in this reſpect in the ſame ſituation as an Engliſhman; and France, as far as reſpects him, is a foreign ſtate; and it might equally be contended by the defendant that a capture by a French ſhip would not have been protected by this inſurance. Then it was ſaid that the plaintiff ought not to recover becauſe he was entided to an indemnity by the ſtate of France: but if the fact were ſo, it would be no anſwer to an action on this contract. Laſtly, it was argued that there was no loſs on the ſubject-matter of the inſurance, and that therefore the plaintiff could not abandon: the ſame anſwer may ſuffice for both theſe points; the fact is againſt them, for it is ſtated that the ſhip has been detained in port two or three years; and the paſſage cited from *Goſs* v. *Withers* ſeems deciſive on this head. There Lord *Mansfield* ſaid "I cannot find a ſingle book ancient or modern, which "does not ſay that, in caſe of the ſhip being taken, the in-"ſured may demand as for a total loſs and abandon." And his lordſhip's reaſoning particularly applies to the facts of this caſe; "and what proves the propoſition moſt ſtrongly is that "by the general law he may abandon in the caſe merely of an

"arreſt

" arreſt on an embargo by a prince not an enemy." Now that paſſage ſeems to prove all the points neceſſary to be eſtabliſhed by the plaintiff in this caſe, except that it does not expreſsly mention an embargo at the loading port: but that is (I think) equivalent to a loſs in any other place, it being equally within the words and meaning of the policy. LAWRENCE J. Four objections have been taken on the part of the defendant; 1ſt, It was contended that an embargo at the loading port is not a riſk within the meaning of the policy; 2dly, If it be, that an inſurance on the ſhip will not cover this loſs; 3dly, That the particular ſituation of the parties will prevent the plaintiff's recovery, becauſe he cannot abandon the ſhip ſo as to enable him to call on the underwriters; and 4thly, That the plaintiff ought not to be permitted to recover, on the principle on which the caſe of *Foſter* v. *Thackeray* was determined. With regard to the firſt, undoubtedly the terms of the policy are ſufficienly large to extend to this caſe; and therefore the defendant ſhould not content himſelf with ſaying that there is no determination in which it has been held that the common policy extends to this loſs; it was incumbent on him to produce ſome caſe wherein it was decided that this did not come within the policy: but it is admitted that there is no ſuch deciſion. Then as the words of the policy are large enough to cover this demand, and as according to the opinions of the writers on this ſubject thoſe words are uſed in their general ſignification, there is no reaſon why they ſhould not have that effect, and why the defendant ſhould not be anſwerable to the plaintiff. In ſupport of the ſecond objection, *Robertſon* v. *Ewer*, *ante*, p. 270, has been relied on: but that caſe does not apply to the preſent; for that was an inſurance on the ſhip, and the only point determined was that the policy did not include ſeamen's wages or proviſions. But here the policy is on the ſhip, boats, ſtores, proviſions, and fiſhing tackle, which are all loſt to the plaintiff. And if the voyage be defeated, it is the ſame thing for this purpoſe as if the ſhip be loſt; it was ſo ſaid in *Goſs* v. *Withers*. The third objection is equally deſtitute of foundation, becauſe the plaintiff is as much in a ſituation to entitle him to abandon as in the caſe of a capture by an enemy. As to the laſt objection, that it will be impolitic to enforce this contract, becauſe by this mean we ſhall be indemnifying the ſubjects of France, for that this muſt be conſidered equal to an inſurance on enemy's property; it muſt be remembered that this action is brought by a neutral, not by a Frenchman; had it been brought by a Frenchman, the caſes of *Brandon* v. *Neſbit* and *Briſtow* v. *Towers* would have furniſhed a deciſive anſwer to it. Both thoſe caſes are not applicable here; and the conſequence of allowing this objection would be that it

would be illegal to inſure the property of a neutral in a foreign port. And as to this being againſt the policy of other countries, we cannot take that into conſideration; in a caſe reported in *Cowper* (1), Lord *Mansfield* ſaid one country does not take notice of the policy or revenue laws of another.—Poſtea to the plaintiff.

Mitchell *et al.* v. Edie, Hil. Ter. 27 Geo. 3. B.R. 1 *Ter. Rep.* 608.

When the aſſured receive intelligence of ſuch a loſs as entitles them to abandon, they muſt make their election in the firſt inſtance; and if they abandon, they muſt give the under-writers notice in a reaſonable time, otherwiſe they waive their right to abandon, and can only recover as for an average loſs.—On a motion for a new trial in an action on a policy of inſurance on goods on board the ſhip Lady Mansfield "from Jamaica to London;" and in which the defendant had paid into court a ſum of money on account of an average loſs; the following facts were reported: the ſhip was captured in the courſe of her voyage by an American privateer, and a few days afterwards the captor, having ſtripped her of her ſtores, and part of her rigging, and having taken out ſome of the hands, ſet her at liberty. There was a clauſe in the policy to exempt the under-writers from average loſſes under 3l. *per cent.* And the part of her cargo taken out did not amount to that ſum. In conſequence of this loſs of part of the crew, it became impoſſible for the ſhip to purſue her voyage, and ſhe was obliged to bear away to Charles Town, where ſhe arrived on the 18th of February, 1782. She was there put into the hands of one *Cruden*, who was a part owner in the ſhip, and had likewiſe been engaged with one of the plaintiffs in former tranſactions. *Cruden* in June, 1782, ſold the cargo and received the whole profits of the ſale, but remitted home no part of them. In his books he had given the under-writers credit for the amount. At the time of the ſale he was in bad circumſtances, and afterwards became inſolvent. In June, 1783, *Cruden* came to England, and ſeveral applications were made to him on the part of the plaintiffs by *Abel*, who had concerns with the plaintiffs as well as with *Cruden*, and who ſaid at the trial, that the plaintiffs had looked to *Cruden* for payment for two or three years; during all which time no notice of abandonment had been given by the plaintiffs to the under-writers. The judge then ſtated, that THE FIRST QUESTION which had been made was, Whether the plaintiffs were entitled to recover as for a total loſs? *And as to this he was of opinion, that as there had been a capture which for a time had occaſioned a total loſs, the owners had*

(1) Vid. *Holman* v. *Johnſon*, *Cowp.* 343, *ante*, vol. I. 269.

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the option to abandon or not as they pleaſed; but if they choſe to abandon, they ought to have done it immediately upon receiving intelligence of the loſs; and that as they had not done ſo, but had looked to Cruden *as their agent for payment, he was of opinion that they had waived their right to abandon, and could only recover as for an average loſs.* Another queſtion was then made, how far the plaintiffs were entitled to an average loſs above the ſum paid into court, which amounted to the difference between the produce of the ſales at Charles Town and the invoice? As to which, the plaintiffs contended that they were entitled to recover from the under-writers a charge of 5l. *per cent.* commiſſion on ſelling at Charles Town, and 5l. *per cent.* more for remitting. That it had been referred to one of the jurymen to conſider what was due for average, who had awarded that nothing was due.—Ashhurst, J. Two queſtions have been made in this caſe. 1ſt, Whether the plaintiffs are entitled, under theſe circumſtances, to recover as for a total loſs? Secondly, Whether, under the reference to the arbitrator, he has done right in awarding that nothing is due to the plaintiffs? As to the firſt, I apprehend that the general rule is, that where any part of the property inſured has been ſaved, the aſſured cannot recover as for a total loſs, unleſs he make his election to abandon, and give reaſonable notice to the under-writer of his intention. But it is contended, that the aſſured never waive their right to abandon, while they are managing in the beſt manner they can for the benefit of all concerned; and that argument is grounded on the common clauſe inſerted in every policy, whereby he is authorized "to ſue, "labour, and travail, without prejudice to the inſurance." Now this clauſe does not in my apprehenſion warrant the poſition in ſo large an extent as it is contended for. It ſeems to me that the meaning of that clauſe is, that till the aſſured have been informed of what has happened, and have had an opportunity of exerciſing their own judgment, no act done by the maſter ſhall prejudice their right of abandonment. And that is reaſonable; becauſe, in general, the parties live in this country, and the loſs may happen at a great diſtance, ſo that they cannot exerciſe their judgment immediately; it is therefore neceſſary that the maſter, who is on the ſpot, ſhould do the beſt he can. But I think that the aſſured are bound to decide, and ſignify their election to the under-writers, whether they will abandon or not, the firſt opportunity; and for this reaſon; that though the perſon, who takes upon him to act on the occaſion for the benefit of all concerned, is not the agent of the aſſured, yet if, upon receiving notice of the loſs, they do not elect to abandon to the under-writers, then they adopt the acts of ſuch perſon,

and make him their agent. This is ſomething like the notice which is neceſſary to be given to the drawer of a bill of exchange, in caſe of non-payment, which if the holder omit to do, he is conſidered as giving credit to the acceptor, and therefore the loſs, if any, muſt fall on him. There may be caſes where the previous acts of the maſter may not make him the agent of either party, and he only acts in common for them both, till notice is received by the parties at home. If after ſuch notice he is continued in his agency, he becomes the agent of the party by whom he is ſo confirmed; but he cannot be conſidered as the agent for the underwriters, till notice has been given to them, and they have had an opportunity of exerciſing their diſcretion, whether they will or will not continue him; though, till notice of the loſs was firſt received by the aſſured, the property continued at the riſk of the under-writers, Here it is plain, that during the courſe of near three years *Cruden* was conſidered by the aſſured as their agent; credit was given to him in that character; frequent applications were made to him for payment; and till his inſolvency, there was no appearance of any intention to diſown him; that was the firſt moment when the aſſured thought of abandoning. As to the ſecond ground of objection: the reference to the arbitrator was to determine *what* was due for average. Now, ſuppoſing that, inſtead of ſaying that nothing was due, he had ſaid that 4l. 5s. *per cent.* was due; it could not have been contended that he had done wrong. This is preciſely the ſame thing; for ſo much has already been paid into court; and there is nothing more due. This is right in ſubſtance; and there ſeems to be no ground for the Court to grant a new trial for this inaccuracy in point of form; eſpecially when they ſee that ſtrict juſtice has been done between the parties.—BULLER, J. agreed. The only queſtion which is of general conſequence is, Whether the owners are entitled to recover as for a total loſs? It is true that the owners are not bound to abandon; there never was a caſe which determined that they were; on the contrary, all the caſes have ſaid that where they are entitled to abandon, if any part of the property exiſts, they have the option whether they will abandon it or not. A total loſs is of two ſorts: one, where in fact the whole of the property periſhes; the other, where the property exiſts, but the voyage is loſt, or the expence of purſuing it exceeds the benefit ariſing from it. I am of the ſame opinion with my brother *Aſhhurſt*, that, where the voyage is loſt, but the property is ſaved, the owners have an option to abandon; but that unleſs they do elect to abandon, it is only an average loſs. Whether many years ago it might not have been wiſer for the courts to have determined that the owners ſhould not in

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any caſe abandon where the property did exiſt, is not for our conſideration. About the year 1745 that queſtion was determined after much deliberation; but ſtill unleſs the owners do ſome act, ſignifying their intention to abandon, it is only a partial loſs. Then the only point to be conſidered is, whether this doctrine will be productive of any uncertainty? If it would, that would be a ſufficient reaſon in a new caſe for not adopting it. But, in my opinion, a contrary deciſion would be productive of infinite uncertainty. For it would leave open a very vague queſtion, namely, what time the aſſured ſhould be allowed to abandon. If it can extend to three years, there is no reaſon why it ſhould not to a much longer period. But no uncertainty can follow from this determination; for our opinion is, that when the account of a loſs has reached the aſſured, they muſt make their election whether they will abandon or not; if they do, they muſt give notice of their intention to the under-writers within a reaſonable time. If they act otherwiſe, they cannot be permitted at any ſubſequent period to change the partial into a total loſs. The Court then obſerved, that, as a verdict had been entered under a miſtake, it muſt be altered, and a nonſuit entered.

Where repairs are ordered by the under-writers, for the payment of which a bottomry bond is given, and they refuſe to pay it on the arrival of the ſhip, in conſequence of which the ſhip is ſold, they are liable for all the damage which accrues to the owner in conſequence of that refuſal.—On the trial of an action brought againſt one of the under-writers of a ſhip from Leghorn to London, with liberty to touch at Nice; the jury found a verdict of 62l. 19s. which, together with 17l. 10s. paid into court by the defendant, they calculated as the average loſs *per cent.* which the plaintiff was entitled to, under the circumſtances of the caſe. On a motion for a new trial, *Buller*, J. reported the facts to be, that the ſhip inſured met with an accident in the courſe of her voyage from Leghorn to London, and was obliged to put into Nice to repair. Advice thereof was tranſmitted to the owner (the plaintiff), and that it was neceſſary to unload the veſſel, and that a conſiderable expence muſt be incurred. This account was communicated by him to the under-writers, at the ſame time that he expreſſed his deſire to abandon: an altercation aroſe between them upon this ſubject; he being deſirous of abandoning altogether, and they inſiſting upon the veſſel's being repaired, and telling him to pay the tradeſmen's bills. He conſented at laſt, however, that the repairs ſhould be done, but refuſed to advance any money; in conſequence of which it became neceſſary to take up a large ſum on a bottomry bond, which was accordingly done. Before the repairs were begun the

Da Coſta v. Newnham, Ea. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 407.

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crew were diſcharged, and ſeveral of them were afterwards hired at different times at ſo much *per diem* to aſſiſt in the work. The ſhip was refitted, and reſumed her voyage, and gained freight afterwards. When ſhe arrived at her port of diſcharge, application was made to the under-writers to take up the *reſpondentia* bond, which they refuſed to do; and therefore the veſſel was obliged to be ſold in order to ſatisfy that debt: ſo that ſhe never was in the free poſſeſſion of the plaintiff again. The amount of the *reſpondentia* bond, together with the intereſt due, was 678l. and the ſhip ſold for 600 guineas. Under theſe circumſtances, *Buller*, J. ſtated that it had been agreed at the trial, and he had ſo ſtated it to the jury, that there had not been a total loſs at Nice; for though the plaintiff had offered and was entitled to abandon, yet in truth he had not abandoned. Then conſidering it only as an average loſs, the queſtion was, Whether the under-writers ſhould be liable for the full amount of the inſurance? The bottomry bond was only 600l. but the ſhip never came free into the plaintiff's hands; for, in conſequence of the refuſal of the under-writers to diſcharge it, ſhe was obliged to be ſold. He thought that as for all the ſubſequent injury which had accrued to the plaintiff in conſequence of that refuſal, and by which the plaintiff was damnified to the whole amount of the inſurance, the under-writers were liable, becauſe it was their own fault in not taking up the bond for the expences of thoſe repairs which had been incurred by their own expreſs directions. Then the only remaining queſtion was, how the average ſhould be calculated? As to that, he ſaid that four or five different methods had been delivered in to him, which were then in court; one of theſe was a paper delivered in by the defendant, which he ſhould at once lay out of the queſtion: for in that one third of the ſum charged for repairs was taken off, which was the uſual ſum allowed in reſpect of *new work for old*. Now this was never allowed unleſs the ſhip got into the poſſeſſion of the owner again; for the uſuage in that caſe was founded upon the idea that the owner got the ſhip the better for the repairs; therefore that rule did not apply in this caſe. As to another article reſpecting freight, there is no doubt but that the freight muſt contribute to the general average. The grounds on which the rule had been obtained were, that in the account of the charges and expences incurred at Nice, and for which the bottomry bond had been given, there were many articles for which the under-writers on the *ſhip* were not liable, ſuch as the charges for wages and proviſions, ſhipping and unſhipping the cargo, warehouſe-room, taking care of the cargo, &c.; that beſides, at the time of the accident there was above 300l. due for freight, no part of which was applied to theſe purpoſes, which

which would have ſuperſeded the neceſſity of taking up ſo large a ſum on *reſpondentia*. And again, that no allowance had been made for thirds in the repairs, which the under-writers were entitled to by the uſage of trade. And alſo upon an affidavit that the amount of the goods had been undervalued. ASHHURST, J.—I find no reaſon for thinking that the jury have given too much in the manner in which they have eſtimated the plaintiff's loſs. They have found that he is entitled under all the circumſtances to receive the whole value of the ſhip. I do not take it under the technical term of *total loſs*. The queſtion then turns on a matter of calculation, how much the defendant is bound to contribute. 1ſt. As to the freight claimed by the defendant; he was the inſurer of the ſhip, and not of the freight; and therefore there is no ground for making a reduction of the freight before the ſhip got to Nice. At that period the plaintiff might have abandoned if he pleaſed, for the ſhip was then in a ſituation not worth repairing, and that was notified to the under-writers; but he did not abandon as he might have done; and upon their inſiſting that the veſſel ſhould be repaired, he undertook the management of it; but that was at the riſk of the under-writers. The plaintiff had declared that he would not advance any money; and therefore the captain was obliged to raiſe money on hypothecation. The ſhip was put into the beſt repair ſhe was capable of, and afterwards proceeded to London. On her arrival the bond was tendered for payment to the under-writers, but they refuſed to diſcharge it; in conſequence of which the ſhip was obliged to be ſold; and that put the owner into the ſame ſituation as if he had originally abandoned at Nice, and made it a total loſs. And now the under-writers contend that they are entitled to the allowance of one third for the repairs. That indeed is the rule where a ſhip is repaired, and delivered over to the owner again for his benefit; in ſuch caſes it is right that ſuch an allowance ſhould be made, upon the ground that the owner is put in a better ſituation than he was before, by having new work for old. But here, as the plaintiff never has been put into free poſſeſſion again of the ſhip, and that, through the default of the under-writers, he cannot be ſaid to have had any benefit from the repairs, and therefore he is not bound to make that allowance. As to the charge for the ſailors' work, had they remained *as ſuch* on board the ſhip, it would be fair that a deduction ſhould be made; but it appears that the crew were diſcharged immediately on the ſhip's coming into port. And there is no reaſon why they ſhould not afterwards be employed as labourers in making the repairs as well as any others. They did not work as ſailors, but as common workmen; and therefore the plaintiff was entitled to make that

that charge. *Buller*, J. The repairs were undertaken at the riſk of the under-writers, and they were anſwerable for all ſubſequent loſſes. The ſhip was repaired, and the neceſſary expences defrayed by raiſing money on a *reſpondentia* bond. Then the ſhip never was in the free poſſeſſion of the plaintiff from that time: ſhe came home ſubject to that *onus*. If the under-writers had diſcharged it, and thereby reſtored the veſſel to the owner, they might then have demanded the uſual allowance of one third, new for old. But they refuſed to do ſo; in conſequence of which the ſhip was obliged to be ſold, and therefore through their neglect there has been in effect a total loſs to the plaintiff. Conſidering the ſhip then as loſt through their means, the deductions which they claim out of the expences incurred at Nice for general average muſt be proved by them. There was no proportion agreed on at the time they directed the repairs. They were bound, in the firſt inſtance, to pay the whole amount of the bond. This is not like the caſe put of a total loſs without benefit of ſalvage, for the plaintiff agrees to allow that. Nor is it like the caſe where there is an election in the party to abandon or not, where that election muſt be made either one way or the other; for here, by the conſent of the under-writers, the plaintiff has ſteered a middle courſe. They pointed out to him what he ſhould do, and they muſt abide by the conſequences of their interference. As to its not appearing that any ſpecific demand was made upon the defendant for his ſhare, it would be monſtruous to require that the particular proportion of each individual ſhould be ſeparately demanded, when they are all acting as a body: a demand upon any of them with that view was ſufficient. Then the caſe is reduced to a mere queſtion of damages. 1ſt, As to the one third for repairs, I have already given it as my opinion, that the under-writers were not entitled to it, becauſe the plaintiff never had the ſhip again. 2dly, As to the wages and proviſions; this is not like the caſe where a ſhip is detained by an embargo, where the Court have ſaid that the expence ſhall fall on the owner only, and the freight muſt bear it; but this is a queſtion of general average, the ſhip having been obliged to go into port for the general benefit of the whole concern. A paſſage from *Beawes* is mentioned in *Park*, 143, ſhewing the law in foreign countries upon this ſubject; that when a ſhip is forced by a ſtorm to enter into a port to repair the damage ſhe has ſuffered, if ſhe cannot continue her voyage without an apparent riſk of being loſt, in ſuch caſe the wages and victuals of the crew are brought into an average from the day it was reſolved to ſeek a port to refit the veſſel to the day of her departing from it, with all the charges of loading, unloading, anchorage, pilotage, and every other expence incurred

curred by this neceſſity. But I do not know that this point has ever been ſettled in England: there is one caſe mentioned in the ſame book (1), where Lord *Mansfield* ſeemed to approve of this rule: but it is not neceſſary to determine that point now; for it appears that the crew had been all diſcharged, and theſe men were only employed as common workmen. As to the difference in the value of the goods as it is now ſtated, that only makes a difference of two and a half *per cent.* which is not a ſufficient ground for a new trial, inaſmuch as it appears that the verdict has been taken for 10 *per cent.* leſs than the plaintiff is entitled to. On the whole I am of opinion that this rule ſhould be diſcharged, 1ſt, Becauſe, under the interference and directions of the underwriters, and their ſubſequent conduct in refuſing to pay the bottomry bond, they are liable for all the damage which has happened to the plaintiff; and, 2dly, Becauſe this is a queſtion of general average, and the ſhip's goods and freight ſhould all contribute their ſeveral proportions. GROSE, J. of the ſame opinion.—Rule diſcharged.

Fraudulent Warranty.

FALSE warranty in a policy of inſurance, will vitiate it, though the loſs happen in a manner not affected by that falſity.—This was an action on the caſe brought for the recovery of a total loſs on a *policy of inſurance* made on goods and merchandizes on board the ſhip *Bona Fortuna*, at and from North Bergen to any port or places whatſoever, until her ſafe arrival in London. It was underwritten thus: "*Warranted* NEUTRAL *ſhip and property.*" But in truth the plaintiffs were Britiſh ſubjects, having intereſt on board the ſhip to the amount of the ſum inſured. For the plaintiff it was inſiſted, that this warranty was only meant to ſecure the inſurers againſt the peril of enemies, and therefore was equivalent to a warranty *free from capture*, and that the loſs had not happened in ſuch manner as to make the truth or falſehood of this warranty at all material. SED PER CUR: The point is too clear to be argued, there was a falſehood in reſpect to the condition of the thing inſured, therefore it was no contract.—Judgment for the defendant.

Woolmer *et al.* v. Muilman, Tr. Ter. 3 Geo. 3. B.R. 3 *Burr.* 1419. 1 *Black. Rep.* 427.

Concealment of the true port of loading will vitiate a policy of inſurance.—In an action on a policy of inſurance the caſe was, that the ſhip was inſured *at and from* Genoa, liable to average; her loading conſiſting of pot-aſh, verdigreaſe, cotton, and other periſhable commodities. *This loading was put on board at Leghorn* the 10th of Auguſt; and the veſſel had lain at Genoa above five months, *being originally bound for Dublin*; but, loſing her convoy, ſhe put

Hodgſon v. Richardſon, Ea. Ter. 4 Geo. 3. B.R. 1 *Black.* 463.

(1) *Park*, 142.

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into Genoa the 13th of Auguſt, and lay there till the 5th of January, when ſhe ſailed. And the inſurance was made the 20th of January; at which time theſe circumſtances were known to the inſured, but not communicated to the under-writer. A few days after ſhe put to ſea, ſhe was ſhattered by a ſtorm, and the cargo conſiderably damaged. The inſured brought his action on the policy, and the jury found a verdict for the plaintiff. And now it was moved for a new trial, contending, that *the policy was bad* ab initio, *for want of a due diſcloſure of the circumſtances; as Genoa, from the wording of the policy, imported to be the port of loading; and the goods were liable to take damage, by having lain ſo long aboard: and therefore, though the preſent loſs actually happened by a ſtorm, yet if the policy was originally bad, the inſured cannot recover.* And they urged the propriety of granting a new trial here, becauſe the ſeveral inſurers were bound, by a rule of court, to abide the event of this action.—Lord MANSFIELD, Ch. J. It is certainly very beneficial to all parties, that there ſhould be but one trial, for all the ſeveral inſurers on one policy. But then, that one trial ſhould be a ſatisfactory trial. I think, that new trials in general are moſt beneficial for the furtherance of juſtice, and ought to be granted with great latitude. In all free countries there is allowed, for the benefit of the ſubject, a great variety of appeals. And the old law here in England never meant, that the verdict of a jury ſhould by all means be final: but it preſcribed an odious way of new trials, by the criminal proceſs of attaint. Whereas, the modern courſe of new trials anſwers the ſame end, in a better way. In the preſent caſe, the verdict is ſuch a one as ought not to ſtand. The queſtion is, whether here was a ſufficient diſcloſure: *i. e.* Whether the fact concealed was material to the riſk run? This is a matter of fact; and, if material, the conſequence is matter of law, that the policy is bad. Now who can ſay, that no riſk was run during the five months' ſtay at Genoa, or no damage happened in that period? The policy is founded on miſrepreſentation; the ſhip is inſured, "at and "from Genoa to Dublin, the adventure to begin from the "loading to equip for this voyage." This plainly implies, that Genoa was the port of loading. And at the trial all the witneſſes ſaid, that by uſage it was material to acquaint the under-writer, whether the inſurance was to be at the commencement, or in the middle, of a voyage. The concealment of material circumſtances vitiates all contracts upon the principles of natural law. A man, if kept ignorant of any material ingredient, may ſafely ſay, It is not his contract.—Rule for new trial abſolute.

Middlewood *v.* Blakes, Hil. Ter. 37 Geo. 3. B R. 7 *Ter. Rep.* 162.

A concealment of the intention to touch at a particular port will vitiate the policy.—This was an action on a policy of aſſurance on goods on board the ſhip Arethuſa, *at and from*

from London to Jamaica. The ſhip was captured by an enemy on her voyage out on the north ſide of St. Domingo, and carried into the Spaniſh port of that name: and the aſſured declared as for a total loſs by capture. The defendant paid the premium into court; and reſiſted the demand *on the ground of a deviation from the voyage inſured*; as to which it appeared in evidence that the ſhip was entered outwards at the cuſtom-houſe, and *the clearance of the goods was for Jamaica only*, but that ſhe ſailed from London *with directions to the captain to touch in his way to Jamaica at Cape Nicola Mole in the iſland of St. Domingo, in order to land ſome ſtores there purſuant to a charter-party entered into for that purpoſe*; after which he was to proceed to Jamaica. The iſland of St. Domingo lies in the track to Jamaica; and conſequently the courſe of the voyage from London to Jamaica, and from London to Cape Nicola Mole, is to a certain point exactly the ſame. From that point there are three tracks which a ſhip bound on the voyage to Jamaica may take; one of them to the ſouthward immediately of St. Domingo, another ſtill further to the ſouthward, and a third to the northward of that iſland; in which latter, after the ſhip in queſtion had paſſed the dividing point of the three ſeveral tracks, but before ſhe had reached the ſubdividing point of the continuing courſe to Jamaica, and that leading into the port of Cape Nicola Mole, ſhe was captured. With reſpect to the three ſeveral tracks to Jamaica from the dividing point which the ſhip paſſed, it appeared that thoſe to the ſouthward of St. Domingo were the moſt uſual, eſpecially in time of peace, and were the ſafeſt navigation; that the other to the northward was the ſhorteſt, but more difficult navigation, but was ſometimes preferred in time of war by thoſe who were acquainted with it, more eſpecially in the preſent war, becauſe great part of the iſland of St. Domingo, including Cape Nicola Mole, being in poſſeſſion of the Britiſh forces, there was leſs riſk to be apprehended from privateers. But whether this or either of the other courſes was the moſt advantageous to be purſued in any particular inſtance depended upon circumſtances, upon which it was proper for the captain of the ſhip to exerciſe his judgment at the time. It was not pretended that the captain had in fact exerciſed any ſuch judgment in ſelecting this courſe which he had taken; but it was evident that he had adopted it as the moſt direct and proper one to be taken for the purpoſe of going in to the Cape, whither he was then bound. Lord *Kenyon*, before whom the caſe was tried, was of opinion that the defendant was diſcharged under theſe circumſtances, becauſe *at the time when the ſhip was captured ſhe was bound to a different place from that for which ſhe was inſured, and with a view to which the captain under compulſion of his orders had taken this particular track, and was not left at liberty*

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to exerciſe his judgment at the dividing point for the benefit of all concerned, as the aſſurers had a right to inſiſt upon. And accordingly the jury found a verdict for the defendant, being, as they ſtated, unanimouſly of opinion, that "THE CONCEALMENT OF THE INTENTION TO GO TO ST. DOMINGO VITIATED THE POLICY." A rule having been obtained calling on the defendant to ſhew cauſe why the verdict ſhould not be ſet aſide and a new trial granted, and cauſe ſhewn.—PER CURIAM: At the trial ſix witneſſes, who had gone many voyages to Jamaica, were examined on the part of the plaintiff reſpecting the common courſe of the voyage; two of whom had never taken the northern paſſage, and the other four ſaid that the ſouthern was the moſt uſual, and that at all events the captain ought to exerciſe his diſcretion in each particular caſe whether he ſhould take the one courſe or the other. When this policy was ſubſcribed the under-writers ſuppoſed that the captain would have gone the moſt common and uſual way, or at leaſt that he would have been at liberty to exerciſe his own judgment on the ſubject; inſtead of which it appears that *he had no diſcretion, but was bound to take the northern paſſage.* Had the intention of going to St. Domingo firſt been communicated to the under-writers, perhaps they would not have ſubſcribed the policy, or if they had would have required a larger premium. Therefore on the ground that a full diſcloſure was not made to the defendant when he underwrote the policy in queſtion, the rule ought to be diſcharged.

Carter v. Boehm, Ea. Ter. 6 Geo. 3. B.R. 3 *Burr.* 1909. 1 *Black. Rep.* 593.

What degree of concealment will avoid a policy of inſurance.—This was an inſurance-cauſe, upon a policy intereſt, or no intereſt; without benefit of ſalvage. The inſurance was made by the plaintiff, for the benefit of his brother, Governor *George Carter*, and a verdict was found for the plaintiff, upon which a new trial was moved for on an objection, "That circumſtances were not ſufficiently diſcloſed." Lord MANSFIELD reported the evidence—That it was an action on a policy of inſurance for one year; viz. from the 16th of October, 1759, to the 16th of October, 1760, for the benefit of the Governor of Fort Marlborough, *George Carter*, againſt the loſs of Fort Marlborough, in the iſland of Sumatra, in the Eaſt Indies, by its being taken by a foreign enemy. The event happened: the fort was taken, by Count *D'Eſtaigne*, within the year. The firſt witneſs was *Cawthorne*, the policy-broker, who produced the memorandum given by the Governor's brother (the plaintiff) to him: and the uſe made of theſe inſtructions was, to ſhew "That the inſurance was "made for the benefit of Governor *Carter*, and to inſure him "againſt the taking of the fort by a foreign enemy." Both ſides had been long in chancery: and the chancery-evidence

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on both ſides was read at the trial. It was objected, on behalf of the defendant, to be a fraud, by concealment of *circumſtances which ought to have been diſcloſed*; and particularly, the weakneſs of the fort, and the probability of its being attacked by the French: which concealment was offered to be proved by two letters. The firſt was a letter from the governor to his brother *Roger Carter*, his truſtee, the plaintiff in this cauſe: the ſecond was from the governor to the Eaſt-India Company. The evidence in reply to this objection conſiſted of three depoſitions in chancery, ſetting forth that the governor had 20,000l. in effects; and only inſured 10,000l.; and that he was guilty of no fault in defending the fort. The firſt of theſe depoſitions was Captain *Tryon's*: which proved that this was not a fort proper or deſigned to reſiſt European enemies; but only calculated for defence againſt the natives of the iſland of Sumatra; and alſo that the governor's office is not military, but only mercantile; and that fort Marlborough is only a ſubordinate factory to fort St. George. There was no evidence to the contrary. And a verdict was found for the plaintiff, by a ſpecial jury. After argument, and time taken to conſider, Lord MANSFIELD delivered the reſolution of the Court. This is a motion for a new trial. In ſupport of it, the counſel for the defendant contend, "That ſome cir-"cumſtances in the knowledge of Governor *Carter*, not "having been mentioned at the time the policy was under-"wrote, amount to a concealment, which ought, in law, to "avoid the policy." The counſel for the plaintiff inſiſt, "That the not mentioning theſe particulars, does not amount "to a concealment, which ought, in law, to avoid the "policy; either as a fraud, or as varying the contract." 1ſt. It may be proper to ſay ſomething, in general, of concealments which avoid a policy. 2dly. To ſtate particularly the caſe now under conſideration. 3dly. To examine whether the verdict, which finds this policy good although the particulars objected were not mentioned, is well founded. Firſt. Inſurance is a contract upon ſpeculation. The ſpecial facts, upon which the contingent chance is to be computed, lie moſt commonly in the knowledge of the inſured only: the under-writer truſts to his repreſentation, and proceeds upon confidence that he does not keep back any circumſtance in his knowledge, to miſlead the under-writer into a belief that the circumſtance does not exiſt, and to induce him to eſtimate the riſque, as if it did not exiſt. The keeping back ſuch circumſtance is a fraud, and therefore the policy is void. Although the ſuppreſſion ſhould happen through miſtake, without any fraudulent intention; yet ſtill the under-writer is deceived, and the policy is void; becauſe the riſque run is really different from the riſque underſtood and intended to be run, at the time of the agreement. The policy

would equally be void, againſt the under-writer, if he concealed, as if he inſured a ſhip on her voyage, which he privately knew to be arrived: and an action would lie to recover the premium. The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be innocently ſilent, as to grounds open to both, to exerciſe their judgment upon. *Aliud eſt celare; aliud, tacere: neque enim id eſt celare quicquid reticeas; ſed cum quod tu ſcias, id ignorare emolumenti tui cauſa velis eos, quorum interſit id ſcire.* This definition of concealment, reſtrained to the efficient motives and preciſe ſubject of any contract, will generally hold to make it void, in favour of the party miſled by his ignorance of the thing concealed. There are many matters, as to which the inſured may be innocently ſilent—he need not mention what the under-writer knows—*ſcientia utrinque par* pares *contrahentes facit.* An under-writer can not inſiſt that the policy is void, becauſe the inſured did not tell him what he actually knew; what way ſoever he came to the knowledge. The inſured need not mention what the under-writer ought to know; what he takes upon himſelf the knowledge of; or what he waives being informed of. The under-writer needs not to be told what leſſens the riſque agreed and underſtood to be run by the expreſs terms of the policy. He needs not to be told general topics of ſpeculation: as for inſtance—the under-writer is bound to know every cauſe which may occaſion natural perils; as, the difficulty of the voyage—the kind of ſeaſons—the probability of lightning, hurricanes, earthquakes, &c. He is bound to know every cauſe which may occaſion political perils; from the ruptures of ſtates; from war, and the various operations of it. He is bound to know the probability of ſafety, from the continuance or return of peace; from the imbecility of the enemy, through the weakneſs of their councils, or their want of ſtrength, &c. If an under-writer inſures private ſhips of war, by ſea and on ſhore, from ports to ports, and places to places, any-where—he needs not be told the ſecret enterprizes they are deſtined upon; becauſe he knows ſome expedition muſt be in view; and, from the nature of his contract, without being told, he waives the information. If he inſures for three years, he needs not be told any circumſtance to ſhew it may be over in two: or if he inſures a voyage, with liberty of deviation, he needs not be told what tends to ſhew there will be no deviation. Men argue differently, from natural phenomena, and political appearances: they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both: each profeſſes to act from

from his own skill and sagacity; and therefore neither needs to communicate to the other. The reason of the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract; which one privately knows, and the other is ignorant of, and has no reason to suspect. The question therefore must always be, "Whether there was, under all the circumstances at the time the policy was under-written, a fair representation; or a concealment; fraudulent, if designed; or, though not designed, varying materially the object of the policy, and changing the risque understood to be run." This brings me, in the second place, to state the case now under consideration. The policy is against the loss of Fort Marlborough, from being destroyed by, taken by, or surrendered unto, any European enemy, between the 1st of October, 1759, and 1st of October, 1760. It was underwritten on the 9th of May, 1760. The under-writer knew at the time, that the policy was to indemnify, to that amount, *Roger Carter*, the governor of fort Marlborough, in case the event insured against should happen. The governor's instructions for the insurance, bearing date at Fort Marlborough the 22d of September, 1759, were laid before the under-writer. Two actions upon this policy were tried before me in the year 1762. The defendants then knew of a letter written to the East-India Company, which the company offered to put into my hands; but would not deliver to the parties, because it contained some matters which they did not think proper to be made public. An objection occurred to me at the trial, "Whether a policy against the loss of Fort Marlborough, for the benefit of the governor, was good;" upon the principle which does not allow a sailor to insure his wages. But considering that this place, though called a fort, was really but a factory or settlement for trade; and that he, though called a governor, was really but a merchant—considering too, that the law allows the captain of a ship to insure goods which he has on board, or his share in the ship, if he be a part owner; and the captain of a privateer, if he be a part-owner, to insure his share—considering too, that the objection did not lie, upon any ground of justice, in the mouth of the under-writer, who knew him to be the governor, at the time he took the premium. And as, with regard to principles of public convenience, the case so seldom happens (I never saw one before), any danger from the example is little to be apprehended—I did not think myself warranted, upon that point, to nonsuit the plaintiff; especially too, as the objection did not come from the bar. Though this point was mentioned, it was not insisted upon, at the last trial; nor has it been seriously argued, upon this motion, as sufficient, alone, to vacate the policy: and if it

had, we are all of opinion "That we are not warranted to "ſay it is void, upon this account." Upon the plaintiff's obtaining theſe two verdicts, the under-writers went into a court of equity; where they have had an opportunity to ſift every thing to the bottom, to get every diſcovery from the governor and his brother, and to examine any witneſſes who were upon the ſpot. At laſt, after the fulleſt inveſtigation of every kind, the preſent action came on, to be tried at the ſittings after laſt term. The plaintiff proved, without contradiction, that the place called Bencoolen, or Fort Marlborough, is a factory or ſettlement, but no military fort or fortreſs. That it was not eſtabliſhed for a place of arms or defence againſt the attacks of an European enemy; but merely for the purpoſe of trade, and of defence againſt the natives. That the fort was only intended and built with an intent to keep off the country blacks. That the only ſecurity againſt European ſhips of war, conſiſted in the difficulty of the entrance and navigation of the river, for want of proper pilots. That the general ſtate and condition of the ſaid fort, and of the ſtrength thereof, was, in general, well known by moſt perſons converſant or acquainted with Indian affairs, or the ſtate of the company's factories or ſettlements; and could not be kept ſecret or concealed from perſons who ſhould endeavour by proper enquiry, to inform themſelves. That there were no apprehenſions or intelligence of any attack by the French, until they attacked Nattal, in February, 1760. That on the 8th of February, 1760, there was no ſuſpicion of any deſign by the French. That the governor then bought, from the witneſs, goods to the value of 4000l. and had goods to the value of above 20,000l. and then dealt for 50,000l. and upwards. That on the 1ſt of April, 1760, the fort was attacked by a French man-of-war of 64 guns, and a frigate of 20 guns, under the Count *D'Eſtaigne*, brought in by Dutch pilots; unavoidably taken; and afterwards delivered to the Dutch; and the priſoners ſent to Batavia.—On the part of the defendant, after all the opportunities of enquiry, no evidence was offered, that the French ever had any deſign upon Fort Marlborough, before the end of March, 1760; or that there was the leaſt intelligence or alarm "that they might make "the attempt," till the taking of Nattal in the year 1760. They did not offer to diſprove the evidence, that the governor had acted, as in full ſecurity, long after the month of September, 1759; and had turned his money into goods, ſo late as the 8th of February, 1760. There was no attempt to ſhew that he had not loſt by the capture very conſiderably beyond the value of the inſurance. But the defendant relied upon a letter, written to the Eaſt-India Company, bearing date the 16th of September, 1759, which was ſent to England by the Pitt, Captain *Willon*, who arrived in May, 1760, together with

with the inſtructions for inſuring; and alſo a letter bearing date the 22d of September, 1759, ſent to the plaintiff by the ſame conveyance, and at the ſame time; [which letters his lordſhip repeated (1)]. They relied too upon the croſs-examination of the broker who negociated the policy, "That, "in his opinion, theſe letters ought to have been ſhewn, or "the contents diſcloſed; and if they had, the policy would "not have been under-written." The defendant's counſel contended at the trial, as they have done upon this motion, "That the policy was void." 1ſt. Becauſe the ſtate and condition of the fort, mentioned in the governor's letter to the Eaſt-India Company, was not diſcloſed. 2dly. Becauſe he did not diſcloſe, that the French, not being in a condition to relieve their friends upon the coaſt, were more likely to make an attack upon this ſettlement, rather than remain idle. 3dly. That he had not diſcloſed his having received a letter of the 4th of February, 1759, from which it ſeemed that the French had a deſign to take this ſettlement, by ſurprize, the year before. They alſo contended, that the opinion of the broker was almoſt deciſive. The whole was laid before the jury; who found for the plaintiff. Thirdly—It remains to conſider theſe objections, and to examine, "Whether this verdict is well founded." To this purpoſe, it is neceſſary to conſider the nature of the contract, at the time it was entered into. The policy was ſigned in May, 1760. The contingency was, "Whether Fort Marlborough was or "would be taken, by an European enemy, between October, 1759, and October, 1760." The computation of the riſque depended upon the chance, "Whether any European "power would attack the place by ſea." If they did, it was incapable of reſiſtance. The under-writer at London, in May, 1760, could judge much better of the probability of the contingency, than Governor *Carter* could at Fort Marlborough, in September, 1759. He knew the ſucceſs of the operations of the war in Europe. He knew what naval force the Engliſh and French had ſent to the Eaſt Indies. He knew, from a compariſon of that force, whether the ſea

(1) The former of them notifies to the Eaſt-India Company, that the French had, the preceding year, a deſign on foot, to attempt taking that ſettlement by ſurprize; and that it was very probable they might revive that deſign. It confeſſes and repreſents the weakneſs of the fort; its being badly ſupplied with ſtores, arms, and ammunition; and the impracticability of maintaining it (in its then ſtate) againſt an European enemy. The latter letter (to his brother) owns that he is "now more "afraid than formerly, that the French ſhould attack and take the ſet-"tlement; for, as they can not muſter a force to relieve their friends at "the coaſt, they may, rather than remain idle, pay us a viſit. It ſeems, "they had ſuch an intention, laſt year." And therefore he deſires his brother to get an inſurance made upon his ſtock there.

was open to any ſuch attempt by the French. He knew, or might know, every thing which was known at Fort Marlborough in September, 1759, of the general ſtate of affairs in the Eaſt Indies, or the particular condition of Fort Marlborough, by the ſhip which brought the orders for the inſurance. He knew that ſhip muſt have brought many letters to the Eaſt-India Company; and, particularly, from the governor. He knew what probability there was of the Dutch committing or having committed hoſtilities. Under theſe circumſtances, and with this knowledge, he inſures againſt the general contingency of the place being attacked by an European power. If there had been any deſign on foot, or any enterprize begun, in September, 1759, to the knowledge of the governor, it would have varied the riſque underſtood by the under-writer; becauſe, not being told of a particular deſign or attack then ſubſiſting, he eſtimated the riſque upon the foot of an incertain operation, which might or might not be attempted, But the governor had no notice of any deſign ſubſiſting in September, 1759. There was no ſuch deſign, in fact: the attempt was made without premeditation, from the ſudden opportunity of a favourable occaſion, by the connivance and aſſiſtance of the Dutch, which tempted Count *D'Eſtaigne* to break his parol. Theſe being the circumſtances under which the contract was entered into, we ſhall be better able to judge of the objections upon the foot of concealment. The firſt concealment is, that he did not diſcloſe the condition of the place. The under-writer knew the inſurance was for the governor. He knew the governor muſt be acquainted with the ſtate of the place. He knew the governor could not diſcloſe it, conſiſtent with his duty. He knew the governor, by inſuring, apprehended at leaſt the poſſibility of an attack. With this knowledge, without aſking a queſtion, he under-wrote. By ſo doing, he took the knowledge of the ſtate of the place upon himſelf. It was a matter as to which he might be informed, various ways: it was not a matter within the private knowledge of the governor only. But, not to rely upon that—The utmoſt which can be contended is, that the under-writer truſted to the fort being in the condition in which it ought to be: in like manner, as it is taken for granted, that a ſhip is ſea-worthy. What is that condition? all the witneſſes agree "That it was only to re-"ſiſt the natives, and not an European force." The policy inſures againſt a total loſs; taking for granted "That if the "place was attacked, it would be loſt." The contingency therefore which the under-writer has inſured againſt is, "Whether the place would be attacked by an European "force;" and not, "Whether it would be able to reſiſt ſuch "an attack, if the ſhips could get up the river." It was particularly left to the jury, to conſider, "Whether this was the

"contingency

" contingency in the contemplation of the parties:" they have found that it was. And we are all of opinion, " That, in this " reſpect, their concluſion is agreeable to the evidence." In this view, the ſtate and condition of the place was material, only in caſe of a land-attack by the natives. The 2d concealment is—His not having diſcloſed, that, from the French not being able to relieve their friends upon the coaſt, they might make them a viſit. This is no part of the fact of the caſe: it is a mere ſpeculation of the governor's from the general ſtate of the war. The conjecture was dictated to him from his fears. It is a bold attempt, for the conquered to attack the conqueror, in his own dominions. The practicability of it, in this caſe, depended upon the Engliſh naval force in thoſe ſeas; which the under-writer could better judge of at London in May, 1760, than the governor could at Fort Marlborough in September, 1759. The 3d concealment is—That he did not diſcloſe the letter from Mr. *Winch*, of the 4th of February, 1759, mentioning the deſign of the French, the year before. What the letter was; how he mentioned the deſign, or upon what authority he mentioned it; or by whom the deſign was ſuppoſed to be imagined; does not appear. The defendant has had every opportunity of diſcovery; and nothing has come out upon it, as to this letter, which he thinks makes for his purpoſe. The plaintiff offered to read the account *Winch* wrote to the Eaſt-India Company: which was objected to; and therefore not read. The nature of that intelligence therefore is very doubtful. But taking it in the ſtrongeſt light, it is a report of a deſign to ſurprize, the year before; but then dropt. This is a topic of mere general ſpeculation; which made no part of the fact of the caſe upon which the inſurance was to be made. It was ſaid—If a man inſured a ſhip, knowing that two privateers were lying in her way, without mentioning that circumſtance, it would be fraud—I agree it. But if he knew that two privateers had been there the year before, it would be no fraud, not to mention that circumſtance: becauſe, it does not follow that they will cruiſe this year at the ſame time, in the ſame place; or that they are in a condition to do it. If the circumſtance of " this deſign laid aſide" had been mentioned, it would have tended rather to leſſen the riſque, than increaſe it: for, the deſign of a ſurprize which has tranſpired, and been laid aſide, is leſs likely to be taken up again; eſpecially, by a vanquiſhed enemy. The jury conſidered the nature of the governor's ſilence, as to theſe particulars: they thought it innocent; and that omiſſion to mention them did not vary the contract. And we are all of opinion, " That, in this re- " ſpect, they judged extremely right." There is a ſilence, not objected to at the trial nor upon this motion; which might with as much reaſon have been objected to, as the two

laſt omiſſions; rather more.—It appears by the governor's (1) letter to the plaintiff, "That he was principally apprehenſive of a Dutch war (2)." He certainly had, what he thought, good grounds for this apprehenſion. Count *D'Eſtaigne* being piloted by the Dutch, delivering the fort to the Dutch, and ſending the priſoners to Batavia, is a confirmation of thoſe grounds. And probably, the loſs of the place was owing to the Dutch. The French could not have got up the river without Dutch pilots: and it is plain, the whole was concerted with them. And yet, at the time of under-writing the policy, there was no intimation about the Dutch. The reaſon why the counſel have not objected to his not diſcloſing the grounds of this apprehenſion, is, becauſe it muſt have ariſen from political ſpeculation, and general intelligence: therefore, they agree, it is not neceſſary to communicate ſuch things to an under-writer. Laſtly—Great ſtreſs was laid upon the opinion of the broker. But we all think, the jury ought not to pay the leaſt regard to it. It is mere opinion; which is not evidence. It is opinion after an event. It is opinion without the leaſt foundation from any previous precedent or uſage. It is an opinion which, if rightly formed, could only be drawn from the ſame premiſſes from which the Court and jury were to determine the cauſe: and therefore it is improper and irrelevant in the mouth of a witneſs. There is no imputation upon the governor, as to any intention of fraud. By the ſame conveyance, which brought his orders to inſure, he wrote to the company every thing which he knew or ſuſpected: he deſired nothing to be kept a ſecret, which he wrote either to them or his brother. His ſubſequent conduct, down to the 8th of February, 1760, ſhewed that he thought the danger very improbable. The reaſon of the rule againſt concealments is, to prevent fraud and encourage good faith. If the defendant's objections were to prevail, in the preſent caſe, the rule would be turned into an inſtrument of fraud. The under-writer here, knowing the governor to be acquainted with the ſtate of the place; knowing that he apprehended danger, and muſt have ſome ground for his apprehenſion; being told nothing of either; ſigned this policy, without aſking a queſtion.—If the objection "That he was "not told" is ſufficient to vacate it, he took the premium, knowing the policy to be void; in order to gain, if the alternative turned out one way; and to make no ſatisfaction, if it turned out the other: he drew the governor into a falſe confidence, "That, if the worſt ſhould happen, he had pro-"vided againſt total ruin;" knowing, at the ſame time,

(1) Dated the 22d of September, 1759.

(2) His words are—"And in caſe of a Dutch war, I would have it "[the inſurance] done at any rate."

"That

"That the indemnity to which the governor truſted, was "void." There was not a word ſaid to him, of the affairs of India, or the ſtate of the war there, or the condition of Fort Marlborough. If he thought that omiſſion an objection, at the time, he ought not to have ſigned the policy, with a ſecret reſerve in his own mind to make it void: if he diſpenſed with the information, and did not think this ſilence an objection then; he cannot take it up now, after the event. What has often been ſaid of the ſtatute of frauds may, with more propriety, be applied to every rule of law, drawn from principles of natural equity, to prevent fraud—"That it ſhould "never be ſo turned, conſtrued, or uſed, as to protect, or be "a means of fraud." After the fulleſt deliberation, we are all clear that the verdict is well founded; and there ought not to be a new trial: conſequently, that the rule for that purpoſe ought to be diſcharged.—Rule diſcharged.

If the voyage deſcribed in a policy be "from A. to B. and "C." and the ſhip go to C. before B. (though C. be nearer to A. than B. is), it is a deviation, and the plaintiff cannot recover for any ſubſequent loſs, if it be not the regular and ſettled courſe of the voyage to go to C. firſt.—This was an action on a policy on the ſhip Bazil "at and from Fiſherrow "to Gottenburgh, and back to Leith and Cockenzie;" valued at 500l. without further account to be given. At the trial it appeared that the ſhip performed her voyage outward to Gottenburgh, and having taken in goods both for Leith and Cockenzie, in her return home in the ſpring of 1787, without going to Leith firſt, put into Cockenzie, where ſhe was ſtranded and loſt. There did not appear to be any ſettled courſe of trade to regulate the track of the voyage in this reſpect; though the weight of the evidence was in favour of going firſt to Leith, in point of prudence, owing to the inſecurity of the harbour of Cockenzie in general; for by diſcharging the lading for Leith there in the firſt inſtance, the riſk of going into the harbour of Cockenzie was thereby much leſſened. Two objections were made at the trial on the part of the defendant, 1ſt, *That as the ſhip went into* Cockenzie *before ſhe went to Leith, it was a deviation from the voyage deſcribed in the policy, which was to Leith and Cockenzie.* 2dly, *That this was a gaming policy within the ſtatute* 9 Geo. 2. c. 37. *being without proof of intereſt.* Both points were reſerved; but the deciſion went wholly on the firſt. AND THE COURT were of opinion that as the intended voyage was deſcribed in the policy, and as there was no regular and ſettled courſe, known to all the traders, different from that ſo deſcribed, the ſhip deviated by putting into Cockenzie firſt, and conſequently that the plaintiff could not recover. And LAWRENCE, J. read the following manuſcript caſe, obſerving that it was the caſe of a general policy in which the intended

Beatſon v. Haworth, Hil. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 531.

voyage

voyage was not deſcribed. [*Glaſon* v. *Simmonds*, B.R. Hil. 15 *Geo.* 2. at Guildhall, cor. *Lee*, Ch. J. March 11th, 1741. An inſurance was made upon goods in the Gothick Lion *at and from London to her ports of diſcharge in the Streights as high as Meſſina*; with power in the voyage to ſtop or ſtay at any ports or places whatſoever. She was freighted with lead of the plaintiff's from London to Marſeilles, *and went into Falmouth; where ſhe ſtaid three weeks*, and took in a freight of tin for Marſeilles. When the ſhip was off Marſeilles the wind was againſt her, and ſhe could not then get in, but being driven towards Corſica went to Genoa, and from thence to Leghorn; and in coming back again to Marſeilles, being attacked by a Spaniſh privateer, ſhe was blown up and the lead loſt. In the action upon the policy it was proved by ſeveral captains of ſhips, and ſo held by the chief juſtice, 1ſt, That the going into Falmouth, *and ſtaying there*, was a deviation. If ſhe had been obliged to put in by neceſſity, or if it were in the uſual courſe of the voyage, though perhaps not in the direct road, it would be no deviation to put in there. *But ſhe ſtaid at Falmouth three weeks, and took in a freight for Marſeilles*, which ſeems to be ſtrong evidence of having wilfully gone out of the way; 2dly, That as ſhe did not ſtop at Marſeilles, this was acting contrary to the terms of the policy; for by her ports of diſcharge muſt be underſtood ſuch ports at which it was intended goods ſhould be delivered, and the firſt of thoſe was Marſeilles. 3dly, It was ſworn by ſeveral captains to be their opinion (but the chief juſtice did not ſay any thing to this point) that the going no further in the Streights than Leghorn, and then returning back again, was a determination of the inſurance at Leghorn, and the inſurers diſcharged from the loſs that happened afterwards. And upon this there was a verdict for the defendant.]—*Per Curiam*, Rule abſolute.

Planché *et al.* v. Fletcher, Mic. Ter. 20 Geo. 3. B.R. 1 *Doug.* 250.

If goods are inſured on board a ſhip *from London to Nantz, with liberty to call at Oſtend*, and ſhe is cleared only for Oſtend, but ſails directly for Nantz, that being the known courſe of the trade, in order to ſave certain duties both in England and France, there is no fraud on the under-writer ſo far as to vacate the policy; and if an inſurance is made before the commencement of hoſtilities, but when every body expects a war immediately, the inſured is not bound to give the under-writer notice, though the ſhip do not ſail till after the war takes place, and the under-writer is liable in caſe of *capture*. Neither do the courts in this country take notice of foreign revenue laws.—The plaintiffs *Planché* and *Jacquery*, merchants in London, inſured goods, "on board the Swediſh ſhip called the "Maria Magdalena, loſt or not loſt, at and from London "and

" and Ramſgate to Nantz, with liberty to call at Oſtend, " being a general ſhip in the port of London for Nantz." There was a declaration in the policy, that the inſurance was made on account of " certain perſons carrying on trade " under the name and firm of *Valée et du Pleſſis, Monſieur* " *Luſſeau le Jeune, Guillaume Albert, et Poitier de la Gueule.*" The defendant under-wrote the policy for 300l. at three guineas *per cent.* The ſhip's clearances from the cuſtom-houſe in London, and her other papers, were all made out as for Oſtend only, but the ſhip and goods were intended to go directly from London to Nantz, without going to Oſtend. Bills of lading, in the French language, dated the 18th of July, 1778, were ſigned by the captain in London, but purporting to be made at Oſtend, and that the goods were ſhipped there to be delivered at Nantz. The policy was ſubſcribed by the defendant on the 7th of July, and the lading was taken in between the 24th of July and the 17th of Auguſt. The proclamation for making repriſals on French ſhips, &c. bore date the 29th, and appeared in the Gazette on the 31ſt of July. Two under-writers had ſigned the policy after the proclamation, at the ſame premium of three guineas; one on the 31ſt of July, and the other on the 7th of Auguſt. The ſhip ſailed on the 24th of Auguſt, and was taken by a king's cutter on her way to Nantz. After her departure from Graveſend the captain threw overboard all the papers he had received from the cuſtom-houſe at London. They had been obliterated by the cuſtom-houſe officers at Graveſend, and were no longer of any uſe. The ſhip was releaſed by the Admiralty, but the goods were condemned. The plaintiff had no connection or ſhare in the ſhip. *Upon a rule to ſhew cauſe why there ſhould not be a new trial on a verdict found for the plaintiffs*, THE GROUNDS of the application were two. FIRST, That there was a fraud on the under-writers, the ſhip having been cleared out for Oſtend, and yet never having been deſigned for that place. SECONDLY, That, as hoſtilities were declared after the policy was ſigned, and before the ſhip ſailed, the defendant ought to have had notice, that he might have exerciſed his diſcretion whether he would chooſe for a peace premium to run the riſk of capture. Beſides the facts above mentioned, the plaintiffs had produced evidence to ſhew, that all ſhips going with goods of Britiſh manufacture to France clear out for Oſtend without meaning to go thither, and that this is univerſally underſtood by perſons concerned in that branch of commerce. The reaſon ſuggeſted for clearing out for Oſtend, and afterwards making bills of lading as from that place, were, that the light-houſe duties are ſaved, which are payable when the voyage is known to be directly down the Channel, and that the French duties are leſs upon goods

from Oſtend, than from England. Lord MANSFIELD, Ch. J. This verdict is impeached upon two grounds. 1ſt. It is ſaid, there was a fraud on the under-writers in clearing out the ſhip for Oſtend when ſhe was never intended to go thither. But I think there was no fraud on them; perhaps not on any body. What had been practiſed in this caſe was proved to be the conſtant courſe of the trade, and notoriouſly ſo to every body. The reaſon for clearing for Oſtend, and ſigning bills of lading as from thence, did not fully appear. But it was gueſſed at. The *Fermiers Generaux* have the management of the taxes in France. As we have laid a large duty on French goods, the French may have done the ſame on ours, and it may be the intereſt of the farmers to connive at the importation of Engliſh commodities, and take Oſtend duties, rather than ſtop the trade, by exacting a tax which amounts to a prohibition. But, at any rate, this was no fraud in this country. One nation does not take notice of the revenue laws of another. With regard to the evaſion of the light-houſe duties, the ſhip was not liable to confiſcation on that account. 2dly, The ſecond objection is, that the policy was made before, and the ſhip ſailed after the proclamation for repriſals. But every man in England and France, on the 17th of July, expected the immediate commencement of a war. I will not ſay it was actually commenced; but the ambaſſadors of both countries were recalled; the Pallas and Licorne were taken; the fleets were at ſea; and, as it appeared afterwards, were waiting for each other to fight. It does not appear that the goods were French property; an Engliſhman might be ſending his goods to France in a neutral ſhip. But it is indifferent whether they were Engliſh or French. The riſk inſured extends to all captures, and as two other underwriters ſigned at the ſame premium, after the proclamation, it appears that the war riſk was in view when the defendant ſigned. Shall he avail himſelf of an event which increaſes the riſk, but which he had in contemplation when he underwrote the policy? I am of opinion that there ſhould not be a new trial. The three other judges concurred, and the rule was diſcharged.

Pawſon v. Watſon, Ea. Ter. 18 Geo. 3. B.R. *Cowp.* 785 1 *Doug.* 11. [n. 3].

A warranty inſerted in a policy of inſurance muſt be *literally* and ſtrictly complied with, whereas a repreſentation of the under-writer need only be *ſubſtantially performed*: but if falſe in a material point it will avoid the policy.—Upon a rule to ſhew cauſe why a new trial ſhould not be granted in this caſe, Lord MANSFIELD reported as follows: This was an action upon a policy of inſurance. At the trial it appeared in evidence, that the firſt under-writer had the following inſtructions ſhewn to him: "Three thouſand five "hundred pounds upon the ſhip Julius Cæſar, for Halifax,

"to

" to touch at Plymouth, and any port in America; *ſhe* " *mounts twelve guns and twenty men.*" Theſe inſtructions were not aſked for, nor communicated to the defendant; but the ſhip was only repreſented *generally to him as a ſhip of force*: and a thouſand pounds had been done, before the defendant underwrote any thing upon her. The inſtructions were dated the 28th of June, 1776, and the ſhip ſailed on the 23d of July, 1776, and was taken by an American privateer. That at the time of her being taken, ſhe had on board 6 *four-pounders*, 4 *three-pounders*, 3 *one-pounders*, 6 *half-pounders*, which are called *ſwivels*, and 27 men and boys in all, for her crew; but of *them*, 16 only were *men* (not 20, as the inſtructions mentioned), and the reſt, boys. But the witneſs ſaid, he conſidered her as being ſtronger with this force, than if ſhe had 12 carriage guns, and 20 men: he alſo ſaid (which is a material circumſtance) that *there were neither men nor guns on board, at the time of the inſurance.* That he himſelf inſured at the ſame premium, without regard or enquiry into the force of the ſhip. Other under-writers alſo inſured at the ſame premium, without any other repreſentation than that ſhe was *a ſhip of force.* That to every four-pounder, there ſhould be five men and a boy. That in merchant ſhips boys always go under the denomination of men. This was met by evidence on the part of the defendant, ſaying, that guns mean *carriage* guns, not *ſwivels*; and men mean *able men*, excluſive of *boys*. There were three cauſes of the ſame nature depending upon the ſame evidence. The defence in each was, that theſe inſtructions were to be conſidered as a warranty, the ſame as if they had been inſerted in the policy; though they were not proved to have been ſhewn to any but the firſt underwriter. IN ALL THE THREE CASES, THE QUESTION for the Court to determine, is, WHETHER *the inſtructions, which were ſhewn to the firſt under-writer, are to be conſidered as a warranty inſerted in the policy; or as a repreſentation, which would avoid the policy, if fraudulent.* If the Court ſhould be of opinion, that the inſtructions amounted to a warranty, then a new trial is to be had in each without coſts; otherwiſe, the verdicts, which were all for the plaintiffs, are to ſtand. At the trial I was of opinion, that it would be of very dangerous conſequence to add a converſation that paſſed at that time, as part of the written agreement. It is a collateral repreſentation; and if the parties had conſidered it as a warranty, they would have had it inſerted in the policy. But ſecondly, if theſe inſtructions were to be conſidered in the light of a fraudulent miſrepreſentation, they muſt be both material and fraudulent; and in that light, I held, that a miſrepreſentation made to the firſt under-writer ought to be conſidered as a miſrepreſentation made to every one of them, and ſo would infect

infect the whole policy. Otherwiſe it would be a contrivance to deceive many; for where a good man ſtands firſt, the reſt underwrite without aſking a queſtion; and if he be impoſed upon, the reſt of the under-writers are taken in by the ſame fraud. The caſe was left to the jury under that direction. AFTER ARGUMENT at the bar, Lord *Mansfield* aſked, Whether there was any caſe that made a difference between a written and a parol repreſentation? No anſwer being given, his lordſhip proceeded:—There is no diſtinction better known to thoſe, who are at all converſant in the law of inſurance, than that which exiſts between a *warranty* or condition, which makes part of a written policy, and a repreſentation of the ſtate of the caſe. Where it is a part of the written policy it muſt be performed. As if there be a warranty of convoy, there it muſt be a *convoy*; nothing elſe will anſwer the idea intended by the warranty: it muſt be ſtrictly performed, as being a part of the agreement; for in the caſe of convoy it might be ſaid, the party would not have inſured without convoy. But, as by the law of merchants all dealings muſt be fair and honeſt, fraud infects and vitiates every mercantile contract. Therefore, if there be fraud in a repreſentation, it will avoid the policy on account of the fraud, but not on account of the non-compliance with any part of the agreement. If in a life policy a man warrant another to be in good health, when he knows at the ſame time he is ill of a fever, *that* will not avoid the policy on the ground of miſrepreſentation (though it will be void for non-compliance with the warranty); becauſe by the warranty the inſured takes the riſk upon himſelf. But if there be no warranty, and he ſay, "the man is "in good health," when in fact he knows him to be ill, it is *falſe*. So it is, if he do not know whether he be well or ill; for it is equally falſe to undertake to ſay that which he knows nothing at all of, as to ſay *that* is true which he knows is not true. But if he only ſay, "he believes the "man to be in good health," knowing nothing about it, nor having any reaſon to believe the contrary; there, though the perſon is not in good health, it will not avoid the policy, becauſe the under-writer *then* takes the riſk upon himſelf. So that there cannot be a clearer diſtinction than that which exiſts between a warranty, which makes part of the written policy, and a collateral repreſentation, which, if falſe in a point of materiality, makes the policy void; but if not material, it can hardly ever be fraudulent. So far from the uſage being to conſider inſtructions as a part of the policy; parol inſtructions were never entered in a book, nor written inſtructions kept, till a few years ago, upon occaſion of ſeveral actions brought by the inſured upon policies, where the brokers had repreſented many things they ought

ought not to have repreſented, in conſequence of which the plaintiffs were caſt. I adviſed the inſured to bring an action againſt the brokers, which they did, and recovered in ſeveral inſtances: and I have repeatedly, at Guildhall, cautioned and recommended it to the brokers to enter all repreſentations made by them in a book. That advice has been followed in London, but it appeared lately at the trial of a cauſe, that at Briſtol, to this hour, they make no entry in their books, or keep any inſtructions. The queſtion then is, Whether in this policy the perſon inſuring has warranted that the ſhip ſhould poſitively and literally have 12 *carriage guns*, and 20 *men?* That is, Whether the inſtructions given in evidence are a part of the policy? Now I will take it by degrees. The two firſt under-writers before the Court are *Watſon* and *Snell*. Says *Watſon*, "it is part of my agree-"ment, that the ſhip ſhall ſail with 12 guns, and 20 men; "and it is ſo ſtipulated, that nothing under that number will "do; ten guns with ſwivels will not do." The anſwer to this is, read your agreement; read your policy. There is no ſuch thing to be found there. It is replied, yes, but in fact there is, for the inſtructions, upon which the policy was made, contain that expreſs ſtipulation. The anſwer again is, there never were any inſtructions ſhewn to *Watſon*; nor were any aſked for by him. What colour then has he to ſay that thoſe inſtructions are any part of his agreement? It is ſaid, he inſured upon the credit of the firſt under-writer. A repreſentation to the firſt under-writer has nothing to do with that, which is the agreement, or terms of the policy. No man who under-writes a policy ſubſcribes by the act of under-writing, to terms of which he knows nothing; but he reads the agreement, and is governed by that. Matters of intelligence, ſuch as, that a ſhip is or is not miſſing, are things in which a man is guided by the name of a firſt under-writer, who is a good man, and to which another will therefore give faith and credit; but not to a collateral agreement, of which he can know nothing. The abſurdity is too glaring, it cannot be. By extenſion of an equitable relief in caſes of fraud, if a man is a knave with reſpect to a firſt under-writer, and makes a falſe repreſentation to him in a point that is material; as where having notice of a ſhip being loſt, he ſays ſhe was ſafe; that ſhall affect the policy with regard to all ſubſequent under-writers, who are preſumed to follow the firſt. How then do *Watſon* and *Snell* under-write the ſhip in queſtion? Without knowing whether ſhe had any force at all. *That* proves the riſk was equal to a ſhip of no force at all; and the premium was a vaſt one; eight guineas. So much therefore for thoſe two caſes. The third caſe is that of *Ewer*, who ſaw the inſtructions, with the repreſentation, which they contained.

contained. Did the number of guns induce him to underwrite the policy? If it did, he would have ſaid, put them into the policy; warrant that the ſhip ſhall depart with 12 guns, and 20 men. Whereas he does no ſuch thing, but takes the ſame premium which *Watſon* and *Snell* did, who had *no* notice of her having any force. What does that prove? That he is paid and receives a premium, as if it were a ſhip of no force at all. The repreſentation amounts to no more than this, I tell you what the force will be, becauſe it is ſo much the better for you. There is no fraud in it, becauſe it is a repreſentation only of what, in the then ſtate of the ſhip, they thought would be the truth. And in real truth the ſhip ſailed with a larger force, for ſhe had nine carriage guns and ſix ſwivels. The under-writers therefore had the advantage by the difference. There was no ſtipulation about what the weight of metal would be. All the witneſſes ſay, that ſhe had more force than if ſhe had 12 carriage guns, in point of ſtrength, of convenience, and for the purpoſe of reſiſtance. The ſuper-cargo, in particular, ſays, "he inſured the ſame ſhip and the ſame "voyage, for the ſame premium, without ſaying a ſyllable "about the force." Why then it was a matter proper for the jury to ſay, whether the repreſentation was falſe, or whether it was in fact an inſurance as of a ſhip without force. They have determined, and I think very rightly, that it was an inſurance without force. *Ewer* makes an objection, that the repreſentation ought to be conſidered as inſerted in the policy; but the anſwer to that is, he has determined whether it ſhould be inſerted in the policy or not, by not inſerting it himſelf. There is a great difference whether it ſhall be conſidered as a fraud. But it would be very dangerous to permit all collateral repreſentations to be put into the policy. I am extremely glad to hear that a great many of the under-writers have paid. Mr. *Thornton* has paid, who was the firſt perſon that ſaw the inſtructions. Shall the reſt refuſe then? As to *Watſon* and *Snell* they have no pretence to refuſe, for there is not a colour for the objection made by them. As to *Ewer*, we are all ſatisfied with the determination of the jury againſt him. Therefore the rule for a new trial muſt be diſcharged. On the Monday following Mr. *Davenport* ſaid, he was deſired by the underwriters to aſk, whether it was the opinion of the Court, that to make written inſtructions valid and binding as a warranty, they muſt be inſerted in the policy. Lord *Mansfield* anſwered, that moſt undoubtedly that was the opinion of the Court: If a man warrant that a ſhip ſhall depart with 12 guns, and it depart with 10 only, it is contrary to the condition of the policy.

So

So on a warranty to sail from Jamaica on or before a day certain, if the ship departs from her port on that day, with all her cargo and clearances on board, and proceeds to the place of rendezvous in the island, expecting to find convoy and proceed immediately, but is detained there by an embargo till after the day, the departure is a compliance with the warranty, although the captain knew of the embargo when he sailed, the embargo being only till convoy should be ready.—This was an action on a policy of insurance, and a verdict for the plaintiff. On a motion for a new trial the facts of the case appeared to be as follows: The policy was on the ship the Leghorn Galley, "*At and from Leghorn to Jamaica*, "with liberty to call at the Windward Islands, and from "thence to Liverpool; warranted to sail from Jamaica *on or* "*before the first of August next.*" The ship had taken in her whole lading and papers, and set sail from the port of Savannah la Mar in Jamaica, on the 1st of August, and went to Bluefields, which is at the distance of about five miles, and is the general place of rendezvous for convoy. *On the 25th of July, an embargo had been laid on all the ships in the island by the governor, and inserted in the public news-papers of that date.* On the first of August, as soon as the ship had crossed the bar, going out of the harbour of Savannah la Mar, the captain returned in a boat, and there made a protest against losses or damages sustained, or to be sustained, on account of the embargo, which protest he could not have made at Bluefields. He then proceeded the same day over land to Bluefields. At that place the ship was detained till the 9th of August, when, convoy arriving, the embargo was taken off, and she sailed for England with the convoy, *but was afterwards separated from it, and taken by an American privateer.* The captain was examined at the trial, and admitted that he had heard of the embargo; but said, he thought it was only meant to prevent ships from departing without the protection of convoy; that he expected to meet with convoy at Bluefields on the 1st of August, and that the embargo would immediately cease, and leave him to pursue his voyage, the same day, without interruption. Lord MANSFIELD.—Whether there was a *bonâ fide* sailing on the 1st of August, or not, depends on the credit of the captain. He positively swore, that he expected to find convoy ready at Bluefields that day, in which case the embargo would have ceased immediately. The jury have believed him, and have found accordingly. WILLES, J.—It appears to me evident from the captain's conduct, that he did not mean a sailing on the voyage. If he had intended to proceed directly, he had no occasion to quit his ship, in order to make the protest. Upon the whole I think there was not

Earle *v.* Harris, Ea. Ter. 20 Geo. 3. B.R. 1 *Doug.* 357.

bonâ fide ſailing on the firſt of Auguſt. ASHHURST, J.—To be ſure there ought to be a fair ſailing; but the whole of the caſe has been before the jury, who have given credit to the captain. We muſt ſet aſide the verdict as being againſt evidence, if at all, and I do not think there is ground for conſidering this as a verdict againſt evidence. BULLER, J.—On the facts, as ſtated by WILLES, J. I ſhould have no doubt that the departure was colourable; but, from the report, it appears, that the captain thought he ſhould find the convoy ready to ſail immediately from Bluefields, and that the embargo would of courſe be taken off. If he had expected, and meant to wait for convoy, it would not have been a ſailing on the voyage; but the queſtion is mere matter of fact, and the jury having believed the captain, I think we muſt be bound by their finding.—The rule diſcharged.

Macdowall *v.* Fraſer, Mic. Ter. 20 Geo. 3. B.R. 1 *Doug.* 260.

In a repreſentation that a ſhip was ſeen ſafe on ſuch a day, and had performed two thirds of her voyage, if it turn out that ſhe had got as far as was repreſented, but was loſt two days before the day mentioned, the miſtake is material, and makes the policy void.—This was an action upon a policy of inſurance on the ſhip the "Mary and Hannah "from New York to Philadelphia." At the time when the inſurance was made, which was in London, on the 30th of January, the broker repreſented the ſituation of the ſhip to the under-writer as follows: "The Mary and Hannah, "a tight veſſel, ſailed with ſeveral armed ſhips, and was "ſeen ſafe in the Delaware on the 11th of December, by a "ſhip which arrived at New York." In fact the veſſel was loſt on the 9th of December, by running againſt *a chevaux de friſe*, placed acroſs the river. The cauſe came on to be tried before Lord MANSFIELD, at the laſt ſittings at Guildhall. The defence was founded on the miſrepreſentation as to the time when the ſhip was ſeen; and the repreſentation and the day of the loſs being proved, the jury found for the defendant.—A rule to ſhew cauſe why there ſhould not be a new trial having been obtained, and cauſe ſhewn, Lord MANSFIELD, Ch. J. ſaid, the diſtinction between a warranty and a repreſentation is perfectly well ſettled. A repreſentation muſt be fair and true. It ſhould be true as to all that the inſured knows; and, if he repreſent facts to the under-writer, without knowing the truth, he takes the riſk upon himſelf. But the difference between the fact as it turns out, and as repreſented, muſt be material. The caſe of the Julius Cæſar was very different from this. The ſhip, there, was only fitting out when the inſurance was made. No guns nor men were put on board. It was only ſaid what was meant to be done, and what was done, though

though different, was as advantageous, or more ſo, than what had been repreſented. There was no evidence of actual fraud in the preſent caſe, and no queſtion of that ſort ſeemed to be made. But there was a poſitive averment, that the ſhip was ſeen in the Delaware, on the 11th of December. The under-writer was deceived as to that fact, and entered into the contract under that deception. There was no evidence at the trial *when* ſhe was ſeen in the Delaware, or in what condition; but, ſuppoſe the fact had been explained in the manner now ſuggeſted, why did the inſured take upon him to compute the day of the month on which ſhe had been ſeen? Why did he not mention exactly what his information was, and leave the under-writer to make the computation? In inſurances on ſhips at a great diſtance, their being ſafe up to a certain day, is always conſidered as a very important circumſtance. I am of opinion, that the repreſentation concerning the day was material.—WILLES, ASHHURST, and BULLER, Juſtices, were of the ſame opinion.

Any perſon acting by the orders of the inſured, and who is any wiſe inſtrumental in procuring the inſurance, is bound to diſcloſe all he knows to the under-writer, before the policy is effected; and where any miſrepreſentation ariſes from his fraud or negligence, the policy is void. And where one of two innocent perſons muſt ſuffer by the fraud or negligence of a third, whichever of the two gave him credit ought to bear the loſs.—This was an action on a policy of inſurance for 110l. under-written by the defendant on the 21ſt of September, 1782, at ſix guineas *per cent.* on a cargo of oats on board the ſhip Joſeph, loſt or not loſt, at and from Hartland to Portſmouth, beginning the adventure from the loading thereof on board the ſaid ſhip at Hartland. The defendant pleaded the general iſſue, and paid the premium into court. The jury found a verdict for the plaintiff, ſubject to the opinion of the Court on the following caſe: "That on the 27th of July, 1782, *William Bundock*, of Pool, agent for the plaintiff, contracted with "*Richard Thomas* of Hartland, a corn-factor, for the purchaſe of 500 quarters of oats, to be conſigned to *William Fuller* at Portſmouth, on the plaintiff's account, and directed *Thomas* to ſend him *(Bundock)* a bill of loading and invoice, and alſo a like bill of loading and invoice to the plaintiff at *Cuthbert Fiſher*'s, eſq. London. That, in purſuance thereof, *Thomas* ſhipped the oats on board the ſhip inſured, which ſailed from Hartland on the 16th of September, 1782; and was loſt the ſame day off the pier of Hartland. That on the 16th of September, 1782, *Thomas* wrote two letters to *William Bundock* and *Cuthbert*

Fitzherbert *v.* Mather, Mic. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 12.

" *bert Fiſher*, informing them that he had ſent a bill of load-
" ing and invoice, *that Mr.* Fiſher *might inſure if he*
" *liked.* About ſix or ſeven o'clock of the evening of the
" 16th of September, *Thomas heard a report that the ſhip*
" *was on ſhore, and at ſix o'clock in the morning of the 17th,*
" *he knew the ſhip was loſt.* The 16th of September was
" not a poſt-day, and the above letters did not leave Hart-
" land till one o'clock in the afternoon on the 17th, which
" was the poſt-day; and the letters which went by the poſt
" of that evening, were received in London on the 20th of
" September. On the 19th the plaintiff wrote a letter to
" *Fiſher*, deſiring him to inſure his amount of the cargo to
" Portſmouth. The laſtmentioned letter, together with the
" aforeſaid letter from *R. Thomas* to Mr. *Fiſher*, dated the
" 16th of September, were both received by *Fiſher* in Lon-
" don on the 20th of September, and he thereupon directed
" the inſurance in queſtion to be effected. And, on the
" 21ſt of September, the defendant under-wrote the policy
" ſtated in the declaration." TWO QUESTIONS were made: FIRST, Suppoſing *Thomas* to be the agent of the plaintiff, whether his negligence in not ſending an account of the loſs of the ſhip, ſhall vacate the policy? SECONDLY, Whether *Thomas* was the plaintiff's agent? All the orders which *Bundock* had given to *Thomas* being to ſend ſuch a quantity of oats on board a ſhip, and to ſend a bill of lading; the moment he had done that his agency ceaſed.—PER CURIAM: This policy was effected by miſrepreſentation; and that miſrepreſentation aroſe from the proper agent of the plaintiff, who gave the intelligence. Now whether this happened by fraud or negligence, it makes no difference, for in either caſe the policy is void. It was by miſrepreſentation, becauſe the under-writer was warranted, on the information of the agent, to take for granted, that on the 17th of September at 12 or 1 o'clock, the ſhip was ſafe; for the agent gave an account of the ſhip being loaded, and ſaid nothing of what had happened to her. Then there was ſtrong ground to believe on this letter, that ſhe was ſafe when the poſt came away. If *Thomas* were not guilty of *fraud*, at leaſt he was guilty of great *negligence*; and this policy, being effected by miſrepreſentation, is void. He acted honeſtly when he wrote the letter; but on the 16th at night he heard the ſhip was on ſhore, and the next morning *he knew that ſhe was loſt.* The poſt did not go out till the afternoon of that day, therefore he had full opportunity to ſend an account of the loſs. On general principles of policy the act of the agent ought to bind the principal; becauſe it muſt be taken for granted, that the principal knows whatever the agent knows. Though the plaintiff be innocent, yet if he

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build his information on that of his agent, and his agent be guilty of a miſrepreſentation, the principal muſt ſuffer. It is the common queſtion every day at Guildhall, when one of two innocent perſons muſt ſuffer by the fraud or negligence of a third, which of the two gave credit? Here it appears that the plaintiff truſted *Thomas*; and he muſt therefore take the conſequences.—Judgment for the defendant.

A repreſentation made to the firſt under-writer extends to all the others. But a repreſentation, that the ſhip is *expected* to ſail on ſuch a day is not material, ſo as to vitiate the policy, although it ſhould turn out that ſhe actually ſailed ſix months before.—Upon a motion for a new trial in an action on a policy of aſſurance the ground mentioned was, that ſince the trial, a material repreſentation which had been made to *Shulbred* the firſt under-writer on the policy, and which turned out to be falſe, had been diſcovered. It appeared from *Shulbred*'s affidavit, that when he ſigned the policy in March, 1778, the broker was getting ſeveral others on other ſhips ſubſcribed at the ſame time, all belonging to the ſame owner, and ſaid, ſpeaking of them all—"*Which veſſels* "*are expected to leave the coaſt of Africa in November or* "*December*, 1777." In truth, the veſſel in queſtion had ſailed in May, 1777, and *Shulbred* ſwore in his affidavit, that if he had known that circumſtance he would not have ſigned. There had been actions brought againſt all the under-writers on the policy except *Shulbred*. Lord MANSFIELD.—It has certainly been determined in a variety of caſes, that a repreſentation to the firſt under-writer extends to the others. But under what circumſtances has the defendant gone to trial in this caſe? He certainly knew what had been repreſented to himſelf. He was acquainted with *Shulbred*, and had an opportunity of aſking before the trial what had been repreſented to *him*. If therefore this evidence is *new*, it is owing to his own negligence. But the repreſentation is not material. It was only an *expectation*, and the under-writers did not enquire into the ground of the expectation. This was lying by till after a trial, in order to make an objection if the verdict ſhould be for the plaintiff.—The rule diſcharged (1).

Barber *v.* Fletcher, Mic. Ter. 20 Geo. 3. B.R. 1 *Doug.* 305.

(1) In the caſe of *Shirley* v. *Wilkinſon*, which came on in B.R.M. 22 *Geo.* 3. upon a motion for a new trial, Lord *Manſfield* and the reſt of the Court were clearly of opinion, that if the broker, at the time when the policy is effected, in repreſenting to the under-writer the ſtate of the ſhip, and the laſt intelligence concerning her, does not diſcloſe the whole, and what he conceals ſhall appear *material* to the jury, they ought to find for the under-writer, the contract in ſuch caſe being void, although the concealment ſhould have been innocent, the facts not mentioned having appeared immaterial to the broker, and having not been communicated merely on that account.

Wilſon v. Ducket; Mic. Ter. 3 Geo. 3. B.R. 3 *Burr.* 1361.

What part of a premium muſt be returned, if a policy of inſurance be given up and cancelled, was in this caſe diſcuſſed, but not determined. This was an action upon a policy of inſurance on a ſhip; with a count of a general *indebitatus aſſumpſit* for money had and received to the plaintiff's uſe: and damages were laid at 98l. The trial was had under a decree of the court of chancery, where the now defendant, the inſurer, being there complainant, had offered to pay back the premium, which was 10l. No money was, in the preſent caſe, paid into court; though the uſual courſe in theſe caſes is for the defendant, the inſurer, to bring the premium into court. The jury found a verdict for the plaintiff, for the ten pounds premium, on the count for money had and received to his uſe; although they were of opinion againſt the policy, upon the foot of fraud; and found againſt it, as being fraudulent. (In fact, the firſt under-writer was only a decoy-duck, to induce other perſons to under-write the policy: and it had been previouſly agreed between the inſured and him, "That he ſhould not be bound by "his ſigning the policy;" which this Court conſidered as a fraud, and therefore that the jury had given a right verdict in finding the policy fraudulent). By concurrence of Lord *Mansfield* (before whom it was tried), and of the counſel on both ſides, it was agreed to bring this queſtion before the Court, "Whether, upon a policy of inſurance being found "fraudulent, the premium ſhould be returned to the plaintiff "the inſured, or retained by the defendant the inſurer?" The method taken was by the defendant's counſel moving for a rule to ſhew cauſe why the judgment ſhould not be entered up for the defendant; and the Court's making a rule to ſhew cauſe. For the plaintiff, the cauſe ſhewn was, that this contract was to be looked upon as *void ab initio*. Therefore no riſque was run by the defendant; and conſequently, he had no right to retain the premium. There is no caſe at common law, on this head, that has been judicially determined. But in caſes like this, equity and common law courts have concurrent juriſdiction; and muſt determine alike, upon like circumſtances: and the two caſes in equity, of (1) *Wittingham* v. *Thornborough*, and (2) *De Coſta* v. *Scandret*, are nearly in point. On the behalf of the defendant was mentioned a caſe of *Rucker* v. *Hollingbury* before the maſter of the rolls; who was of opinion contrary to the above two caſes. But Lord MANSFIELD ſaid that there muſt be ſome miſtake, in reciting this laſt caſe before the maſter of the rolls: for, the practice of the court of chancery

(1) V. Precedents in chancery 20. where a fraudulent policy was decreed to be delivered up; and the premium to be repaid; the plaintiffs deducting thereout their coſts.

(2) The like decree—policy to be delivered up, with coſts: but the premium to be paid back, and allowed out of the coſts.

is certainly agreeable to the other cases. But what he wanted to know was, "Whether there was any common-law deter-"mination to the same effect:" [Which it did not appear that there was.] Whereupon Lord MANSFIELD said, it was plain what must be done in this case: for, he looked upon the offer made by the complainant's bill in equity, to be the same thing as if the money had been actually brought into court, in the present case.—Verdict for the plaintiff vacated; and a verdict to be entered for the defendant.

Deviation].—If a ship be driven out of her loading port into another port, and being there, she does the best she can to get to her port of destination, she is not obliged to return to the port from whence she was driven.—Upon a motion for a new trial the facts appeared to be as follows: This was an action upon the case to recover a loss upon the ship Friendship, which the plaintiff, who was a merchant in the West Indies, had ordered the defendant, who was his correspondent in England, to get insured "*at and from* St. Kitts *to* London," and which the defendant had neglected to do. The plaintiff in a letter, dated St. Kitts, 4th of May, 1781, directed the defendant to make an insurance upon the ship, '*at and from St. Kitts to* '*London*,' *warranted to sail with convoy*. The plaintiff wrote to the defendant, the 14th of June, 1781, St. Kitts. "That "the ship was loaden, and would sail on or before the first "of August." The plaintiff wrote again to the defendant, St. Kitts, the 3d of July, 1781. "I now inform you that "the ship left port to take in her cargo. She let go an an-"chor at Sandy Point; but as the wind blew fresh, she "drove out and could not come in again: she was obliged to "go to St. Eustatia; I hope you have not neglected to "make the insurance for fear of accidents." The plaintiff wrote again to the defendant, St. Kitts, the 25th of July, 1781 (received in London on the 14th of September, 1781). "As the ship Friendship did all in her power to get up from "St. Eustatia but could not, therefore I thought proper to "sell her, which I did to Mr. *Ross*, of St. Eustatia. I hope "the insurers will not insist on the premium; therefore hope "you will withdraw the insurance, as I suppose the insurers "will not be liable." The plaintiff wrote to the defendant, St. Kitts, the 26th of July, 1781 (received in London on the 11th of September, 1781). "Mr. *Ross* has purchased the "ship Friendship, which you are directed to insure from St. "Eustatia to London; but if the former insurers will not give "up the premium, you may assign my interest in that in-"surance over to Mr. *Ross*." About the beginning of September, before the arrival of the two last letters, the defendant had gone into the country, and had left word with his clerk to open all letters. These letters were sent after him into the country, and the defendant did not receive them in fact till the

Delaney *et al.* v. Stoddart, Mic. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 22.

24th of September. The defendant wrote to the plaintiff, London, Auguſt 1ſt, 1781. " I ſhall make the inſurance; I " have already wrote you, that I ſhall cheerfully take part in " the ſhip Friendſhip," And the following entry was made in the defendant's book, 2d of Auguſt, 1781: " *Owners of* " *ſhip Friendſhip debtors for inſurance on ſhip and freight,* " FROM ST. KITTS TO LONDON, *warranted to depart with* " *convoy on or before the firſt of Auguſt, at* 12 *per cent.*" While the defendant was in the country, *Roſs*'s agent enquired at the defendant's to know whether the inſurance had been effected, and was told by the clerk, that he believed it was. The premium was then as high as 40 guineas on ſhips in the ſame fleet, and the defendant, immediately upon coming to town, cancelled the inſurance in his books; but the news of the loſs had arrived at Lloyd's ſeveral hours before that time. It alſo appeared that the ſhip Friendſhip had ſailed the firſt of Auguſt from St. Euſtatia with the convoy, and that ſhe had afterwards foundered at ſea. That St. Euſtatia is in the direct road to London from St. Kitts, and the convoy from St. Kitts always looked into St. Euſtatia, to take up any ſhips that might be there. That if the Friendſhip had ſailed from St. Kitt's, ſhe muſt have gone by St. Euſtatia, but would not have ſtopped there. That when ſhe was driven to St. Euſtatia, after making ſeveral efforts to get back to St. Kitts to finiſh her loading, and finding ſhe could not ſucceed, ſhe then took in the reſt of her loading at St. Euſtatia.—The jury found a verdict for the plaintiff 1500l. damages. Lord MANSFIELD, Ch. J. The only queſtion is, Whether this is the ſame voyage as that intended to be inſured? The great queſtion is, Whether there was a deviation? And that depends on the evidence. If a ſtorm drive a ſhip out of her voyage into any port, and being there, ſhe does the beſt ſhe can to get to her port of deſtination, ſhe is not obliged to return back to the point from whence ſhe was driven: but here the witneſſes ſay, ſhe tried to get back to St. Kitts, and could not; and it is a much eaſier navigation to go directly from St. Euſtatia to London, than to go back to St. Kitts firſt. And as to the taking in the cargo at St. Euſtatia, I do not find that the ſhip loſt any time by it. Every thing ſhould be imputed to the ſtorm which was in reality done and occaſioned by it. It was a queſtion which was proper to be left to a jury, whether this was the ſame voyage or not; and they have determined it. WILLES, J. My only doubt is, whether this was the ſame voyage inſured. So far as the ſhip was driven by ſtreſs of weather, ſo far there is an exception. When ſhe was driven to St. Euſtatia, ſhe attempted to get back to St. Kitts; but I do not find that ſhe made any attempt to get to London at that time. When ſhe was at St. Euſtatia, the owner of the ſhip ſold her to *Roſs*, who loaded her afreſh with tobacco inſtead

ſtead of ſugar, which was to have been her original cargo; ſo that there was a new cargo, a new owner, and a new voyage. In theſe caſes we lean very much to deviation. In a caſe (1) lately determined in this court it was held, that going to Beaumaris, though only a few leagues out of the way, was a deviation. It ſtrikes me as a caſe of ſome difficulty: perhaps the jury had not enough evidence laid before them to determine upon; for there is nothing ſaid on the part of the defendant as to the uſual courſe of the voyage. The riſk was certainly increaſed by the ſhip's continuing at St. Euſtatia ſo long; for the inſurance, if good at all, was good all the time ſhe lay by at St. Euſtatia, and ſhe might have continued there much longer. In my opinion, it is very well worth the re-conſideration of a jury. ASHHURST, J. This ought to be conſidered as the ſame voyage inſured. Wherever a ſhip is driven by ſtreſs of weather out of her own port into another, that ſhall not be conſidered as a deviation. Here the ſhip was forced by ſtreſs of weather to go to St. Euſtatia, and being there, ſhe endeavoured ſeveral times to get back to St. Kitts, but without effect. In fact it was better for the parties that the cargo ſhould be completed at St. Euſtatia. Her continuing at St. Euſtatia rather diminiſhed the riſk than otherwiſe; becauſe, if ſhe had gone back to St. Kitts, it would have taken up a longer time. If then every thing was done that could be done under ſuch circumſtances for the benefit of the adventure, this ſhall not vacate the policy. As to the other point concerning the intereſt of the parties, this is not the plaintiff's action, it is the action of *Roſs*. A policy certainly muſt be transferred: for though a choſe in action cannot in law be aſſigned, yet in equity it may; therefore we will permit the action to be brought by truſtees. There was an agreement between the plaintiff and *Roſs* that the policy ſhould be transferred, becauſe *Roſs*'s agent enquired whether the inſurance had been effected; and I think the plaintiff had intereſt enough to found the action upon. BULLER, J. It has been much relied on in this caſe, that there was a change of property; but that, in my opinion, makes no difference. Then, laying that out of the queſtion, and ſuppoſing the ſhip as not being ſold to *Roſs*, I will firſt conſider whether this is a different voyage. But that cannot be, as it would be contrary to the evidence. Neither is it true that the veſſel afterwards purſued the ſame voyage by accident; for that part of the cargo which ſhe took in at St. Kitts continued on board her the whole time, and the original intention of the ſhip's coming to London was likewiſe continued: the parties never thought of a different voyage.—But it is ſaid, that ſhe took in another cargo at St. Euſtatia.—

(1) *Hibbert* and others, aſſignees of *Barber* v. *Pbyn*.

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What ſays the evidence? Where a captain has not taken in a full cargo at St. Kitts, it is uſual to take in the reſt at St. Euſtatia; ſuch was proved to be the cuſtom of the voyage; and it was proved that on a voluntary act of the captain's going to St. Euſtatia, the policy would have protected the ſhip during her ſtay there; a *fortiori* will it, where the ſhip was driven there by ſtreſs of weather. As to the defendant's not being prepared at the trial to anſwer the uſage, he ought to have come prepared for that which was the giſt of his defence.—Then was the riſk altered? Had it been ſo, it was in the defendant's power to have proved it: but there was no proof that it was altered. Part of the ſame cargo continued; nor does it appear that they meant to alter the cargo: for ſhe endeavoured to get back to St. Kitts to take in the reſt, but was prevented by ſtorms. I think the riſk would in reality have been much greater, if ſhe had gone back; for ſhe muſt have come by the way of St. Euſtatia again in her paſſage home.—The part of the cargo which was taken in at the time the ſhip was driven from St. Kitts had been already paid for by the defendant: even this would not have been paid for by the defendant, if he had conceived that the voyage had been at an end. Another circumſtance is very ſtrong; all the other policies on the ſame voyage have been paid. As to the policy being ſubſequently cancelled, it does not appear; for there muſt be ſome act done before the loſs is known to ſignify ſuch cancelling; and if no act be done, things muſt be taken to remain as they were. On all points I think the verdict is right.—Rule diſcharged.

Lavabre *et al.* v. Wilſon; Bize v. Fletcher; and Lavabre *et al.* v. Walter; Mic. Ter. 20 Geo. 3. B.R. 1 *Doug.* 284.

If an inſured ſhip quit the courſe deſcribed in the policy, from neceſſity, ſhe muſt purſue ſuch new voyage of neceſſity in the direct courſe, and in the ſhorteſt time, otherwiſe the underwriters will be diſcharged.—In *Lavabre* v. *Wilſon*, and *Lavabre* v. *Walter*, the voyage inſured was deſcribed in the following words: "At and from Port L'Orient to Pondicherry, "Madras, and China, and at and from thence back to the "ſhip's port, or ports of diſcharge in France, with liberty to "touch in the outward or homeward-bound voyage at the "Iſles of France and Bourbon, and at all or any other place "or places what or whereſoever." And there was this additional clauſe in a ſubſequent part of the policy, viz. "And it "ſhall be lawful for the ſaid ſhip, in this voyage, to proceed "and ſail to, and touch and ſtay at, any ports or places whatſoever, as well on this ſide, as on the other ſide of the Cape "of Good Hope, without being deemed a deviation." The ſhip did not ſail till the 6th of December, 1776, and did not reach Pondicherry till the 23d of July, 1777. She continued there till the 23d of Auguſt following, *when, inſtead of proceeding to* China, *ſhe ſailed for* Bengal, *where having paſſed the winter, and undergone very conſiderable repairs, ſhe ſailed from*

from thence early in the year 1778 (being the ſecond ſhip that left the Ganges), returned to Pondicherry, and after taking in a homeward-bound cargo, at that place, proceeded in her voyage back to L'Orient, but was taken in October in that year by the Mentor privateer. The uſual time in which the direct voyage between Pondicherry and Bengal is performed, is ſix or ſeven days, but the Carnatic was about ſix weeks in going to Bengal, and two months on the way back from thence to Pondicherry. Both going and returning, ſhe either touched at, or lay off, Madras, Maſulipatam, Viſigapatam, and Yanon, and took in goods at all thoſe places. On the trial of *Lavabre* v. *Wilſon*, it was, in the opening for the plaintiffs, inſiſted, that, under the general liberty given by the policy of touching at all places whatſoever, the veſſel might go to Bengal, which, by the operation of thoſe words, was as much part of the voyage, as if it had been expreſsly named. That the ſhip being there, the voyage might be abridged, and her further progreſs to China abandoned, for that veſſels inſured may always return back from any point within the limits of the voyage contained in the policy. Lord MANSFIELD, however, having intimated a clear opinion that the general words were, by the expreſſions of "in the outward, or homeward-bound voyage," and "in this "voyage," qualified and reſtrained ſo as to mean "all places "whatſoever in the uſual courſe of the voyage to and from the "places mentioned in the policy," this ground was immediately abandoned, and never farther mentioned by the counſel for the plaintiffs in the progreſs of theſe cauſes. The plaintiffs then reſted their caſe chiefly on another ground, viz. that *the voyage to* Bengal *was adopted by neceſſity for the ſafety of the ſhip, upon the* bonâ fide *opinion of the captain and the reſt of the officers, and of one* Berard *the ſupercargo, who had the principal management.* To prove this neceſſity, it was ſworn by *Berard* and four mates, that the ſhip had been detained longer in Europe than at firſt was foreſeen, and that ſhe met with extremely bad weather on her outward paſſage, and at Pondicherry was ſo leaky, that it appeared to them, upon conſultation, that ſhe muſt be careened, which could only be done at Bengal, there being no other place ſo near as for her, in her then ſituation, to be able to proceed to it with ſafety, where that operation could be performed; for that no harbour between Pondicherry and the Ganges on one ſide, and Pondicherry and Bombay on the other, would admit of ſo large a veſſel being hove down, her burthen being near 800 tons. Indeed, it turned out when they got to Bengal, that ſhe could be repaired without careening, but this was only diſcovered, they ſaid, after ſhe was unloaded of much more of her contents than could have been done with ſafety in the open road of Pondicherry. All the witneſſes for the plaintiffs ſwore that they took the reſolution of going to Bengal much againſt their inclination, for that it would have been

been not only more for the advantage of the owners, but alſo more for their private intereſt as individuals, to go to China, they having prepared their own adventures for that market.—Beſides the circumſtance of the leak, they aſſigned an additional reaſon for relinquiſhing the voyage to China, viz. that they had been detained ſo long at Pondicherry, from delays in unloading their outward-bound cargo, that they were not ready to leave that place, till it was too late to undertake the China voyage with any degree of prudence or ſafety, and they ſaid Bengal was the beſt place they could go to winter at. The defence ſet up was; 1. *That the ſhip had never ſailed on the voyage inſured, her deſtination,* when ſhe left Europe, *having been for* Bengal *and not* China; 2. That, *ſuppoſing her to have ſailed on the voyage deſcribed in the policy, yet her going from Pondicherry to Bengal, inſtead of proceeding to China, was a deviation, and was not juſtified by neceſſity.* In ſupport of the firſt ground of defence, certain ſecret inſtructions were relied upon, which were found on board the ſhip, and were addreſſed by the owners at L'Orient to *Berard* the ſupercargo, and which, though obſcurely penned, gave great room to contend, either that at her departure it had been reſolved to ſubſtitute Bengal for the China voyage, or, at leaſt, that the alternative was left with *Berard*, to be decided one way or the other, according to certain events in India, which events turned out in the ſort of way that, according to the inſtructions, was to determine the voyage for Bengal. On the ſecond ground they contended, that from the account given by the plaintiffs' own witneſſes, there was no neceſſity for going to Bengal, and, that it appeared, that, inſtead of going directly thither, a trading voyage had been made from Pondicherry, which afforded a ſtrong preſumption, that trading was the object and motive; and that the leak, or lateneſs of the ſeaſon, were only afterthoughts, and mere pretexts. On the part of the defence alſo ſome letters were produced written by the owners to their correſpondents who had got the policy under-written), to raiſe a preſumption, that the neceſſity of going to Bengal was merely a pretence, deviſed after the capture, and when the inſured began to apprehend that the words of the policy would not cover a voyage to that place. In *Lavabre* v. *Walter*, the ſecret inſtructions given to *Berard* had been more attentively peruſed, and afforded ſtronger reaſons than they at firſt ſeemed to do, to ſuſpect that the voyage to Bengal was pre-determined, before the departure from L'Orient. The plaintiffs' witneſſes were much preſſed on this occaſion, to ſay, whether the lateneſs of the ſeaſon alone was ſuch as, independent of the leak, would have determined them to abandon the China voyage; and, on the other hand, whether the leak, independent of the other reaſon, would, in their opinion, have rendered it neceſſary ſo to do. To this they ſaid, that they could not give a certain

tain anſwer; for that, as neither of the caſes had happened, they had not exerciſed their judgment upon them. Lord MANSFIELD ſummed up very ſtrongly againſt the plaintiffs, on the head of fraud. But, independent of that ground, he ſtated a new point againſt them, viz. that, *if neceſſity were admitted to have been the ſole motive for ſubſtituting the voyage to Bengal in the place of that to China, ſtill it was incumbent on the inſured to have purſued that voyage of neceſſity directly, in the ſhorteſt and moſt expeditious manner, and that the delay in going from* Pondicherry *to Bengal, and the repeated ſtops by touching at different places, and trading there, were deviations, and not within the protection which the ſuppoſed neceſſity afforded to the direct voyage.* Notwithſtanding this direction, the jury found a verdict for the plaintiff. Afterwards a new trial having been moved for, Lord MANSFIEL, Ch. J. after argument at the bar, delivered the opinion of the Court as follows: If this application were upon the ground of impeaching the teſtimony of the plaintiffs' witneſſes, whatever my private ſentiments might be, after two concurrent verdicts, I ſhould not be inclined to interpoſe. But, without impeaching the evidence, I think there ought to be a new trial, or rather, that the caſe has been ill decided. The queſtion is, Whether, without imputation on any body, circumſtances have not happened to take the voyage out of the policy? *A deviation from neceſſity muſt be juſtified, both as to ſubſtance and manner.* Nothing more muſt be done than what the neceſſity requires. The true objection to a deviation is not the increaſe of the riſk. If that were ſo, it would only be neceſſary to give an additional premium. It is, that the party contracting has voluntarily ſubſtituted another voyage for that which has been inſured. If the voyage to Bengal was unavoidable, where was the neceſſity to trade? All the ports touched at were out of the direct courſe, and ſix weeks and two months were conſumed inſtead of ſix days. The juſtice of the caſe required a different deciſion.—Rules abſolute (1).

In this caſe the inſurance was on a voyage "from C. to D. "on a repreſentation that the ſhip was firſt to ſail from A. to "B. and from B. to C.; the voyage from A. to B. was per- Driſcol v. Paſſmore, Hil. Ter. 38 Geo. 3. C. B. 1 *Pul. & Bos.* 200.

(1) The two cauſes were again ſet down for trial, but the plaintiffs, when they were ready to be called on, ſubmitted to the opinion of the Court, and abandoned their claim againſt the under-writers. *Lavabre and Company* were bankers at Paris, who had lent the ſum which was the ſubject of this inſurance, upon a contract *à la groſſe aventure* (that is, in the nature of *reſpondentia* and *bottomree* united), to the owners, *Berard and Company*, at L'Orient. In this contract the voyage was deſcribed as in the policy, and the plaintiffs inſtituted a ſuit in France againſt the owners, on the ground of a deviation from the voyage upon which they advanced their money at the riſk of loſing it if the ſhip and goods ſhould be loſt.

"formed,

" formed, but that from B. to C., being unavoidably prevent-
" ed, the ſhip returned to A., from thence proceeded imme-
" diately to C., and in performing the voyage from C. to D. was
" loſt; and this was held a good commencement of the
" voyage inſured."—This was aſſumpſit on a policy of inſurance, with a count for money had and received. The defendant paid five guineas into court. The ſhip Timandra being about to ſail on a voyage from Liſbon to Madeira, from Madeira to Saffi on the coaſt of Africa in ballaſt, and from thence back to Liſbon, with a cargo of wheat; the plaintiff directed his broker to make three inſurances, viz. one on three-fourths of the ſhip for the round voyage, one on three-fourths of the freight on the voyage from Liſbon to Madeira, and one (which was the inſurance in queſtion) on three-fourths of the freight from Saffi to Liſbon. The two former were effected without any difficulty, but the broker was not able to get the third under-written at the ſame time, on account of the diſtant period at which the riſk was to commence: however, on a repreſentation ſome time afterwards, that he had received intelligence of the ſhip's arrival at Madeira, and that ſhe was about to proceed on her voyage immediately, this alſo was effected. When the Timandra arrived at Madeira, all the crew except two, being alarmed by reports of ſome Mooriſh cruiſers being off Saffi, and of their having captured and ill-treated a Dane and an American, quitted the ſhip, and refuſed to return to it unleſs the captain would promiſe to ſail immediately for Liſbon. Under theſe circumſtances, the captain carried the ſhip back to Liſbon; but on his arrival there, the charterers inſiſted on his proceeding directly from thence to Saffi; which he accordingly did, and was captured in his return from Saffi to Liſbon. It was in evidence that the difference of ſeaſon ariſing from this delay did not vary the riſk. A verdict was found for the plaintiff, and the defendant afterwards obtained a rule to ſhew cauſe why the above verdict ſhould not be ſet aſide, and a new trial be had, *on the ground of the voyage inſured never having commenced.* EYRE, Ch. J. This is admitted to be a new caſe, and conſequently there are no authorities: we ought therefore to be fully ſatisfied, that upon ſome principle of law the verdict is wrong before we interfere by granting a new trial. It has been argued in ſupport of the rule, that the voyage inſured was the third branch of a ſpecific voyage, ſpecifically deſcribed in the policy: but I take the voyage inſured to be a voyage from Saffi to Liſbon only. Now that the voyage ſo deſcribed did literally commence there can be no doubt, and I know no way in which that voyage could be reſtricted in point of commencement or connection with any other voyage, but by repreſentation or warranty. That point was ably put by the Counſel: If a man be aſked to under-write a voyage from Saffi to Liſbon, he

he naturally ſays, "Let me know what this voyage is, and at "what time it is to commence, that I may judge of the riſk. "Is the ſhip now at Saffi, or where is ſhe?" He will expect a repreſentation, and that repreſentation ought to be true: here the repreſentation was, that the ſhip was bound from Liſbon to Madeira with a cargo, from Madeira to Saffi in ballaſt, and from thence to Liſbon. That repreſentation was really true at the time that it was made, and the under-writer was to form his own calculation of the time when the Timandra would arrive at Saffi. If the inſurance was made on a repreſentation which was true at the time, it will be difficult to ſtate a caſe where ſubſequent events, not happening through miſconduct, and not totally diſappointing the voyage, will diſcharge the under-writer. He formed his judgment of the caſe, knowing that all was executory, and that an alteration might ariſe of a kind that might increaſe his riſk; upon the repreſentation made to him he under-wrote. The fact is, that the repreſentation being true, a circumſtance occurred under which the captain was diſtreſſed how to act, and reſpecting which there might have been different opinions: he reſolved to go back to Liſbon; the charterer there called upon him to fulfil his engagements; he ſailed accordingly, and arrived at Saffi; and in the courſe of his voyage home was captured. Then why have the jury done wrong in ſaying that the under-writers are liable? They were literally bound to inſure a voyage from Saffi to Liſbon; tied up, indeed, as far as a repreſentation of the projected voyage, executory in its nature, could tie it up, and that repreſentation was true at the time that it was made. The voyage from Saffi to Liſbon might have been performed with as much eaſe after the circuitous voyage had taken place (unleſs a Spaniſh war had broken out) as in the direct courſe originally propoſed.—On what principle then can the under-writers be diſcharged? The voyage has in ſubſtance been performed: the ſhip was diverted from her intended courſe by circumſtances for which no one was to blame, and having arrived at Saffi, took in the cargo which was the original object of the inſurance. HEATH, J. I am of the ſame opinion. This is an inſurance on a voyage from Saffi to Liſbon, which being a voyage to commence *in futuro*, it was neceſſary that the agent of the inſurer ſhould give all the intelligence of which he was poſſeſſed to the under-writers.—Now the captain's orders were to go from Madeira to Saffi, and from thence to Liſbon. Indeed it is not contended that there was any miſrepreſentation, but only that the voyage inſured was never commenced; though the intention clearly was to have proceeded in the round voyage, had not the crew been alarmed by reports of an enemy off the coaſt of Saffi. The queſtion is not whether the captain meant to abandon, ſince he had it not in his power ſo to do, without the conſent of the charterers; and at their inſtance he did proceed on the voyage

as ſoon as he conveniently could. This is like all other caſes of deviation juſtified by particular circumſtances, and I ſee no reaſon to quarrel with the verdict. ROOKE J. expreſſing ſome doubts with reſpect to the liability of the under-writers, founded on the circumſtance of their having at the time of the inſurance apparently taken into conſideration the period at which their riſk was to commence, ſince they refuſed to under-write the Timandra till the broker informed them of her arrival at Madeira; the caſe ſtood over, and now *Eyre*, Ch. J. ſaid, that the Court were unanimouſly of opinion, that no new trial ought to be granted.—Poſtea to the plaintiff.

Driſcol *v.* Bovil, Mic. Ter. 39 Geo 3 C.B. 1 *Pul. & Bos.* 313.

At the trial of this cauſe, the ſame facts appeared in evidence as in the laſt caſe of *Driſcol* v. *Paſſmore*, with the addition of a letter written by the plaintiff on the 18th of Auguſt from Liſbon (after his return from Madeira to that place), to his broker in London; which contained the following paſſage: "Should the merchant here, who chartered "the veſſel, inſiſt on her proceeding to Saffi to fulfil the "charter, I want to know if it is agreeable to the under-"writers that the veſſel may proceed to complete her "voyage, as by recent accounts, the riſk is not ſo great. "I expect your immediate anſwer reſpecting their deter-"mination on this buſineſs. I hope they will be ſatisfied "that the return of the veſſel to this port is much more in "favour of them, than of me or any other perſon concern-"ed. By the next packet that ſails from hence I ſhall be "able to inform you whether ſhe is to proceed to Saffi or "not; but the opinion of the under-writers either one way "or the other is neceſſary." The broker in his anſwer to this letter gave his opinion that the policy on the round voyage was at an end, and informed the plaintiff that he had effected a new policy on the voyage from Saffi to Liſbon. A verdict was found for the plaintiff. A new trial was moved for on the ground, that although the deviation made by returning to Liſbon might poſſibly be juſtified by neceſſity, ſtill that it appeared by the plaintiff's letter that the original object of the voyage had not been kept conſtantly in view: for it long depended on the will of the charterer whether the veſſel ſhould proceed or not; and that the plaintiff himſelf was manifeſtly deſirous of abandoning the voyage. PER CURIAM: This certainly is not a verdict againſt law. The queſtion before us is a mere queſtion of fact. This motion ſeems to have been made on two grounds; firſt, that the deviation was not juſtified by neceſſity, though little reliance has been placed on that; ſecondly, that the voyage inſured was abandoned. Now, whether the deviation were juſtified by neceſſity or not, reſts on one plain fact; namely, that on receipt of the intelligence of ſome Mooriſh cruiſers being off Saffi, the crew refuſed to proceed

proceed. What then could the captain do but return? As to the abandonment of the voyage, that ſhould appear in clear terms or in an ambiguous conduct; now it ſeems that the plaintiff has acted with great prudence and circumſpection, but that he has never abandoned. The terms of his letter expreſsly prove that he had not formed any concluſion as to what he ſhould do, and that he did not think himſelf at liberty to form one. He aſks the broker what the under-writers will ſay, if the merchant ſhall ſtill inſiſt on his completing the voyage. Does he then determine to proceed at any hazard? On the contrary, he wiſhes to know the ſentiments of the under-writers, and reſerves to himſelf the power of determining what part he ſhall take. The verdict is clearly right.—Rule refuſed.

A liberty "*to cruiſe ſix weeks*," in a policy of inſurance, means "ſix weeks *ſucceſſively*, from the commencement of the cruiſe."—On the trial of an action againſt an under-writer, on a policy of inſurance on the ſhip Mary, a letter of marque. Wherein the words of the policy were, "At and from Liver-"pool to Antigua, *with liberty to cruiſe ſix weeks*, and to re-"turn to Ireland, or Falmouth, or Milford, with any prize "or prizes," a verdict was found for the plaintiffs, with liberty to move for a new trial, without coſts, upon the following facts. The policy was made on the 9th of February, 1779, and there was no time fixed in it for the commencement, or the duration, of the voyage. The captain, being called on the part of the plaintiffs, ſwore that he, in fact, ſailed from Liverpool on the 28th of February; he was five days before he cleared the land; and he proceeded on his direct voyage till the 14th of March, chacing, however, at different times, from the 7th to the 14th, when he began his cruiſe, giving notice thereof to the crew, and ordering a minute of it to be entered in the log-book, which was done. From the 14th of March, he continued cruiſing about the ſame latitude (43), till the 17th or 18th of April, when he diſcontinued the cruiſe, of which he alſo gave notice, intending to go to the Burlings, off Liſbon, in the courſe of his voyage. On the 23d, he renewed the cruiſe, of which he gave notice, as before, and ordered a minute, to that purpoſe, to be entered in the log-book. From that time he continued cruiſing till the 28th of April, when he was taken by an American privateer. The counſel for the defendant called many witneſſes, who concurred in thinking, that, by the terms of the policy, the cruiſe muſt mean *ſix ſucceſſive weeks, not interruptedly, and at intervals*.—Two witneſſes examined on the other ſide thought, on the contrary, that the policy did not import any ſuch reſtriction; but they admitted, on the one ſide and the other, that they only ſpoke their opinion, and could ſay nothing of any uſage, none of them having ever known a caſe circumſtanced like the preſent. PER CURIAM, This was merely a queſtion of con-

Syers *et al.* v. Bridge, Mic. Ter. 21 Geo. 3. B.R. 2 *Doug.* 527.

ſtruction, on the face of the policy, and, unleſs an uſage could have been ſhewn in favour of this deſultory cruiſing, calling witneſſes to ſupport it, was calling them to ſwear to mere opinion. None of thoſe produced knew of any inſtance, and, therefore, their evidence ought not to have been received. Yet, their teſtimony had great weight with the jury. The meaning of words depends on the ſubject. The inſtructions were not read, but they ſhew the meaning very clearly, for they run thus, "To cruiſe ſix weeks, and *then* proceed to Antigua (1)." There can be no general rule. Here, the ſubject-matter is deciſive to ſhew that the ſix weeks meant one continued period of time. A cruiſe is a well-known expreſſion for a connected portion of time. There are frequently articles for a month's cruiſe, a ſix weeks' cruiſe, &c. Such a liberty as in this caſe, to a letter of marque, is an excuſe for a deviation. But what is contended for by the plaintiffs is impoſſible in practice. Suppoſe the ſhip returns *directly back*, cruiſing for the ſpace of a week: ſhe may then take perhaps three weeks to return to where ſhe had been. Can ſhe then renew the cruiſe, and return again, and ſo repeatedly? The voyage, in that way, might laſt for years. But the true meaning is, "I will excuſe "a deviation for ſix weeks." The inſtructions, although it happens that they were not read, ſtrike much. Another argument: Six weeks is a continuation, a congregate denomination of time. If they had meant ſeparate days, they would have ſaid 42 days.—The rule made abſolute.

Wooldridge *v.* Boydell, Mic. Ter. 19 Geo. 3. B.R. 1 *Doug.* 16.

If a ſhip inſured for one voyage, ſails upon another, though ſhe be taken before the dividing point of the two voyages, the policy is diſcharged.—The ſhip Molly being inſured "At and "from Maryland to Cadiz," was taken in Cheſapeak Bay in the way to Europe. And on the trial of this action againſt the defendant, one of the underwriters on the policy, a verdict being found for the defendant, a new trial was moved for, and the facts of the caſe appeared to be as follows:—The ſhip was cleared from Maryland to Falmouth, and a bond given that all the *enumerated* goods were to be landed in Britain; and all the other goods in the Britiſh dominions. An affidavit of the owner ſtated that the veſſel was bound for Falmouth. The bills of lading were "*to Falmouth and a Market.*" And there was no evidence whatever that ſhe was deſtined for Cadiz. The place where ſhe was taken, was in the courſe from Maryland both to Cadiz and Falmouth, before the dividing point. Many circumſtances led to a ſuſpicion that ſhe was, in truth, neither deſigned for Falmouth nor Cadiz, but for the port of Boſton, to ſupply the American army; but there was not ſufficient direct evidence of that fact.—At the trial Lord MANSFIELD told the jury, that if they thought the voyage intended was to Ca-

(1) They were in court, and had been ſtated by the counſel for the defendant.

diz,

diz, they must find for the plaintiff.—If, on the contrary, they should think there was no design of going to Cadiz, they must find for the defendant. Lord MANSFIELD:—The policy, on the face of it, is from Maryland to Cadiz, and therefore purports to be a direct voyage to Cadiz. All contracts of insurance must be founded in truth, and the policies framed accordingly. When the insured intends a deviation from the direct voyage, it is always provided for, and the indemnification adapted to it. There never was a man so foolish as to intend a deviation from the voyage described, when the insurance is made, because that would be paying without an indemnification. Deviations from the voyage insured arise from after-thoughts, after-interest, after-temptation; and the party who actually deviates from the voyage described, means to give up his policy. But a deviation merely intended, but never carried into effect, is as no deviation. In all the cases of that sort, the *terminus à quo*, and *ad quem*, were certain and the same. Here, was the voyage ever intended for Cadiz? There is not sufficient evidence of the design to go to Boston, for the Court to go upon. But some of the papers say to Falmouth and a Market, some to Falmouth only. None mention Cadiz, nor was there any person in the ship, who ever heard of any intention to go to that port. "*A market*" is not synonymous to "Cadiz;" that expression might have meant Leghorn, Naples, England," &c. No man, upon the instructions, would have thought of getting the policy filled up to Cadiz. In short, that was never the voyage intended, and consequently is not what the under-writers meant to insure. WILLES, and ASHHURST, J. Of the same opinion. BULLER, J. This is a question of fact. There cannot be a deviation from what never existed. The weight of the evidence is, that the voyage was never designed for Cadiz.—Rule discharged.

If a ship insured from a certain time, sail before the time on a different voyage from that insured, the assured cannot recover, though she afterwards get into the course of the voyage described in the policy, and is lost after the day upon which the policy was to have attached.—On the trial of an action on a policy of assurance on the ship Polly, "at and from the 20th "October, 1786, from any ports in Newfoundland to Fal- "mouth, or her ports of discharge in England, with liberty to "touch at Ireland, and any ports in the Channel." The jury found a verdict for the plaintiff, subject to the opinion of the Court, on the following case. That the defendant on the 1st day of March, 1786, had under-written a policy of insurance for 50l. at a premium of five guineas *per cent.* upon the same ship, on the interest and for the account and use of the plaintiff, "at and from Torquay to the banks of Newfoundland, and to

Way *v.* Modigliani, Tr. Ter. 27 Geo. 3. B.R. 2 *Ter. Rep.* 30.

" any and all port or ports in Newfoundland, and during her " ſtay there, and in port, or at ſea, and banking, coaſting, and " fiſhing on the banks and ſhore, until the 20th of October, " 1786, incluſive." That afterwards (*viz.*) on the 24th of October, 1786, the policy of *inſurance* in queſtion was tendered to Mr. *James Allen*, and two other under-writers, with the words, " on the banks or from any ports in Newfoundland to " Falmouth, or her ports of diſcharge in England, with liberty " to touch at Ireland, and in any ports in the Channel;" which policy, ſo worded, the ſaid *James Allen* and the ſaid two other under-writers declined to underwrite; whereupon the broker who effected the ſame ſtruck out the words, " On the " banks or," and then they underwrote the ſame; and afterwards on the ſame day the policy ſtated in the declaration with the words ſtruck out as aforeſaid, was tendered to the defendant, who underwrote the ſame for 100l. at a premium of two guineas *per cent.* It was agreed that this inſurance was to take up the ſhip from the 20th October. On the 1ſt of October, 1786, the ſhip left a port in Newfoundland, and went to the Banks, fiſhed there till the 7th October, and ſailed from thence on that day to England, and of courſe never did fiſh or remain upon the Banks after the 20th October, 1786. The veſſel was loſt on the 30th November following in the courſe of her voyage homewards.—ASHHURST, J. One of two things muſt neceſſarily be the caſe. Either the policy never attached at all, becauſe the ſhip did not ſail upon the voyage inſured; or if ſhe did, there was afterwards a deviation by her going to the Banks to fiſh, inſtead of proceeding homewards, according to the terms of the policy. It is immaterial which was the caſe; for either way the defendant is diſcharged.—BULLER, J. The firſt is the ſubſtantial ground, namely, that the policy never attached at all. Where a policy is made in ſuch terms as the preſent to inſure a veſſel from one port to another, it certainly is not neceſſary that ſhe ſhould be in port at the time when it attaches, but then ſhe muſt have ſailed *on the voyage inſured*, and not on any other. Now what is the caſe here: The voyage inſured is from a port in *Newfoundland to England*; whereas, this veſſel ſailed *to the Banks*, which was a different voyage. This point has been already decided by the caſe of *Wooldridge* and *Boydell*, where it was held, that if a ſhip, inſured for one voyage, ſail upon another, although in the ſame track part of the way, and ſhe be taken before the dividing point of the two voyages, the policy is diſcharged. That was a ſtronger caſe than the preſent, for there the very intention of ſailing upon a different voyage than that inſured vacated the policy. Here ſhe actually went and fiſhed upon the Banks after ſhe ſailed from port.—GROSE, J. The object of the underwriter's ſtriking out the words mentioned, was to avoid

avoid this very riſk of fiſhing upon the Banks. It certainly is material whether a ſhip ſails immediately from her port, as ſhe has there an opportunity of making every neceſſary preparation for the voyage.—Poſtea to the Defendant.

Warranty.

AN inſurance was made on goods from the lading of them on board the ſhip at London, to Liverpool "*loſt or not loſt*:" at the bottom of the policy was added "*warranted well Decem-*" *ber 9th*, 1784." At the trial, it appeared that the defendant underwrote the policy between one and three o'clock in the afternoon of that day, and that the ſhip was loſt about eight o'clock the ſame morning. A nonſuit was entered, with liberty for the plaintiff to move to enter the verdict for him, in caſe the Court ſhould be of opinion that he was entitled to recover. Which motion being made: PER CURIAM.—The ſingle queſtion is, Whether the warranty at the bottom of the policy means warranted well at the *time when the defendant ſubſcribed it*, or *any time* on that day? And we are all of opinion that, if the ſhip were well at any time on that day, it is ſufficient; and the underwriter is conſequently liable. It is a matter of indifference whether the thing warranted be or be not material; but it muſt be literally complied with; and if it be ſo, that is ſufficient. Here the ſhip was warranted ſafe on the 9th of December, and there was great reaſon for inſerting thoſe words, becauſe they protected the underwriter againſt all loſſes before that day; to which he would otherwiſe have been liable, as the policy was on the goods from the lading of them on board the ſhip.—Rule abſolute. Blackhurſt *v.* Cockell, Tr. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 360.

A warranty on the margin of a policy muſt be ſtrictly followed, as much as if written in the body of the inſtrument.—The plaintiff inſured the ſhip called the Martha, at and from London to New York, the voyage to commence from a day ſpecified; and, *on the margin* of the policy, were written theſe words—"Eight nine-pounders with cloſe quarters, ſix ſix-" pounders on her upper decks, *thirty ſeamen, beſides paſſengers*." On the trial, the defence ſet up was, that there were not thirty *ſeamen* on board the ſhip, according to the terms of the ſtipulation in the margin of the policy: and, in fact, it appeared upon the evidence, that, to make up that number, the plaintiff reckoned the ſteward, cook, ſurgeon, ſome boys, and apprentices, and ſome perſons deſcribed as men learning to be ſeamen; and that only twenty-ſix perſons had ſigned the ſhip's articles. Lord MANSFIELD obſerved, in ſumming up to the jury, that the import of words muſt be collected from the ſubject, to which they are applied. That if, in the preſent caſe, the inſured had ſtipulated for thirty ſeamen, *beſides boys and landmen*, then it would have been clear that the terms had not been complied with; but that, in this policy, *ſeamen* Bean *v.* Stupart, Mic. Ter. 19 Geo. 3. B.R. 1 *Doug.* 11.

were contraſted with paſſengers, and, in that ſenſe, the word ſeemed to include boys as well as men. The jury found a verdict for the plaintiff as for a total loſs. And on ſhewing cauſe againſt a motion for a new trial, Lord MANSFIELD obſerved, that the warranty might have been ſo worded as only to include able ſeamen (as if ſeamen had been oppoſed to landmen); but that, as expreſſed here, the contraſt being with paſſengers, the whole of the crew or ſhip's company appeared to be meant. That this was the general maritime ſenſe of the word. And after it had been argued in ſupport of the rule, his LORDSHIP ſaid, There is no doubt, but that this is a warranty. Its being written on the margin makes no difference. Being a warranty, there is no doubt but that the under-writers would not be liable if it were not complied with, becauſe it is a condition on which the contract is founded. But the queſtion is, Whether, in this warranty, the word "*ſeamen*" was uſed in the ſtrict literal ſenſe or not? If it was, the warranty has not been complied with. It is a matter of conſtruction. Boys are reckoned ſeamen, not only at the cuſtom-houſe, and Greenwich hoſpital, but in the diſtribution of prizes.—Rule diſcharged.

Kerrion *et al. v.* Berthon Sittings at Guildhall after M. 19 Geo 3 11 *Doug.* 11.

The following words were written tranſverſely on the margin of the policy: "In port, 20th of July, 1776." —The ſhip was proved to have ſailed the 18th of July, and Lord MANSFIELD held that this was clearly a warranty; and though the difference of two days might not make any material difference in the riſk, yet as the condition had not been complied with, the under-writer was not liable. But, 1. though a written paper be wrapt up in the policy, when it is brought to the under-writers to ſubſcribe, and ſhewn to them at that time; or, 2. even though it be wafered to the policy at the time of ſubſcribing, ſtill it is not, in either caſe, a warranty, or to be conſidered as part of the policy itſelf, but only as a repreſentation. The firſt of thoſe points occurred in a cauſe of *Pawſon* v. *Barnevelt* tried before Lord MANSFIELD at Guildhall at the Sittings in *Trinity* Term, 18 *Geo.* 3. where the policy was the ſame as in the caſe of *Pawſon* v. *Ewer*, *ante*, p. 73. The counſel for the defendant offered to produce witneſſes to prove, that a written memorandum incloſed, was always conſidered as part of the policy. But his Lordſhip ſaid, it was a mere queſtion of law, and would not hear the evidence; but decided, that a written paper did not become a ſtrict warranty by being folded up in the policy. The ſecond occurred in *Bize* v. *Fletcher*, *ante*, p. 426, tried at Guildhall after *E.* 19 *Geo.* 3. where it appeared, that, at the time when the inſurers underwrote the policy, a ſlip of paper was wafered to it, deſcribing the ſtate of the ſhip as to repairs and ſtrength, and alſo mentioned ſeveral particulars of her intended voyage, which particulars, in the event, had not been complied with. Lord MANSFIELD ruled, that this was only a repreſentation; and, if the jury ſhould think there was no fraud intended, and that the variance between the intended

tended voyage as described in the slip of paper, and the actual voyage as performed, did not tend to increase the risk to the under-writers, he directed them to find for the plaintiff, who accordingly had a verdict.—1 *Doug.* 12. (n. 4) 284, 285.

Whatever is written in the margin of a policy of insurance is a warranty, and must be literally complied with.—This was an action upon promises brought by the plaintiff (an under-writer) to recover back the amount of a loss which he had paid upon a policy of insurance. On the trial of the cause, the jury found a special verdict; which stated, That the defendant gave to one *Anderson*, an insurance broker, instructions in writing to cause an insurance to be made on a certain ship called the Juno: [Here the Instructions were set forth:] that *Anderson*, in consequence of the instructions on the 14th June, 1779, caused a policy of assurance to be made on the said ship Juno, upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, *&c.* of and in the ship Juno, at and from Africa to her port or ports of discharge in the British West Indies, at and after the rate of 15l. *per cent.* The verdict, after reciting two memoranda, which are not material, then proceeded to state, that in the margin of the said policy were written the words and figures following, "Sailed from Liverpool with 14 six-pounders, swivels, small arms, and 50 hands or upwards: copper sheathed." That the plaintiff underwrote the policy for 200l. and received a premium of 31l. 10s. That the Juno sailed from Liverpool on the 13th October, 1778, having then only 46 hands on board her, and arrived at Beaumaris, in the isle of Anglesea, in six hours after sailing from Liverpool as aforesaid, with the pilot from Liverpool on board her, who did pilot her to Beaumaris on her said voyage; and at Beaumaris the said ship took in six hands more, and then had, and during the said voyage until the capture thereof, continued to have, 52 hands on board. That the said ship in the said voyage from Liverpool aforesaid to Beaumaris, until and when she took in the said six additional hands, was equally safe as if she had had 50 hands on board her for that part of the said voyage. The verdict then stated that the defendant was interested, and the ship captured. And that when the plaintiff received an account of the said loss, he paid to the defendant the 200l. insured by him as aforesaid, *not having then had any notice that the said ship had only* 46 *hands on board her when she sailed from Liverpool.* The COUNSEL for the defendant admitted, that a marginal note in a policy of insurance may be a warranty; but contended that in the present case, that which was written in the margin had no relation whatever to the voyage, but related merely to the force of the ship at Liverpool, before the voyage commenced, and was totally unconnected with the risk insured.—Lord MANSFIELD, Ch. J. There is a material distinction between a warranty and a representation. A representation may be *equitably and substantially*

De Hahn *v.* Hartley, Tr. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 343.

tially anſwered: but a warranty muſt be *ſtrictly* complied with. Suppoſing a warranty to ſail on the 1ſt of Auguſt, and the ſhip did not ſail till the 2d, the warranty would not be complied with. A *warranty in a policy of inſurance is a condition* or a contingency, and unleſs that be performed, there is no contract. It is perfectly immaterial for what purpoſe a warranty is introduced; but, being inſerted, the contract does not exiſt unleſs it be literally complied with. Now in the preſent caſe, the condition was the ſailing of the ſhip with a certain number of men; which not being complied with, the policy is void.—ASHHURST, J. The very meaning of a warranty is to preclude all queſtions whether it has been *ſubſtantially* complied with: it muſt be *literally* ſo.—BULLER, J. It is impoſſible to divide the words written in the margin in the manner which has been attempted; *viz.* that that part of it which relates to the copper ſheathing ſhould be a warranty, and not the remaining part. But the whole forms one entire contract, and muſt be complied with throughout.—Judgment for the plaintiff.

Hore *v.* Whitmore, Ea. Ter. 18 Geo. 3. B.R. *Cowp.* 784.

If a ſhip has been warranted to ſail on a particular day, though the ſhip be delayed, the warranty has not been complied with, and the inſurer is diſcharged from his contract.—Thus, in an action on a policy of inſurance, upon a motion to ſet aſide the verdict which had been given for the plaintiff, the caſe appeared to be this. The declaration ſtated, that a policy was made on the ſhip New Weſtmorland, at and from Jamaica to London, *warranted to ſail on or before the 26th of July*, 1776, free from capture, and free from all reſtraints and detainments of kings, princes, and people, of what nation, condition, or quality ſoever. It further ſtated, that the ſaid ſhip was preparing and ready to ſail, and would have ſailed on the 25th of July, on her intended voyage, *if ſhe had not been reſtrained by the order and command of Sir Baſil Keith*, the then governor of Jamaica, and detained beyond the day: that ſhe afterwards ſailed and was captured. For the plaintiff it was ſaid, that the uſual clauſe againſt the detention of rulers and princes being inſerted in this policy, the embargo, by which the ſhip was prevented from ſailing on the day mentioned in the warranty, came expreſsly within the meaning of it, and therefore excuſed the delay. On the other hand it was ſaid, that the loſs of the ſhip could in no poſſible reſpect be connected with the embargo. That the warranty was *poſitive and expreſs*; that the ſhip ſhould depart on or before the day appointed, and therefore muſt be complied with. Of this opinion was the Court; and accordingly the rule to ſet aſide the verdict for the plaintiff, and to enter a nonſuit, was made abſolute.

Bond *v.* Nutt, Ea. Ter. 17 Geo. 3. B.R. *Cowp.* 601.

When a ſhip is warranted to ſail on or before a particular day, if ſhe ſail from her port of loading, "with all her cargo "and clearances on board," to the uſual place of rendezvous at another part of the ſame iſland, merely for the ſake of joining

ing convoy, it is a compliance with the warranty, though ſhe be afterwards detained there by an embargo beyond the day.—This was an action on a policy of inſurance upon the ſhip Capel in the Weſt-India trade, loſt or not loſt, "at and from Jamaica to London; warranted to have ſailed on or before the 1ſt of Auguſt, 1776." The policy was effected on the 20th of Auguſt, 1776, at a premium of 15 guineas *per cent.* to return 5 *per cent.* if the ſhip departed with convoy; and 8 *per cent.* if with convoy for the voyage, and arrived ſafe. At the trial, there was no controverſy about the facts; and they were ſhortly theſe: The ſhip was completely laden for her voyage to England, at St. Anne's in Jamaica; and ſailed from St. Anne's Bay, on the 26th of July for Bluefields, in order to join the convoy there, Bluefields being the general place of rendezvous for convoy on the Jamaica ſtation, like Spithead in England; and where a convoy then lay, which was expected to ſail for England every day: but the greater part of the way from St. Anne's to Bluefields, is out of the direct courſe of the voyage from St. Anne's to England. That ſhe arrived off Bluefields on the 28th or 29th of July, where ſhe was immediately ſtopped by an embargo laid on all veſſels being in any part of Jamaica, and was detained there till the 6th of Auguſt, when ſhe ſailed with the convoy for England; but afterwards, being ſeparated in the paſſage, was taken by an American privateer. Upon theſe facts the jury found a verdict for the defendant. When this caſe was firſt argued at the bar, two points were relied upon for the defendant, in ſupport of the verdict, which the jury had given in his favour: 1ſt. That the departure from St. Anne's was not a departure from Jamaica, within the meaning of this policy. 2d. If it were, that the going to Bluefields was a deviation. Upon the firſt argument, Lord MANSFIELD, CH. J. ſaid: One point now ſtarted is entirely new: that ſuppoſing the voyage to have begun from St. Anne's, the going to Bluefields (which, it is admitted on all hands, was out of the courſe of the voyage), though for the purpoſe of convoy only, ſhall be conſidered as a deviation. In anſwer, it has been ſaid by the counſel for the plaintiff, that there are caſes in which the contrary has been held; but they are not cited. I could wiſh therefore that theſe caſes might be particularly looked into, and this ground mentioned again. It is a very material point: but widely different from a warranty to depart on a particular day, which is a condition precedent that admits of no latitude.——The ſecond point was again argued; and then the judges ſeverally mentioned their ideas upon the ſubject, without coming at that time to any deciſion.—Lord MANSFIELD:—I am extremely glad this motion has been made; I have thought much of it ſince the trial. Some things are clear, and there are others which require conſideration. The policy was made on the 20th of Auguſt, 1776, upon

upon the contingency of a fact, which muſt have exiſted one way or the other at the time the policy was under-written. That contingency was, that the ſhip ſhould have ſailed on or before the 1ſt of Auguſt: conſequently it muſt have taken place or not upon the 20th of that month. The port, from whence the ſhip was to be inſured, was, if I may uſe the expreſſion, the whole iſland of Jamaica: but from which of the ports the ſhip would ſail, neither party knew; therefore they have uſed the words, "at and from Jamaica:" by force of which ſhe certainly was protected in going from port to port, and till ſhe ſailed. It follows, that the word *ſailed* in the warranty, muſt mean that ſhe had ſailed *on her homeward-bound voyage*. The queſtion then is a matter of fact; and one that admits of no latitude, no equity of conſtruction, or excuſe. Had ſhe or had ſhe not ſailed on or before that day? That is the queſtion. No matter what cauſe prevented her; if the fact is, that ſhe had not ſailed, though ſhe ſtaid behind for the beſt reaſons, the policy was void: the contingency had not happened; and the party intereſted had a right to ſay, there was no contract between them. Therefore, what was ſaid in argument is very true; if ſhe had been prevented by any accident from ſailing till the ſecond of Auguſt, as by the ſudden want of any neceſſary repair, or if an enemy had been at the mouth of the port; the captain would have done very right not to ſail, but there would have been an end of the policy. It is very different from the caſes where a voyage has been begun; there the uſage of the voyage may juſtify going a little out of the direct courſe. This alſo is clear; if the ſhip had broken ground, and been fairly under ſail upon her voyage for England on the 1ſt of Auguſt, though ſhe had gone ever ſo little a way, and had afterwards put back from the ſtreſs of weather, or apprehenſion from an enemy in ſight, or had been then put under an embargo, and had been detained till September, it would ſtill have been a *beginning* to ſail, and the ſtoppage would have come too late becauſe the warranty was upon a fact antecedent. Such a caſe happened before me a day or two after the preſent action was tried (1). It was an inſurance upon a ſhip from Grenada to London, *warranted to ſail on or before the 1ſt of Auguſt*. She had barely begun to ſail on the day when ſhe was ſtopped by an embargo, and detained beyond the time. I thought the voyage was begun: the jury were of that opinion; and there has been no motion for a new trial. I am giving no opinion, only breaking the caſe. Here the whole queſtion turns upon this: Did the voyage from Jamaica homeward begin from St. Anne's, or from Bluefields? Per-

(1) *Toellofſon* v. *Fergufſon* at Guildhall, *Hil. Vac.* 1777.

haps

haps where a voyage is once begun, the going a little out of the way to join convoy may be very reasonable, and for the benefit of all parties; but still it does not vary the fact of sailing. Here it was very reasonable; but the question, whether the voyage began from St. Anne's or Bluefields, still remains. Another material circumstance arises from the words, "at and from Jamaica." At the trial I reasoned thus: "By the terms of the policy she was protected during "her stay at Jamaica: by force of them she had a right to go "to any port, or all round the island; and she went to Blue-"fields for reasons best known to herself. Therefore the "voyage began from Bluefields." Had the insurance been at and from the port of St. Anne's, it did strike me, that going round the island to Bluefields, would have been a deviation. But this is a question of so much value and consequence, that the Court wish to consider the case thoroughly, before they give a final decision upon it. The other judges also inclining in support of the verdict, THE COURT TOOK TIME TO CONSIDER, and then their unanimous opinion was pronounced by Lord MANSFIELD, Ch. J. We are all satisfied that the truth of the case is, that the voyage from Jamaica to England began from St. Anne's. That when the ship sailed from St. Anne's, she had no view or object whatsoever, but to make the best of her way to England. That the value of this question, admitted on both sides, shews that every other ship under the same circumstances looked upon the touching at Bluefields, where the convoy then lay ready, to be the safest course of navigation from Jamaica to England; and that it would have been unwise and imprudent for any ship not to have touched there. The great distinction is this: that she sailed from St. Anne's for England *by way of* Bluefields; and that it was not a voyage from St. Anne's to Bluefields with any object or view distinct from the voyage to England. If she had gone first to Bluefields for any purpose independent of her voyage to England, to have taken in water or letters, or to have waited in hopes of convoy coming there, none being ready, that would have given it the condition of one voyage from St. Anne's to Bluefields; and another from Bluefields to England. But here, under all the circumstances, we think she had no other object than to come directly to England by the safest course. Therefore the rule for a new trial was made absolute.

So also, a French ship being warranted to sail from Guadaloupe on or before the 31st of December. if she take in all her loading and papers, and leave her port of loading before that day, and sail to another part of the island, in the direct course of her voyage, and merely in the hopes of joining convoy, and to take the governor's dispatches for France, the warranty is complied with, though the governor there should detain

Thelluſſon *v.* Fergusſon, Ea. Ter. 20 Geo. 3. B.R. 1 *Doug.* 361.

detain her beyond the day, and although it was a condition inſerted in one of her clearances, "that ſhe ſhould paſs that "way to take the orders of government."—This was an action on a policy of inſurance, on the French ſhip l'Aimable Gertrude, "*At and from Guadaloupe to Havre, warranted to* "*ſail on or before the* 31ſt *of December.*" On the trial it was afterwards moved for a new trial, and the facts appeared to be as follows: *The ſhip took in her complete lading and proviſions for France, and all her clearances and papers,* at a port called Pointe à Pitre, in the iſland of Guadaloupe, *and ſailed from thence on the* 24*th of October*, for Baſſeterre, where there is no port, but only an open road. The town of Baſſeterre is the reſidence of the French governor. The ſhip arrived there at night, when the captain went on ſhore, and next day waited on the governor, who would not permit him to depart, and to prevent it, took his ſhip's papers from him. At this place he was detained with his ſhip till the 10th of January, when he ſet ſail with a convoy which had arrived ſome little time before, and being ſeparated after ſome days from the convoy, the ſhip was taken by an Engliſh veſſel. The captain, who was the only witneſs produced at the trial, ſwore that notice had been given on the part of the governor, ſome days before he ſailed, to him and the other captains of ſhips at Pointe à Pitre, who were preparing to ſail for Europe, that a convoy was expected from Martinico to be at Baſſeterre, by the 25th of October, and that in conſequence of this intimation, he had worked night and day to get ready, and had paid extraordinary gratifications to obtain his ſhip's papers and clearances as ſoon as poſſible; that the deſire of being in time for the convoy was the only reaſon for this haſte; and that, although he was not able to ſail till the 24th, he was ſtill in hopes of being in time for the convoy, as he thought it might very probably have been detained at Martinico ſome days beyond its time. The laſt ſhip-paper which he received at *Pointe à Pitre*, was *le rôle d'equipage*, or the muſter-roll. This paper, which was much relied on by the counſel for the defendant, was dated the 24th of October, and was in the following words: "Vu par nous, chargé du detail des claſſes "au departement de la *Grande Terre*, *Guadaloupe*, l'equipage "denommé au rôle des autres parts au nombre de vingt per-"ſonnes, le capitaine compris. Permis au ſieur *Jean Jaques* "*Lethuillier*, commandant le navire *l'Amiable Gertrude du* "*Havre*, *de s'en ſervir pour faire ſon rétour*, au dit lieu, "*paſſant à la* Baſſeterre *pour y prendre les ordres du gouverne-*"*ment*, en obſervant les ordonnances & réglemens de la "marine. Fait à *Pointe à Pitre*, *Guadaloupe*, le 24e Octobre, 1778.—*Montenot.*" Under this there was written, on the ſame paper, an account, dated the 30th of October, of ſome changes in the number of the crew, and under that the following

following entry: "Vu par nous, ecrivain de la marine chargé "du detail des claſſes, les vingt-cinq perſonnes exiſtantes au "preſent rôle, le capitaine compris. Il eſt permis au ſieur "*Lethuillier*, commandant le navire *l'Amiable Gertrude du* "*Havre*, *de faire ſon rétour* au dit lieu, en ſe conformant "aux ordonnances et réglemens royaux de la marine. A "*Baſſeterre*, *Guadaloupe*, le 2e *Janvier*, 1779." On another paper, called *Le Congé*, dated the 16th of October, which was read on the part of the plaintiff, there was written at the bottom, as follows: "Vu de relache à la *Baſſeterre*, *Guada-* "*loupe*, *pour y attendre un convoi pour France*. Ce 28e *Oc-* "*tobre*, 1778.—*Monentheil*." The captain ſwore, that he underſtood the only reaſons for the condition in the muſter-roll, that he ſhould go to Baſſeterre, were, that the convoy was to be at that place, and that he might take ſuch diſpatches as were ready for Europe. He had not objected to it, becauſe in the regular courſe of his voyage to France from *Pointe à Pitre* he muſt have gone that way, cloſe under the guns of Baſſeterre, in order to avoid Montſerrat, there being no other courſe, except they were to keep quite to the leeward, which is not the cuſtom. If he had arrived there in the day-time, he would not have caſt anchor, but would have ſent his boat for the diſpatches; but having arrived at night, his ſhip had been detained, contrary to his intention and expectation. The defendant's counſel, to invalidate the captain's teſtimony, beſides the muſter-roll, and the entry under it, as above ſtated, read the proteſt made by the captain on his arrival at Dover (10th March, 1779), and alſo his depoſition in anſwer to the 29th interrogatory in the proceedings in the Admiralty, on the condemnation of the ſhip. The words of the proteſt on which they relied were as follows: "Whereupon he (the captain), waited on the proper officer "at *Pointe à Pitre* for his muſter-roll, and was anſwered, "it could not be granted, but on condition that he ſhould "ſail firſt to Baſſeterre, and *there wait* the directions of the "general of the iſland." And in a ſubſequent part: "Where- "upon, at his (the captain's) inſtance, the ſaid *John Nicholas* "*Lethuillier*, his father, came to Baſſeterre, and went with "Meſſrs *Gobert* and *Boteul*, commiſſioners of commerce to "the ſuperintendant, and alſo to the general of the iſland, "ſtating to them, that the ſaid ſhip and cargo were inſured "upon condition that ſhe ſhould have departed from the "iſland of Guadaloupe before the 31ſt of December next, "the terms of which inſurance they judged it eſſential to "fulfil, notwithſtanding which they were ſtill abſolutely re- "fuſed permiſſion to depart, and were kept there until after "the ſaid 31ſt of December." The depoſition relied on was as follows: "At the time the ſhip was firſt purſued and "taken, ſhe was ſteering her courſe towards Breſt. Her

"courſe

" courſe was at all times, when the weather would permit, " directed to Breſt, for which port he was directed to ſail, " although the deſtination was for Havre-de-Grace by the " ſhip's papers. She was *not*, before nor at the time of the " capture, ſailing *beyond or wide of Havre-de-Grace*. She " was then about eight leagues weſt of Uſhant, and her " courſe was not altered to any other port or place, but was " obliged to be directed to Breſt in conſequence of the orders " he had received, ſubſequent to the delivery of the ſhip's " papers." In anſwer to the 27th interrogatory his depoſition was: " That all the ſhip's papers found on board were " true and fair, and none of them falſe and colourable." *At the trial* the captain ſwore, that he had received the directions to keep in the courſe to Breſt at Baſſeterre from his father, who had formerly commanded the ſhip, *but that this was done as the ſafeſt way, in time of war, of getting to Havre, which ſtill continued to be the place of the ſhip's deſtination.* The grounds of the application for the new trial were two: 1. That there had been no inception of the voyage on the 24th of October, nor till after the 31ſt of December. 2dly, That the ſhip never ſailed on the voyage inſured, *viz.* from Guadaloupe to Havre, but on a voyage from Guadaloupe to Breſt. Lord MANSFIELD, Ch. J.—1. In my apprehenſion there is no contradiction between the parol evidence and the proteſt and depoſitions. Under an inſurance at ſuch a place as Guadaloupe or Jamaica, the ſhip is protected in going from port to port in the iſland. But the queſtion here is, Whether the voyage was *bonâ fide* commenced, and was ſtopt by accident? As to the condition about taking the orders of government, the ſhip could not ſail from any part of the iſland without the governor's leave. But the captain, when he left *Pointe à Pitre*, expected to meet with convoy at Baſſeterre, and to proceed immediately without interruption. A convoy had been publiſhed, and he certainly would have gone to Baſſeterre at any rate, independent of the clauſe in the muſter-roll. 2. With regard to the ſecond point, the voyage to Breſt was, at moſt, but an intended deviation, not carried into effect.—WILLES, J. and ASHHURST, J. of the ſame opinion.—BULLER, J. The caſe in 1777, between the ſame parties, is in point. There was no embargo there, nor in the preſent caſe, when the ſhip ſailed. There muſt be a lawful *bonâ fide* ſailing, which I think there was in this caſe. The ſhip was completely ready in all reſpects.—The rule for a new trial diſcharged.

Thelluſſon *v.* Staples, Sittings at Guildhall, Ea. Vac. 1780. 1 *Doug.* 365.

The judgment given in the laſt cauſe was not ſatisfactory to about twenty other under-writers upon the ſame policy, nineteen of whom obtained leave to conſolidate their different cauſes upon the uſual terms, in order to bring the queſtion once

once more into court. Accordingly, in the enſuing ſittings the cauſe *Thelluſſon* v. *Staples* was ſet down for trial firſt. In this cauſe, the ſecond point as to the deviation was abandoned; and on the firſt, the ſame evidence was given as upon the former occaſion. The point was again fully argued for the defendant.—Lord *Mansfield:* The ſingle queſtion on this policy is, Whether the ſhip ſailed on her voyage to Havre before the 31ſt of December? She certainly ſailed from *Pointe à Pitre* completely loaded before that time. The doubt on the firſt queſtion of this ſort in *Bond* v. *Nutt*, *ante*, p. 440, was this: the policy was "at and from Jamaica;" now the word *at* certainly comprizes the whole iſland, and, under that word, you may ſail from one port to another every-where along the coaſt of the iſland. The ſhip, therefore, in that ſenſe, was ſtill at Jamaica after ſhe had got to Bluefields. She did not leave Bluefields till after the day named in the warranty, and that place was quite out of the courſe of navigation from St. Anne's to England. I own, at the trial, I thought the voyage to England did not commence till the ſhip ſailed from Bluefields, and, according to my opinion then, a verdict was found for the defendant. But there was a doubt. I therefore wiſhed (as I always do in ſuch caſes) that the opinion of the Court might be taken in order to ſettle the point. The caſe, when it came on in court, was very ably argued; I was completely convinced, and the Court were unanimouſly of opinion, that the voyage to England began when the ſhip ſailed from St. Anne's; and upon the ſecond trial the plaintiff had a verdict. *Earle* and *Harris*, *ante*, p. 417, was ſtill a ſtronger caſe. *There* an embargo was actually publiſhed before the ſhip ſailed, and the captain immediately after croſſing the bar, returned to make a proteſt, and ſent his ſhip knowingly into the embargo: but he ſwore that he expected the embargo was to be taken off, and that he ſhould proceed immediately upon his voyage; and the jury believed him. In this caſe to go by ſteps. There was public notification of a convoy to be at Baſſeterre on the 25th of October. The captain thought that it might be ſtopped a day or two at Martinico, and that he ſhould get to Baſſeterre in time. He worked night and day, paid double fees for his papers, and ſailed with full expectations of purſuing his voyage directly. He knew of no embargo, and Baſſeterre was directly in his road. In that reſpect this caſe differs ſtrongly from *Bond* v. *Nutt*. He was even in the regular voyage obliged to paſs under the cannon of Baſſeterre. He had his muſter-roll on condition of calling there; but he made no difficulty of taking it on that condition, becauſe he knew he muſt paſs that way at all events. Did he not *bonâ fide* begin his voyage? He certainly had no idea, when he ſailed from *Pointe à Pitre*, of meeting with any ſtop. So it was in the former caſe of

Thelluſſon

Thelluſſon v. *Ferguſſon.* There was no idea of the embargo in that caſe when the ſhip ſailed. Here there is not the leaſt ſuſpicion of fraud. This captain certainly did not know of the deciſion in *Bond* v. *Nutt.* He thought when he was detained at Baſſeterre beyond the 31ſt of December, that the policy was forfeited, which is a ſtrong circumſtance in the plaintiff's favour, for it ſhews that the ſailing was not colourable. This queſtion has undergone the conſideration of a ſpecial jury, and of the Court. Under-writers have a right to litigate queſtions, which ſeem to them to be in their favour. But, at laſt, there ſhould be an end of litigation. If you ſhould be of the ſame opinion with the former jury and the Court, you will find for the plaintiff: which they did accordingly. The cauſe of the twentieth under-writer, on the ſame policy, who refuſed to conſolidate, ſtood next in the paper for trial; but upon the above verdict being given, his counſel conſented that a verdict ſhould alſo be entered againſt him.

Lilly, *et al.* v. Ewer, Hil. Ter. 19 Geo. 3. B.R. 1 *Doug.* 72.

In a policy of inſurance, "ſailing with convoy," means "ſailing with convoy for the voyage."—This was an action for money had and received, brought againſt an under-writer, for a return of premium. The policy was on the ſhip the Parker galley; "at and from Venice to the Currant "Iſlands, and at and from thence to London;" *at a premium of five guineas per cent*; "*to return* 2*l. per cent if the ſhip* "*ſailed with convoy from Gibraltar, and arrived.*" The ſhip touched at Gibraltar on her way home, and ſailed from thence under convoy of the Zephyr ſloop of war, *but the convoy was deſtined only to go to a certain latitude, about as far as Cape Finiſterre*, being ordered on the Liſbon ſtation; and, accordingly the ſhip and convoy ſeparated, and the ſhip arrived ſafe at London. THE ONLY QUESTION in the cauſe was, Whether, by the terms of the policy, the condition for the return of premium was, *a departure from Gibraltar with ſuch convoy as could be met with, for whatever part of the voyage that might happen to be, or, a departure with convoy for the voyage?*—On the trial a verdict was found for the plaintiff. It appeared that the plaintiffs had called witneſſes (one of whom was Mr. *Gormon*, an eminent merchant), who ſwore that for ſome years paſt, when convoy *for the voyage, or the whole voyage*, was intended, thoſe explanatory words had been added, and that, by this uſage, the expreſſions of "*ſailing with convoy*," and "*ſailing with convoy for the* "*voyage*," had received diſtinct technical meanings; "with "convoy," ſignifying whatever convoy the ſhip ſhould depart with, whether for a greater or leſs part of the voyage. Several policies were alſo produced, which had been filled up at the office of the ſame broker, who had prepared that which had given occaſion to this cauſe, in which the words, "*for* "*the voyage*," or "*for England*," were added. The captain

tain proved, that at the time when he left Gibraltar, no other convoy was to be had. The witneſſes for the defendant ſwore, that they underſtood the words "*with convoy*" to mean *convoy for the voyage*; and the broker ſaid, that at the time when this policy was ſigned, he underſtood, and apprehended it was ſo underſtood by all the parties, that the convoy was to be for the voyage, and that the return was ſuch as was uſual when convoy for the voyage was meant.—Lord MANSFIELD: On the words, I was ſtrongly of opinion that the policy meant a departure with convoy intended for the voyage. The parties could not mean a departure with convoy which might be deſigned to ſeparate from the ſhip in a minute or two; though, when convoy for the whole of a voyage is clearly intended, an unforeſeen ſeparation is an accident to which the under-writer is liable; for the meaning of ſuch a warranty is not that the ſhip and convoy muſt continue and arrive together. But I ſtill think that the evidence was properly admitted at the trial of this cauſe, becauſe the ſenſe contended for by the plaintiffs was not inconſiſtent with the words of the policy; and, therefore, it was material to ſee what the uſage was. I laid great ſtreſs on Mr. *Gorman*'s teſtimony. I did not conſider him as a common witneſs. However, it ſeems from what I have heard ſince, that people in the city are diſſatisfied with the verdict, and think the evidence of the plaintiffs' witneſſes was founded on a miſtake. Certainly critical niceties ought not to be encouraged in commercial concerns; and wherever you render additional words neceſſary, and multiply them, you alſo multiply doubts and criticiſms. It may be hard, becauſe words have been added in ſome inſtances to force a conſtruction in this caſe, from the omiſſion of them. The queſtion is of great importance.—Rule for a new trial abſolute (1).

This was an action on a policy of inſurance, the facts of which were the following. The policy was effected September 10th, 1793, on goods on board the ſhip Little Betſey, on a voyage at and from London to St. Sebaſtian in Spain, *warranted to depart with convoy for the voyage*. No convoy was appointed directly to St. Sebaſtian, but on the 7th of

D'Eguino *v.* Bewicke, Mic. Ter. 36 Geo. 3. C.B. 2 *Hen. Black.* 551.

(1) The new trial came on before Lord *Mansfield*, at the ſittings after Trinity Term, 19 *Geo.* 3. when a verdict was found for the defendant the inſurer. Vide the caſe of *Jeffery* v. *Legender*, 3 *Lev.* 320. B.R.M. 3 *W.* & *M.* or *Jefferys* v. *Legendra*, as it is called in other books; 2 *Salk.* 443. 1 *Show.* 320. 4 *Mod.* 58. *Holt*, 465. where, according to *Levinz*, upon a ſpecial verdict, finding a warranty in theſe words, "*warranted to depart with convoy*," *Holt*, chief juſtice, and the greater part of the Court, held, that thoſe words mean ſailing with convoy for the whole voyage.

November the ſhip ſailed from Spithead, under convoy of a ſquadron of frigates, the commander of which had orders from the admiralty, " to take with him the Dido frigate and " Weazle ſloop of war, and proceed to Gibraltar, and to take " with him the trade bound to Gibraltar, and alſo ſuch ſhips " *as ſhould be at Spithead bound to Bilboa*, and to detach the " Weazle with the latter, with orders to ſee them ſafe to " Bilboa, and after ſo doing to return to England, taking " under his convoy ſuch veſſels as he ſhould find at Bilboa " bound for England." On the 29th of November the commodore made a ſignal for the Weazle to part company, and take with her ſuch ſhips as were bound to Bilboa and St. Sebaſtian, the captain of the Weazle having had previous inſtructions from the commodore, " to take, when the ſignal " to part company ſhould be made, the veſſels bound to " Bilboa and St. Sebaſtian under his convoy, and ſee them in " ſafety *off* Bilboa, there to enquire if there were any veſſels " bound to England, and to take any ſuch under his convoy " to Spithead." The Weazle accordingly left the reſt of the fleet, taking the Little Betſey and other ſhips under convoy for Bilboa and Sebaſtian, but ſoon after parted from them in chace of a ſtrange ſhip, and did not afterwards join them. The Little Betſey arrived in ſafety off Bilboa, which was in her courſe to St. Sebaſtian, but was taken by the French in her paſſage between the former port and the latter. At the trial it was objected that the warranty had not been complied with, the convoy being only to Bilboa; but it was left to the jury to determine whether there was not a ſufficient convoy within the meaning of the policy, and a verdict was found for the plaintiff. A new trial was afterwards moved for on the ground that warranties were to be ſtrictly conſtrued, and that there was a non-compliance with the warranty in this caſe, and the plaintiff was therefore not entitled to recover: that however near the port of St. Sebaſtian might be to Bilboa (1), the principle was the ſame, and a convoy to Bilboa could no more be conſtrued to be a convoy to St. Sebaſtian, than a convoy to the Cape of Good Hope would be a convoy to the Eaſt Indies.—BULLER, J. If government thought a convoy to the Cape was a ſufficient protection to the Eaſt-India trade, and the uſage were for the Eaſt-India ſhips to ſail with a convoy only to the Cape, and to conſider that as the Eaſt-India convoy, and no other convoy was appointed to the Eaſt Indies, I ſhould hold that the warranty

(1) From the nearneſs of St. Sebaſtian to Bilboa, it ſeems that if the Weazle had continued in company with the convoy, ſhe would have afforded protection to ſhips going to both ports.

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was complied with; though I agree that if there were another convoy to the Eaſt Indies it would be otherwiſe. The captain of a merchant ſhip has nothing to do with, nor can he know the inſtructions from the admiralty to the king's officers, but muſt take ſuch convoy as he finds.—HEATH, J. The owner of a ſhip, when he makes an inſurance, cannot know the orders of the admiralty reſpecting convoys.—ROOKE, J. agreed.—Lord Ch. J. EYRE: I am ſatisfied with the finding of the jury.—Rule refuſed.

Webb *v.* Thomſon, Ea. Ter. 37 Geo. 3. C.B. 1 *Pul. & Baſ.* 5.

Sailing orders are neceſſary to the performance of *a warranty to depart with convoy*, unleſs particular circumſtances exempt the inſured from the general rule.—On the trial of an action on a policy of inſurance there was a verdict for the plaintiff. The policy was effected on the *Golden Grove*, Captain *Hodſer*, bound from London to the Weſt-Indies, and *warranted to depart with convoy*. She ſailed from Spithead, the place of rendezvous, in company with a convoy under Sir *Hugh Cloberry Chriſtian*, and was afterwards wrecked on the coaſt of Dorſetſhire. At the trial it was proved that the captain, and a paſſenger on board, who was ſuppoſed to have ſeen the ſailing orders, were drowned at the time of the ſhip being wrecked. The ſecond mate being examined, as to his knowledge reſpecting ſailing orders, ſtated that the captain left the ſhip *for the purpoſe of obtaining* them from the admiral; and that afterwards on a ſignal for ſailing, the captain being aſked in what manner it ſhould be anſwered, gave the neceſſary directions. But the teſtimony of the mate being ſhaken by Admiral *Chriſtian*'s evidence, a verdict was found for the plaintiff. A new trial was moved for on two queſtions. FIRST, Whether, in point of fact, Captain *Hodſer* ever received ſailing orders? AND SECONDLY, Whether in point of law the actual receipt of them be neceſſary to the performance of a warranty to depart with convoy?—BULLER, J. The caſe is here brought to a queſtion of law. *In point of law then, the general propoſition is, that ſailing inſtructions are neceſſary.* I have never decided this point myſelf, but it has often been determined at Guildhall. I do not ſay that there may not be caſes in which they may be diſpenſed with. In *Hibbert* v. *Pigou* my expreſſion is, "It is not neceſſary to ſay whether ſailing orders are eſſential or not; as at preſent adviſed, I do not ſay that they are abſolutely neceſſary." And the caſe of *Victorin* v. *Cleeve* goes no further. If the captain from any misfortune, from ſtreſs of weather, or other circumſtances, be abſolutely prevented from obtaining his inſtructions, ſtill it is a departure with convoy: but then he muſt take the earlieſt opportunity to obtain them. Generally ſpeaking, unleſs ſailing inſtructions are obtained, the warranty is not complied with: the captain cannot anſwer ſignals; he

does not know the place of rendezvous in caſe of a ſtorm; he does not in effect put himſelf under the protection of the convoy, and therefore the under-writers are not benefited.—The other judges concurring, rule refuſed.

Rot'swell v. Cooke, Mic. Ter. 38 Geo. 3. C.B 1 *Pul. & Boſ.* 172

In an inſurance on a ſhip "at and from Hull to Bilboa, "*warranted to depart from England with convoy*," the voyages from Hull to Portſmouth where ſhe meets with convoy, and from thence to Bilboa, may be conſidered as diſtinct, and in caſe of a loſs between the two latter places, an apportionment and return of premium may be demanded.—This was an action on a policy of inſurance on the ſhip Manning "at and "from Hull to Bilboa, warranted to depart from England "with convoy:" the declaration alſo contained a count for money had and received. On the trial of the cauſe, it appeared in evidence that the ſhip ſailed from Hull to Portſmouth, and from thence departed with a convoy, which, not being direct for Bilboa, ſhe afterwards left, and was captured; on this evidence the plaintiff would have been non-ſuited; but on his counſel inſiſting that he was entitled to a verdict for the premium, which had not been returned, under the count for money had and received, a verdict paſſed for the plaintiff for the whole premium. It was moved to ſet aſide this verdict and enter a nonſuit, on the ground of the riſk having commenced. Cauſe being ſhewn, and the Court entertaining doubts, EYRE, Ch. J. ſaid, we will conſider of this caſe. Either the voyage inſured is to be conſidered as in effect two voyages with two diſtinct premiums, or one voyage only with one premium. Suppoſing there were two voyages; if the ſhip had been loſt on the firſt, there ought to be a return of premium upon the ſecond; but I cannot think that in ſuch a caſe a return would have been demanded. *Bermon* v. *Woodbridge*, *ante*, p. 480, is very ſtrong againſt two voyages; the outward-bound voyage might there have been conſidered as a diſtinct riſk; and if it was there thought that no return ſhould be made, it ſhakes the principle of *Stevenſon* v. *Snow*, *ante*, p. 475. Before we decide in favour of a return, we muſt ſee diſtinctly that there were two voyages and two diſtinct premiums conſolidated into one. HEATH, J. It is difficult to reconcile the caſes on principle. One went on uſage; in *Stevenſon* v. *Snow*, on the other hand, uſage was diſclaimed, and yet the Court relied on the opinion of all mankind, which is uſage. ROOKE, J. As theſe contracts are entered into every day, we ought to adhere to the deciſions on the point. Where the courts have decided againſt a return of premium, they have diſtinguiſhed the caſes from *Stevenſon* v. *Snow*. It has been the courſe of conſtruction to divide ſuch a policy as this into two voyages. If the ſhip does not depart from Portſmouth with convoy, the contract ceaſes as to the latter part, though it remains

mains good as to the former. The word England here anſwers to the word Portſmouth in other caſes. As the courts have been anxious not to overturn *Stevenſon* v. *Snow*, I ſhould be unwilling to do what they have avoided. That caſe is probably conſidered as law at Lloyd's coffee-houſe. THE COURT took time to conſider. AND NOW EYRE, Ch. J. ſaid, The verdict now ſtands for the return of the whole premium; and the queſtion is, Whether it ſhould ſtand for the whole, for none, or for a part? If for a part, I do not know how we are to ſettle it; it muſt depend on there being or not being ſome rule to be found to direct us in making the deciſion. Certain it is, that if the ſhip had been loſt in coming round to Portſmouth, the under-writers would have been liable; it is not therefore reaſonable that they ſhould have been ſo liable without retaining a proportion of the premium. You ſhould enquire whether there is any rate of premium among the underwriters from Hull to Portſmouth, and whether the premium has ever been apportioned where there has been only one inſurance, without diſtinguiſhing the different riſks in the policy. If you can find any rule, I recommend you to adopt it. But if you cannot agree, we think the whole premium ought not to be returned; and therefore the preſent verdict muſt be ſet aſide, and the caſe go to a new trial.—Rule abſolute.

Eden *et al.* v. Parkiſon, Tr. Ter. 21 Geo. 3. B.R. 2 *Doug.* 732.

Under a warranty in a policy of inſurance, that the ſhip and cargo are neutral property, it is ſufficient that they are neutral when the riſk commences.—The plaintiffs inſured the ſhip the Yonge Herman Hiddinga, and her cargo, "at and from "L'Orient to Rotterdam; warranted a neutral ſhip and "neutral property." The ſhip being captured in the courſe of the voyage by ſome Engliſh men-of-war, the plaintiffs brought this action againſt the defendant, one of the underwriters on the policy, ſtating, in their declaration, that the defendant ſubſcribed the policy on the 28th of November, 1780, and avering, that *the ſhip and cargo were*, at that time, *neutral property*. At the trial a verdict was found for the plaintiffs, ſubject to the opinion of the Court, on a caſe as follows: The ſhip in queſtion ſailed from L'Orient, on the voyage inſured, on the 11th of December, 1780, having the inſured cargo on board, and *both the ſhip and cargo were neutral property at the time of the ſhip's departure from* L'Orient, *and ſo continued until the 20th of December*, 1780, *on which day hoſtilities having commenced between the Engliſh and the Dutch, the Dutch ceaſed to be a neutral power, and the ſhip and cargo ceaſed to be a neutral property*. They were taken on the 25th of December, 1780, and condemned as lawful prize, in the admiralty court, on the 19th of February, 1781. Lord MANSFIELD—Many points have been gone into on both ſides, which are not neceſſary for the deciſion of this caſe. For inſtance, there is

no doubt but you may warrant a future event. But the ſingle queſtion here, is, What is the meaning of this policy? It is an inſurance upon a ſhip, and her cargo, at and from L'Orient to Rotterdam. The inſured warrant them neutral, and the defendant would have the Court to add, by conſtruction, "And "ſo ſhall continue during the whole voyage." The contract is not ſo. The inſured tell the ſtate of the ſhip and goods then, and the inſurers take upon themſelves all future events, and riſks, from men-of-war, enemies, detention of princes, &c.—The parties themſelves could not have changed the nature of the property; but they did not mean to run the riſk of war. If it made a difference what country the property belonged to, the under-writers ſhould have enquired. The riſk of future war is taken by the under-writer in every policy. By an implied warranty, every ſhip inſured muſt be tight, ſtaunch, and ſtrong; but it is ſufficient if ſhe is ſo at the time of her ſailing. She may ceaſe to be ſo in twenty-four hours after her departure, and yet the under-writer will continue liable. The caſe of *Lilly* v. *Ewer*, *ante*, p. 448, turns quite the other way. The deciſion there was, that the ſhip muſt ſail with convoy according to the uſage of the trade; *i. e.* convoy deſtined to go as far as uſual in that voyage. The preſent is the cleareſt caſe that can be. The warranty is, that things ſtand ſo at the time; not that they ſhall continue. WILLES, ASHHURST, and BULLER, juſtices, of the ſame opinion.—Poſtea to the plaintiffs.

Tyſon *et al.* v. Gurney, Mic. Ter. 30 Geo. 3 B.R. 3 *Ter. Rep.* 477.

So alſo in this caſe it was held, that if goods be inſured from A. to B. in a neutral ſhip, it is ſufficient to charge the under-writers, that the ſhip was neutral when ſhe ſailed.—On the trial of an action on a policy of inſurance on goods from London to Amſterdam, and from thence to St. Euſtatia, *in any neutral ſhip*. A verdict was taken for the plaintiffs, ſubject to the opinion of the Court. The goods inſured were the property of the plaintiffs, and were ſhipped at London on board the New Content, for Amſterdam, where, on the ſhip's arrival, they were unloaded and re-ſhipped on board the Carolina Aletta, bound to St. Euſtatia, conſigned to the plaintiffs. That ſhip *at the time of ſailing was a neutral ſhip*, but during her voyage hoſtilities commenced between Great Britain and Holland, and ſhe was captured by an Engliſh ſhip of war, and carried into St. Kitts. The ſhip and cargo were condemned on the 24th of February, 1781, by the vice-admiralty court of St. Kitts, as lawful prize. AT THE TRIAL three points were made on the part of the defendant. FIRST, That though the ſhip were neutral when ſhe ſailed, yet ſhe ceaſed to be ſuch after her departure, and during the voyage. SECONDLY, That no claim was made by the plaintiffs, or their agents, at St. Kitts, and that they did

did not appeal againſt the ſentence of condemnation.—3dly, That this was an illegal inſurance, becauſe the plaintiffs were Americans, and one of them was reſident at Philadelphia at that time. THE DEFENDANT now abandoned the two firſt points, but contended that this was an illegal inſurance, being an inſurance on a trade prohibited by the 16 *Geo.* 3. c. 5. ſ. 1. Lord KENYON, Ch. J.—The words of the act of parliament are "That all ſhips of or belonging to "the inhabitants of the ſaid colonies, together with their "cargoes, apparel, and furniture, and all other ſhips whatſoever, "together with their cargoes, which ſhall be found trading in "any port or place of the ſaid colonies, or going to trade, or "coming from trading, in any ſuch port or place, ſhall become "forfeited to his majeſty, as if the ſame were the ſhips of open "enemies." Now the cargo in queſtion was neither on board an American ſhip, or any other ſhip trading to any port in the colonies; and therefore is not within this act of parliament. The legiſlature did not think proper to declare that the property of Americans ſhould be forfeited, unleſs it were found on board an American veſſel, or on board ſome other veſſel trading to one of their ports. And the property of Americans found in any other part of the world is not forfeited by this act. There is no pretence for the conſtruction put on this ſtatute by the defendant's counſel.—The two firſt points were very properly abandoned.—Poſtea to the plaintiffs.

On an action on a policy of inſurance, a condemnation by a foreign court of admiralty is not concluſive evidence that the ſhip was not neutral, unleſs it appear that the condemnation went upon that ground.—Inſurance of freight and goods, upon the ſhip the Jane (or Joanna), at and from Venice to London, "warranted neutral ſhip and neutral property." On the trial of the cauſe a verdict was found for the plaintiff, ſubject to the opinion of the Court, on a caſe, as follows: That the defendant under-wrote the policy; that the ſhip was taken by a French frigate, called La Magicienne, as ſhe was ſailing from Venice on her voyage to London; that the plaintiff offered to give evidence, on the trial, that the property of the ſhip and the property of the cargo were neutral, and that *the papers belonging to the ſhip* fell overboard by accident, *after ſhe was brought to, by the* French *frigate*; but the defendant objected to ſuch evidence being received, and produced, as the ground of his objection, the ſentence of the condemnation of the ſhip in *the French* admiralty court:——"The Joanna; "Duke De Penthievre, Admiral of France—Seen by us, "the Procés Verbal made on board the ſnow Joanna, taken by "the king's frigate La Magicienne, commanded by Mr. *De* "*Boades*, dated the 2d of December laſt. Signed, *Saint* "*Owey*, ſteward, *Bouret*, *Dominico Zane*.—Seen by the cap-

Bernardi *v.* Motteux, Hil. Ter. 21 Geo. 3. B.R. 2 *Doug.* 574.

" tain commander. Signed *Boades*:—purporting, that, the " ſaid ſecond of December laſt, at five o'clock in the evening, " his ſaid majeſty's frigate La Magicienne, commanded by the " ſaid captain *De Boades*, being ten leagues eaſt of Cap des " Moulins, having diſcovered a ſnow ſteering ſouth-ſouth-" weſt, the wind ſouth-weſt, and having come up with her, " and ſtopt her, under Venetian colours, after an hour's chace, " the ſaid Mr. *De Boades* ordered the captain to bring on " board his muſter-roll, paſſport, and bills of loading; with " which order the captain did not readily comply, under " a pretence that the ſea was rough, and that his long boat was " leaky; but, being at laſt obliged to comply, upon threats " being made of firing on him, and being come on board, he " declared, that, in getting up the ſhip's ſide, the box contain-" ing his muſter-roll, his patents and paſſport, had fallen from " his pocket into the ſea, and only ſhewed his bills of loading, " by which they found the ſaid ſnow the Joanna, of 14 men, " including officers, commanded by *Dominico Zane*, of Venice, " ſailed from Venice the 25th of September, with a cargo of " 12 bales of ſilk, dryed raiſins, oil, cream of tartar, potaſh, " and other effects mentioned in the bills of loading by him " exhibited, for the account of ſundry perſons in Venice, con-" ſigned to ſundry merchants in London, whither he was " bound. Theſe goods going into an enemy's country, and " the loſs of his papers which had fallen into the ſea, raiſing " ſuſpicion, the ſaid ſnow had been ſtopt, and carried by his " majeſty's frigate La Magicienne, to Almeria, where ſhe had " been put into the hands of the conſul, after the ſaid *Saint* " *Owey*, lieutenant acting as ſteward, and the ſaid *Bouret*, en-" ſign on board the ſaid frigate, had put their ſeal on the ſaid " ſnow, where they found no papers, and taken on board the " ſaid ſhip ten of the ſaid ſnow's crew, which were replaced " by ſix men from on board La Magicienne, and three from " the Atalante, with a coaſting pilot, who have brought the " ſaid ſnow into the port of Almeria. The premiſes con-" ſidered—We, by virtue of the power delegated to us as " aforeſaid, have declared, and declare, as good prize, the ſhip " the Joanna, her tackle, and apparel, together with the " goods of her cargo, and do adjudge them to the captors, " that, in conſequence of this decree, the whole be ſold (if not " already done), in the uſual manner, and the produce divided " according to the deſire and ordinance of the king, made the " 28th of March, 1778. We order, by theſe preſents, the vice-" conſul of France at Almeria to look to the execution of this " our ordinance, and thereby authorize and command the firſt " tipſtaff or ſerjeant to proceed in all forms requiſite thereto. " Done at Paris, the 13th of January, 1779. RIGOT." The queſ-tion ſtated for the opinion of the Court was, Whether the

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ſaid ſentence was not concluſive evidence againſt the plaintiff's recovering in this action? If the Court ſhould think it not concluſive, then a verdict to be entered for him. If they ſhould think it concluſive, then a nonſuit to be entered. In the courſe of the arguments on this caſe, the third article of the regulations of the marine of France, bearing date the 26th of July, 1778, and alſo the *procés verbal* made at the time of the capture, though not ſtated in the caſe, nor given in evidence at the trial, were ſo much referred to, and ſeemed of ſuch weight to the Court, that it will be neceſſary to inſert them in this place. *Arret*, for the regulation of the marine, &c. 26th of July, 1778.—*Art.* 3. "All veſſels taken, of what nation "ſoever, either neutral, or allied, from which it is known that "any papers have been thrown into the ſea, ſuppreſſed, or "abſtracted, ſhall be declared good prize, together with their "cargoes, upon the mere proof that ſome papers have been "thrown into the ſea, without any neceſſity of examining what "thoſe papers were, by whom they were thrown, and even "though a ſufficient quantity ſhould remain on board to "juſtify that the ſhip and its cargo belonged to friends "or allies." The *procés verbal* was ſet forth in the ſentence of condemnation. It was admitted that the ſentence had been appealed from, and affirmed, but nothing new, or ſpecial, appeared in the proceedings on the appeal. The caſe was twice argued; and after the ſecond argument, Lord MANSFIELD directed the cauſe to ſtand over, till there ſhould be an opportunity to apply to the defendant, for his conſent, that the above *arret*, and the *procés verbal*, ſhould be added to the caſe; but the defendant's counſel would not conſent that the *procés verbal* ſhould be conſidered as part of the caſe. After the firſt argument, LORD MANSFIELD ſaid, the firſt principles are clear, and admitted. All the world are parties to a ſentence of a court of admiralty. Here, there is a monition publiſhed at the Exchange, and in other countries at ſome place of general reſort, and any perſon intereſted may come in, and appeal, at any time, if there has been no laches. If there has, the time of appeal is limited. But the ſentence, as to that which is within it, is concluſive againſt all perſons, unleſs reverſed by the regular court of appeal. It cannot be controverted, collaterally, in a civil ſuit. The difficulty here is, what the ground was on which the French court of admiralty went; whether, the ground of enemy's property, or that of the papers having been thrown overboard. By the maritime law of all countries, throwing papers overboard is conſidered as a ſtrong preſumption of enemy's property, and upon that principle the *arret* of 1778 is founded. But, in all my experience in England, I have never known a condemnation on that circumſtance only. It is made uſe of as a ſtrong ground of ſuſpicion. The *arret*

is

is very rigid. It is difficult to find out what the ground of this ſentence was. I incline to think, the Court went upon the ground of enemy's property, and conſidered the want of the papers as a ſtrong preſumption of that fact; but they did not examine the captain upon interrogatories, as to the contents of the papers; and upon the whole, enough does not appear on this obſcure ſentence, to aſcertain preciſely upon what it was founded, and ſome other method ought to be taken to enquire what the ground of it was. As to whatever it meant to decide, we muſt take it as concluſive. WILLES, and ASHHURST, Juſtices, concurred with his lordſhip. BULLER, J. ſaid, that, to be ſure, the ſentence was obſcure, but, taking it altogether, he did not think there was much difficulty in diſcovering the grounds of it. The two circumſtances of the cargo being conſigned to the enemy, and the falling of the papers into the ſea, are ſtated as the grounds of ſuſpicion. The latter circumſtance—papers falling into the ſea—could not be a ground of condemnation. The other could raiſe no other ſuſpicion, nor a preſumption of any thing elſe, but the property being enemy's property. It follows, therefore, that the condemnation went upon that ground. If it had gone upon a wilful throwing papers overboard, that would have been ſtated, ſubſtantively, as the ground. In the firſt place, lay the *arret* out of the caſe, and then wilful throwing papers overboard is only preſumptive evidence of enemy's property; then take the *arret*, ſtill wilful throwing overboard might have been uſed as evidence of enemy's property, or it might have been a ſubſtantive ground under the *arret:* here it is not ſtated as a ſubſtantive ground. On the ſecond argument, Lord MANSFIELD ſaid, that, if the *procés verbal* ſhould be agreed to be made part of the caſe, it would clearly explain the ambiguity of the ſentence, as it ſet forth the ground for taking the ſhip to have been the *arret* of July, 1778. Without the *procés verbal*, the ſentence, he ſaid, was equivocal; it took all in; and it was difficult to ſay, what it went on. If the papers produced to the captor were fair, the property was neutral. But, the *procés verbal* put the ground of the ſentence out of all doubt. WILLES, and ASHHURST, Juſtices, of the ſame opinion. BULLER, J. alſo declared, that he thought the *procés verbal* muſt be taken as part of the proceedings, and, as that expreſsly referred to the *arret* as the ground of the capture, and the ſentence was conſiſtent with it, the ſentence muſt be taken to have been founded on the *arret*. But he adhered to his former opinion, on the caſe as ſtated without the *procés verbal*, namely, that the interpretation of the ſentence, taken by itſelf, muſt be, that the condemnation went on the ground of enemy's property, and was, therefore, concluſive againſt the plaintiff. Lord MANSFIELD then ſaid, if the defendant

ſendant would not conſent that the *procés verbal* ſhould be made part of the caſe, there muſt be a new trial.—*Upon this, it was obſerved, that it would be hard upon the plaintiff now to grant a new trial, for that his witneſſes were gone to* Venice, *and the terms on which the caſe was reſerved for the opinion of the Court were, that, if the ſentence ſhould be thought not to be concluſive, a verdict ſhould be entered for the plaintiff.* The ultimate refuſal of the defendant was now ſignified, by *Lee*, who aſſigned as the reaſon for it, that the *procés verbal* was not a proceeding in the French court of admiralty, but merely an account of what paſſed on the capture, reduced into writing, at the time. He obſerved, that, in the ſentence, all the *procés verbal*, except the concluding part, which refers to the *arret* of July, 1778, was recited, and he thought this afforded a ſtrong argument for inferring, that the Court had purpoſely omitted that part of it, to ſhew that they did not condemn the ſhip on the ground of the *arret*. LORD MANSFIELD diſapproved much of the defendant's refuſal, but he ſaid he thought the juſtice of the caſe might ſtill be got at, on the ground of the ambiguity of the ſentence, which did not mention a word about the property being enemy's property; that it was clear the French admiralty meant to proceed on the ground of throwing the papers overboard; and he agreed with the counſel for the plaintiff, that the *procés verbal* ought to be conſidered as part of the proceedings, and that the ſentence ought not to have been read without it. BULLER, J. thought, there was weight in what had been obſerved by *Lee*, on the reaſon for omitting the concluding part of the *procés verbal* in the ſentence. Indeed it was not clear that what was now offered to be produced was the ſame *procés verbal* which the ſentence recites, and, if it could be ſuppoſed that the captain had made another, omitting the reference to the *arret* as the ground of capture, that could only be accounted for by his having found that the capture could not be ſupported on that ground. WILLES, J. thought it moſt manifeſt, that the *procés verbal* made at the time of the capture was that on which the ſentence proceeded. The ſentence began with mentioning it, and recited it exactly, as to date, and every thing elſe, as far as it went. The word "purporting" did not require a recital of the whole, and it was not neceſſary for the admiralty court to ſet forth the captain's reaſons for detaining the ſhip. He had all along been of opinion that the ſentence was ſo ambiguous, that it did not appear that the cauſe of condemnation was that the property was not neutral, and, therefore, had thought evidence neceſſary to explain it. ASHHURST, J. concurred, as to the ambiguity of the ſentence, and that it was, therefore, not concluſive; and, on that ground, Lord MANSFIELD, and WILLES, and ASHHURST, juſtices, declared

declared their opinion that the poſtea ought to be delivered to the plaintiff; *Lee* ſtill urging the danger of opening the ſentences of foreign courts of admiralty, which are uſually informal, and expreſſing his apprehenſions, that the conſequence of this determination would be, that, in all caſes of this ſort, there would be controverſies about the ground of the foreign ſentence. On this, Lord MANSFIELD ſaid, that this ſuppoſed inconvenience would be entirely obviated, if the foreign courts would ſay, in their ſentences, "condemned as enemy's property."—Poſtea delivered to the plaintiff.

Calvert *v.* Bovill, Hil. Ter. 38 Geo. 3. B R. 3 *Ter. Rep.* 523.

In an action on a policy of inſurance on goods warranted American, on board a ſhip from London to Virginia, a ſentence of a foreign court, which, after reciting that "foraſmuch as "the true deſtination of the veſſel was for the Engliſh "iſlands, having been hired and loaded at London, and having "on board eighty barrels of gunpowder, declares the ſhip and "cargo a good prize," is not concluſive evidence againſt the warranty of neutrality; becauſe the ſpecial grounds aſſigned for the ſentence do not neceſſarily lead to ſuch a concluſion.—This was an action on a policy of inſurance on the captain's goods and private adventure, warranted American property, on board the ſhip Friends, at and from London to Virginia. It was clearly proved at the trial that the property of the goods (which were ſhipped purſuant to an order of council, then rendered neceſſary) was in the plaintiff; that he was an American; that the ſhip, which was American built, and manned by American ſailors, had been conſigned by her owners in Virginia to their correſpondents in London with a cargo of merchandize, and was afterwards cleared out and ſailed from London upon the voyage inſured, having all neceſſary papers on board to evince that ſhe was an American ſhip, and that the real place of her deſtination was Norfolk in Virginia, to which port ſhe belonged. That in the courſe of her voyage having met with very tempeſtuous weather, and being much damaged, ſhe was obliged from diſtreſs to bear away for the firſt port in the Weſt-Indies, in which courſe ſhe was captured by a French privateer and carried into Guadaloupe, where ſhe was condemned by ſentence of the court there, expreſſed, as to the matter in judgment, in theſe terms; "Seen "by us, the judges of the court of commerce, the papers "which have been here produced reſpecting the capture of the "brig Friends, Captain *Thomas Calvert*, made by the privateer "La Legere, Captain *A. T.*, and having heard on that ſubject "the opinion of citizen *Serand*, commiſſary of the executive "directory of the ſaid court, and alſo heard the report, and "conſidered the whole; foraſmuch as the true deſtination of "the ſaid veſſel was for the Engliſh iſlands, having been hired "and loaded at London, and that there has been found on board "her

" her eighty barrels of gunpowder; the Court declares the " ſaid brig Friends a good prize for the benefit of the captors, " together with her tackle, apparel, cargo, and generally all " that belongs to her," &c. THE QUESTION was, Whether the ſentence of condemnation was concluſive evidence againſt the warranty of the goods being American property? A verdict was taken for the plaintiff, with liberty for the defendant to move to ſet it aſide and enter a nonſuit if the Court ſhould be of opinion that the ſentence was concluſive; which motion having been accordingly made, *rule niſi obtained*, and cauſe ſhewn againſt it. PER CURIAM, it is contended that though in point of fact the goods were the property of an American, the ſentence of condemnation precludes the plaintiff from aſſerting that fact. To a certain degree this Court will ſupport the proceedings in foreign courts by preſuming that their ſentences are juſt; and we will not make any exception at preſent of the proceedings of the French courts of admiralty. But when an attempt is made to pervert the juſtice of the caſe, it becomes neceſſary for us to ſee whether the deciſion of the court at Guadaloupe has ſo determined on the fact of neutrality that we cannot examine into it. But it has been ſaid, as nothing can juſtify the ſentence of the French court of admiralty but the fact that this was Britiſh property, we muſt conclude that they condemned the ſhip and cargo on the ground that they were Britiſh property: but that is a concluſion againſt all the the facts proved in the caſe. If indeed that Court had ſtated in their ſentence that they condemned the goods becauſe they were Britiſh property, we ſhould have been bound by their ſentence, but they have aſſigned other reaſons for their adjudication; the expreſs grounds of the ſentence of condemnation are, that the ſhip was deſtined for one of the Weſt-India iſlands, that ſhe was hired and loaded at London, and that ſhe had a certain quantity of gunpowder on board, therefore they condemned her and her cargo as good prize. Then it is impoſſible for us to conclude that the French court decided on the ground that this was Britiſh property, when all the evidence in the cauſe and the reaſons expreſsly given by them for their judgment lead to a contrary concluſion.—Rule diſcharged.

By the ſentence of a French court of admiralty it appeared that the ſhip inſured warranted American had been condemned as enemy's property for want of having on board a role d'equipage, or liſt of the crew, ſuch as is required by a marine ordinance of France, and adjudged by the court there to be requiſite within the meaning of the treaty of commerce between France and America; and this was held to be concluſive evidence againſt the warranty of neutrality, though in fact the ſhip was American.—This action was brought to recover a total loſs by capture upon a policy of inſurance under-written by the defendant

Geyer *v.* Aguilar, Tr. Ter. 38 Geo. 3. B R. 7 *Ter. Rep.* 681.

fendant on the freight of the American ſhip Rainbow, *William Smith*, maſter, at and from Charleſtown to London, "war-"ranted American property," and valued at 800l. The premium having been returned and accepted without prejudice, the defendant pleaded the general iſſue; and on the trial the following caſe in ſubſtance was reſerved for the opinion of this Court. The plaintiff reſides at Charleſtown in North America, and was the ſole owner of the ſhip Rainbow which took in a cargo at Charleſtown upon freight for the voyage deſcribed in the policy. The ſhip ſailed upon the voyage inſured under the command of Captain *W. Smith*, a native of the iſland of Bermuda, who was naturalized in the United States of North America on the 18th of January, 1796; and on the 25th of March, 1797, ſhe was captured by a French privateer and carried into Nantz, in France, where ſhe was condemned and ſold for the benefit of the captors. The Rainbow at the time of her firſt ſailing and till her capture had on board a proper regiſter as an American-built veſſel, a paſſport or ſea-brief duly certified, and the ſeveral other documents referred to in the ſentences of condemnation; *but ſhe had no certified role d'equipage or liſt of her crew.* The plaintiff offered to prove that he was born within the United States of North America, and had been domiciled there from his birth, and that the ſhip and freight were his ſole property: but on the other hand there was produced a record of condemnation by the commercial tribunal of Nantz, having competent juriſdiction, dated the 12th of May, 1797, which ſtated the queſtions of fact made to be, 1ſt, *Whether the ſhip Rainbow and her cargo were neutral property?* 2dly, *Whether the papers and other things found on board the Rainbow ſufficiently proved the property?* And the queſtions of right to be, 1ſt, Whether a neutral American ſhip fitted out with papers vouching its neutrality were a lawful prize for having on board bills of lading of her cargo which are not ſigned? 2dly, Whether theſe bills of lading not poſitively pointing out that the merchandiſe which they contained were neutral property could give cauſe for confiſcation? 3dly, Whether a neutral American ſhip was to be declared a lawful prize becauſe ſhe had not on board a liſt of the crew, or becauſe that which ſhe produced was not ſigned by a public officer? &c. It then ſtated that the privateer having chaſed the Rainbow, which carried American colours, brought her to, and on examination of her papers the French captain obſerved *there was no liſt of the crew, that the manifeſt of the cargo was contrary to the declaration made to him by the American officer, and that the bills of lading produced were not ſigned;* for which reaſon he thought the American ſhip a lawful prize, eſpecially as her deſtination was for London, an enemy's country. He therefore brought her into Nantz. That Captain *Smith* offered

offered to prove, 1ſt, That the ſhip Rainbow was American-built and American property, conſequently neutral; 2dly, That the goods on board her belonged to and were going on account and riſk of ſubjects of the united ſtates of America, and conſequently were neutral property alſo. To prove the firſt point it was argued that the 25th article of the treaty between France and America, made the 6th of February, 1778, required that when either of the powers ſhould be engaged in war, the ſhips of the other ſhould be provided *with a ſea-letter or paſſport*, expreſſing the property and deſtination of the ſhip, with the name and abode of her maſter, and that Captain *Smith* had conformed to this law. Firſt he carried a regiſter dated the 6th of October, 1795, delivered at Charleſtown by the proper officers which proves the ſhip Rainbow American-built, and owned by *John Geyer*, an American citizen; on which regiſter there was an indorſement that Captain *Smith*, after taking the uſual oath, had taken the command of the ſhip. Then he produced a paſſport or ſea-letter in due form from the American government, dated the 14th of February, 1797, for the voyage inſured. 2dly, To prove the cargo American and neutral, five bills of lading were produced expreſſing the real names of the parties, &c. And annexed to the ſhip's manifeſt is a judicial act, proving authentically that the ſhippers of the goods therein ſpecified, which correſpond with the bills of lading, had appeared before a juſtice and notary of Charleſtown, and ſworn before him that the goods they had laden in this ſhip were their property, and that no ſubjects of the powers then at war had either directly or indirectly any intereſt therein; which paper was duly legalized by Citizen *Dupont*, the French conſul, and dated at Charleſtown, 2d Ventoſe, in the 5th year of the Republic. On the part of the captors it was replied, that the 25th article of the treaty of February, 1778, required American ſhips to have on board a liſt ſigned containing the names, ſurnames, places of birth and abode of the perſons compoſing their crews or embarking on board them, and that in every port the captain ſhould ſhew it to the cuſtom-houſe officers and juſtices; that Captain *Smith* had not on board ſuch a liſt; conſequently it was in contravention of the law, and as ſuch ſubject to confiſcation. That this law is confirmed by the 9th article of the regulation of the 26th of July, 1778, which declares all foreign ſhips to be good prize that have not on board a liſt of the crew ſigned by the public officers of the neutral place they depart from; and ſtill further confirmed by the 4th article of the decree of the executive directory of the 12th of Ventoſe laſt, which ſays that, conformably to the law of the 14th of February, 1793, the regulations of the 21ſt of October, 1744, and 26th of July, 1778, concerning the manner of proving the property of neutral ſhips and goods,

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ſhall be executed according to their meaning and tenor; conſequently all American ſhips that have on board a liſt of the crew in due form as preſcribed by the model annexed to the treaty of the 6th of February, 1778, ſhall be good prize, and the execution of which is ordered by the 25th and 27th articles of the ſame treaty. That alſo by the 9th article of the regulation of 1778, in order for any veſſel to be conſidered neutral, ſhe ſhould not have on board a commanding officer of an enemy's country, and Captain *Smith* is an Engliſhman born; and that the letter of naturalization in the American ſtates delivered to him at Charleſtown on the 18th of January, 1796, was inſufficient, becauſe annulled by the regulations of the 23d of July, 1794, and the 21ſt of October, 1744, expreſsly requiring that the letters of naturalization ſhould have been obtained before the declaration of war, and that thoſe to whom they are granted ſhould have been domiciled in the neutral ſtates before that period, and ſhould not have returned to their native countries ſince the letters were obtained. But Captain *Smith* did not obtain his letters of naturalization till after the declaration of war between the French republic and England, no mention is made what time he had lived in the united ſtates, and it appeared he had returned to England ſince he obtained his naturalization. In reply it was obſerved, 1ſt, that it was not cuſtomary in the United States for maſters of ſhips to have liſts of their crews, and that there was no public officer appointed to deliver them. That the only paper of the kind made uſe of was one produced of an agreement between the maſter and the crew; and that it muſt have been by miſtake that the decree of the executive directory of the 12th Ventoſe laſt ſeemed to require of American ſhips a liſt of their crew in any different form, ſince the 25th and 27th articles of that treaty, the execution of which is preſcribed, do not ſpeak of it. Moreover this decree being of a date poſterior to the departure of the Rainbow from Charleſtown could not have any retroſpective effect, and conſequently could not be obligatory upon Captain *Smith*. That as to the act of naturalization it was in the form cuſtomary in America, that Captain *Smith* having fulfilled all the formalities preſcribed by the laws of the country and taken the requiſite oath, was declared and inrolled a citizen of the United States. Then the tribunal paſſed ſentence in the following terms; "Conſidering that the "7th article of the law of the 13th Nivoſe, in the 3d year, "which abrogated that of the 9th of May, 1793, cannot be "applied to Captain *Smith* according to the decree of the executive directory of the 12th of Ventoſe, and that this law "remains in force; conſidering that ſuch decree of the 12th "of Ventoſe declares lawful prize all American ſhips not "having

" having a list of their crews conformable to what is prescribed " by the model annexed to the treaty of February, 1788; that " the same decree orders, agreeably to the law of the 9th of May, " 1793, the execution of the regulations for neutrals in time of " war of the 21st of October, 1744, and the 22d of July, 1778, " fixing the manner of establishing at sea the property of neutral " ships and goods; considering there was not on board the ship " Rainbow such a list of the crew as is prescribed by the model " annexed to the said treaty; that the captain of the Rainbow " has only produced conformable to the 27th article of such " treaty his passport and sea-letter and the act of the Ameri- " can congress of the 26th of July, 1790, on the back of which " is an agreement printed in English, and subscribed by only " seven of his crew, and it was not till after the examinations " that there were twelve names upon it, being the crew on " board; consideringthat the captain produced only bills of lad- " ing without signature, which as such are null; that the only " authentic paper he produced is a manifest of his cargo with a " declaration of the shippers that it is their sole property, which " declaration has been received by a justice and notary of " Charlestown and the signature of which has been legalized by " the consul of the Freneh Republic resident there; considering " that the decree of the Directory of 12th Ventose last peremp- " torily declares American ships, which shall not have on board " lists of their crews, lawful prizes; and declares them at the same " time enemies; considering lastly that a ship declared an ene- " my to be a good prize includes the confiscation of her " cargo; the tribunal in conformity to the decree of the execu- " tive directory before quoted, adjudges and declares the va- " lidity of the prize of the American ship Rainbow captain *Wil-* " *liam Smith*; adjudges likewise the validity of the capture and " confiscation of all the cargo, &c. *the whole being, for want of* " *Captain Smith's having the papers in due form, thought to be-* " *long to enemies of the Republic*, &c." The case then set forth another sentence upon appeal, confirming the above, wherein the tribunal of the department declare it has been well adjudged by the sentence of the tribunal of commerce that the appellant is not aggrieved, &c. and condemned him in costs. It then became a question in this cause whether the sentences of condemnation connected with the treaty, French ordinances, and decrees, were to be deemed conclusive against the truth of the warranty expressed in the policy. The plaintiff and defendant mutually admitted that previous to the capture and condemnation of this and other vessels on similar grounds, *no master of an American ship had ever signed a list containing the names, surnames, the places of birth, and abode, of her crew*; but since those condemnations have been known in America, such lists have been constantly delivered and certified, under protests against their necessity; and that American ships having such

ſigned liſts have been liberated by French cruizers on the production thereof. That for a few years previous to and at the time of the Rainbow's capture an open war ſubſiſted between France and other European powers, but the United States of America were not involved in the war. *It was alſo admitted that the plaintiff if it be open to him to eſtabliſh the truth of his warranty, but ſubject to the legal effect of the above ſentences and papers in a Britiſh court, is really a ſubject of the United States of America, having been born and domiciled there from his birth; and that he is the ſole proprietor of the ſhip Rainbow, and of the freight inſured.* The queſtion for the opinion of the Court is, Whether the plaintiff is entitled to recover, or precluded from ſo doing? if entitled to recover, a verdict to be entered up for 183l. 4s.; if precluded from recovering, a nonſuit is to be recorded. FOR THE PLAINTIFF it was argued that the ſentences of condemnation of the French courts do not conclude the queſtion of neutrality againſt the plaintiff. FOR THE DEFENDANT three points were made, 1ſt, That the legal import of the warranty is not merely that the ſhip is American-built or belonging to an American, but that ſhe is ſo navigated as to give the under-writer the full effect of her neutrality; in conſideration of which he receives a leſs premium. 2dly, Here the ſentences ſet forth in this caſe eſtabliſh that in the judgment of the courts pronouncing them the veſſel inſured was not ſo navigated. 3dly, That if ſuch be the plain foundation of the ſentences to be collected generally from the whole ſcope of them, this Court cannot, conſiſtently with the admiſſion of the juriſdiction which pronounced them, examine into their merits or reverſe them under any circumſtances, upon the ground of their error or injuſtice.—Lord KENYON, Ch. J. The ſituation of judges is ſuch, that they are ſometimes obliged to decide againſt their own feelings as men. We come to decide this caſe bound and ſhackled by certain rules from which we dare not depart. The acts of pirates are to be treated as the acts of pirates: they do not profeſs to have any civil code of laws by which they are to be reſtrained. But civilized nations profeſs to be governed by certain rules, and the comity due from the courts in one country to thoſe in another induces them to give credit to each other's acts; and ſo we muſt continue to act in this country until the legiſlature ſhall think fit to forbid it. There is the ſame comity between the different courts in this kingdom. Where there has been a proceeding in the exchequer and a judgment *in rem*, as long as the judgment remains in force it is obligatory on the parties who have civil rights depending on the ſame queſtion. Not long after Lord *Manſfield* came into this court, in an action brought againſt an officer of the cuſtoms or exciſe, he was told by Mr. J. *Deniſon* that as the queſtion had been already decided in the exchequer by a condemnation of the goods

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seized, the judgment of that Court was conclusive in favour of the defendant here; at first Lord *Mansfield* doubted the propriety of that opinion, but on enquiry finding that Mr. J. *Denison* was right, he acquiesced, and always afterwards acted upon it. I admit that, if a foreign court of admiralty proceed on grounds contrary to the law of nations, their judgment ought not to have weight in the courts of this country. But let us see what this case is: the ground on which the courts in France proceeded was, that this was a capture of enemy's property; and it certainly is not contrary to the law of nations to condemn a ship on that ground. Whether or not those courts arrived at that conclusion by proper means I am not at liberty to enquire; here the question is, Whether they have not stated as the ground of condemnation a ground which will bear them out, supposing it to be true? and I am clearly satisfied that they have. They concluded from the evidence that this was enemy's property, not indeed in the formal language of our courts of justice, but they say in substance, "We think this is enemy's property, and therefore we "condemn the ship and cargo." Now that concludes this case; for as long as the foreign judgments are binding upon us, the conclusion that we must draw from the judgments in this case in France is, that the property which was warranted to be American is found by that judgment not to be American property. I feel this however as the grossest injustice towards the Americans. The French courts seem in this instance to have proceeded on Algerine (nay on worse) principles; because they professed to proceed according to law, but in reality made the law a stalking-horse for an act of piracy. But I cannot now question the legality of their decision; I am bound to decide according to the law; it is my duty *jus dicere et non jus dare*.—The other Judges concurring.—Judgment for the defendant.

A warranty in a policy of insurance that the ship is American property means that the ship is entitled to all the privileges of an American flag: and if she has no passport on board (which is required by the treaty between France and America) the warranty is not complied with, and the assured cannot recover against the under-writer, though in fact the ship suffers no inconvenience in the voyage from the want of the passport. —This was an action on two policies of insurance, one on the ship, the Atlantic, the other on goods on board her, from London to Guernsey, from thence to the coast of Africa during her stay and trade there, and at and from thence to her port or ports of discharge in all or any of the British West-India Islands and America. *The ship and goods were warranted to be American property.* The plaintiff averred that the ship and goods were American, and then stated that the ship sailed from London to

Rich *v.* Parker, Tr. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 705.

Guernſey and from thence to the coaſt of Africa, where ſhe was captured by an enemy. On the trial a ſpecial verdict was found; which ſtated that the ſhip, the Atlantic, was an American ſhip, and the property of the plaintiff, a native and citizen of the United States of America, and that the goods were American property. It then ſet forth the treaty between France and the United States of America in 1778; in which it was agreed (inter alia) that *the ſhips and veſſels belonging to the ſubjects of the other ally muſt be furniſhed with ſea-letters or paſſports expreſſing the name, property, and bulk of the ſhip, as alſo the name and place of habitation of the maſter or commander of the ſhip*, that it might thereby appear that the ſhip really and truly belonged to the ſubjects of one of the parties; which paſſports ſhould be made out and granted according to the form annexed. The verdict then ſtated, that before and at the time of ſailing of the ſhip, &c. this country was engaged in a war with France, *and that the ſhip when ſhe ſo ſailed from* London *on her voyage for Guernſey had not on board any ſea-letter or paſſport made out and granted for her according to the form annexed to the treaty*; but that at the time of her ſailing from Guernſey, and from thence continually afterwards until and at the time of the capture, ſhe was furniſhed with and had on board her ſuch a ſea-letter or paſſport, &c. and which was exhibited and ſhewn at the time of her capture and loſs by the maſter of the ſhip to the commander of the French privateer. But whether, &c. THE QUESTION was, Whether or not the warranty in the policy that the ſhip and cargo were American property had been complied with? PER CURIAM: *Nothing can be clearer than this, that if a ſhip that is inſured be not ſea-worthy or in a proper condition for ſailing during any part of the voyage, nothing that happens afterwards can better her original ſituation.* By the treaty between France and America, referred to in the caſe, it is agreed that the ſhips and veſſels belonging to the ſubjects of either ally muſt be furniſhed with ſea-letters or paſſports, &c. *Now the warranty in this policy, that the ſhip was American property, is not ſatisfied by merely ſhewing that in fact the ſhip was American property.* When theſe parties entered into the contract of inſurance, the under-writer was to be indemnified to a certain extent under this warranty; the ſhip was not only not to be liable to riſks ariſing from her not being American property, but ſhe was not to be liable to any inconvenience or impediment in her voyage from her not being in the condition required by the treaty with France. The queſtion here is, Whether or not this ſhip was in ſuch a ſituation as to be entitled, in the words of the defendant's counſel, to all the privileges of an American flag? ſhe certainly was not. It is true perhaps that the French had no right to confiſcate the ſhip for not having the paſſport on board, if in fact it were proved that ſhe

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was an American ſhip: but under the terms of this treaty the French had a right to do certain acts which they could not have done according to the treaty if the paſſport had been on board. If the paſſport were on board, the French ſhips were not to come within cannon-ſhot, nor to chaſe or drive her out of her voyage, and they were not to ſend more than two or three men on board; which negative implies an affirmative, that in caſe ſhe had no paſſport on board, the French would not have been guilty of any infraction of the treaty if they had forced this ſhip out of her voyage. The parties to this contract of aſſurance meant that the under-writer ſhould not be liable to ſuch riſks: but the ſhip was ſubject to theſe riſks and inconveniences through the neglect of the aſſured, becauſe he did not do all that was required by the treaty. Might not this ſhip have been carried into a French port and the voyage been thereby delayed for want of this paſſport, though perhaps ultimately ſhe would not have been liable to confiſcation? And is not that a greater riſk than the under-writer engaged to inſure in the caſe of a ſhip warranted American? It is true that the loſs did not happen in conſequence of the ſhip not having a paſſport: but ſtill the under-writer was thereby put to greater riſk than he would have been if the ſhip had had this document on board. The warranty that the ſhip was American does not mean merely that the ſhip was American-built, but that ſhe was entitled to all the privileges and indemnities of an American ſhip, otherwiſe it makes a difference in the value of the riſk. The aſſured ought to diſcloſe to the under-writer all the circumſtances within his knowledge that may affect the quantum of the riſk: now if the under-writer had been informed that this ſhip would not have any paſſport on board in the firſt part of voyage from London to Guernſey, perhaps the under-writer would not have inſured for the ſame premium. For this reaſon the plaintiff is not entitled to recover in this action.—Poſtea to the defendant.

A warranty of Daniſh property (Denmark being then a neutral power) in a policy of inſurance on ſhip and goods, was holden to be concluſively diſproved by a ſentence of a court of Admiralty condemning the ſhip and cargo becauſe the maſter and crew had broken their neutrality in the courſe of the voyage inſured, by forcibly reſcuing the ſhip, which had been ſeized and carried into port by a belligerent power for the purpoſe of ſearch.—The plaintiffs declared upon a policy of inſurance: and at the trial a verdict was found for the plaintiffs, ſubject to the opinion of this Court on the following caſe. The defendant ſubſcribed the policy for 200l. on the cargo of the ſhip Diſpatch, warranted Daniſh *ſhip and property*, on a voyage at and from St. Thomas to the Havannah *F. Weſterman* and *M. Viendt*, who were owners of the ſhip and intereſted in the property inſured to the amount ſtated in

Garrels *et al.* *v.* Kenſington, Ea. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 230.

the declaration, were Daniſh ſubjects reſiding at the Daniſh Iſland of St. Thomas, and the ſhip had on board a regiſter, ſea-letter, and a general clearance from the Cuſtom-houſe Judge and Commandant, and the captain's letter of inſtructions, being the ſhip's papers uſually carried by Daniſh ſhips. The loſs aroſe by capture; and the circumſtances attending ſuch loſs are diſcloſed in the ſentence of condemnation given againſt the ſhip in the Britiſh Vice-Admiralty Court at St Domingo, upon a ſuit there inſtituted upon the relation of *Thomas White*, eſq. commander of his Majeſty's ſloop of war the Pelican; viz. That the ſaid neutral ſhip Diſpatch, with the cargo on board, *being Daniſh property, had been under the authority of the laws of nations and of war, and agreeably to exiſting treaties, ſtopped and detained by John Gaſcoyne, eſq. commander of his Majeſty's ſloop Pelican*, and by him ſent towards the port of Mole St. Nicholas, for the purpoſe of being legally examined, under the command and direction of *Dennis Barret* a midſhipman, of the ſaid ſloop Pelican, as prize-maſter, with two ſeamen; that on the near approach of the ſaid ſhip to the harbour of Mole St. Nicholas aforeſaid, the ſaid maſter, ſupercargo, and crew of the ſaid ſhip Diſpatch, had, *in direct violation and breach of their neutrality, as Daniſh* ſubjects *and contrary to the law of nations and the faith of treaties*, violently and forcibly, at a preconcerted ſignal, ſeized and taken poſſeſſion of the ſaid ſhip and her cargo from and out of the hands and poſſeſſion of the ſaid *Dennis Barrett* and his two ſeamen, and had retained poſſeſſion thereof till again captured by a certain French privateer; and that the ſaid ſhip Diſpatch and her cargo were again captured and taken by his Majeſty's ſaid ſloop of war Pelican, then under the command of *Thomas White*, eſq.; and the ſaid ſhip or veſſel, and the goods, &c. on board were accordingly condemned as a lawful prize. As ſoon as the above ſentence was known to the aſſured, they abandoned to the under-writers. THE QUESTION was, Whether the warranty of the ſhip and cargo being Daniſh had been complied with? THE COURT on the argument intimated their clear opinion that the ſentence of condemnation by a court of competent juriſdiction, having expreſsly adjudged that the ſhip by the acts ſtated had *broken her neutrality, and acted contrary to the laws of nations and the faith of treaties*, had concluded that queſtion, and that they could not examine into the propriety of the concluſion.—The caſe was fully argued. Lord KENYON, Ch. J. It appears to me that the plaintiff is not entitled to recover, notwithſtanding the caſe of *Saloucci* v. *Johnſon*, *Park*, 523. That caſe profeſſed at laſt to proceed on this ground, that the arbitrary ordinances of one country ought not to conclude the rights of other parties, and that courts of juſtice ought to proceed on the acknowledged law of nations and on the exiſting treaties between the different ſtates. But that caſe is important in another point of view; it lays

down

down certain other principles to which I accede, namely, that though it is not neceſſary that a ſhip warranted neutral ſhould continue neutral during the whole voyage, becauſe if ſhe be neutral at the time of ſailing the breaking out of war on the next day will not diſcharge the under-writer, yet the ſhip muſt not forfeit its neutrality by the miſconduct of the parties on board. Now in this caſe the ſhip and cargo were warranted to be Daniſh; and the caſe of *Saloucci* v. *Johnſon* ſays that *a ſhip that is warranted neutral muſt be ſo conducted as not to forfeit its neutrality.* Then was this ſhip ſo conducted? In order to decide that queſtion we muſt look to the ſentence of the court of Admiralty; that ſentence, which we cannot review, has expreſsly ſtated "that the maſter and crew of the ſhip Diſpatch, "in direct violation and breach of their neutrality as Daniſh "ſubjects, and contrary to the law of nations and the faith of "treaties, violently" ſeized and took poſſeſſion, &c. If we had conſtituted that court, perhaps we ſhould have drawn a different concluſion from the facts there ſtated: but we are now concluded by that ſentence; and ſo it was holden in the late caſe of *Chriſtie* v. *Secretan.* Therefore, conformably to that caſe, and not contradicting that of *Saloucci* v. *Johnſon*, I think that the defendant is entitled to our judgment. With regard to the queſtion concerning the right of ſearching neutrals; before the late armed neutrality it was conſidered in this country, and ſo decided in many caſes, that *the right of ſearching neutrals was part of the law of nations;* and it was ſuppoſed to be founded on reaſon.—GROSE, J. This ſhip, though not in terms warranted to be neutral, was ſo warranted in effect; for ſhe was warranted Daniſh, for the purpoſe of having the advantages of neutrality. Then if warranted neutral, ſhe ſhould have ſo conducted herſelf as not to loſe its neutrality: but, on looking into the ſentence of the court of Admiralty, we find that the only ground of condemnation was her having done a certain act in direct violation and breach of her neutrality, and contrary to the law of nations and the faith of treaties. Then for the purpoſe of this inſurance the ſhip was not Daniſh, and conſequently the plaintiffs are not entitled to recover.—LAWRENCE, J. The plaintiff's argument, founded on the caſe of *Saloucci* v. *Johnſon*, proceeds on a ſuppoſition that a point was there decided that was not determined; it was not there decided that this Court can review a ſentence of the court of Admiralty adjudging that a ſhip has forfeited her neutrality, for there it was not adjudged by the court of Admiralty that the ſhip had forfeited her neutrality. But looking into the grounds of this ſentence, we cannot but ſee that the ſhip was condemned for having violated her neutrality, and acted contrary to the law of nations and the faith of treaties.—Poſtea to the defendant.

Return of Premium.

Simond *et al.* v. Boydel, Mic. Ter. 20 Geo. 3. B.R. 1 *Doug.* 268.

ON an inſurance on goods, to be ſhipped on board a certain ſhip, to return part of the premium, "*if ſails with convoy* "*and arrives*,"—the arrival of the ſhip is what is meant, and the full return is to be made on the whole ſum inſured, although there ſhould be an average loſs on the goods.—This action was brought againſt an under-writer, for a return of premium. The material part of the policy was in theſe words: "At and from "any port or ports in Grenada to London, on any ſhip or ſhips "that ſhall ſail on or between the firſt of May and the firſt "of Auguſt, 1778, at eighteen guineas *per cent.* to return 8l. "*per cent. if ſails* from any of the Weſt-India Iſlands *with* "*convoy for the voyage* (1), *and arrives.*" At the bottom there was a written declaration, that the policy was "on ſugars "(the muſcovado valued at 20l. *per* hogſhead), for account of "*L. Q.* being on the firſt ſugars which ſhall be ſhipped for "that account." The ſhip, the Hankey, ſailed, with convoy, within the time limited, having on board fifty-one hogſheads of muſcovado ſugar belonging to *L. Q.* She arrived ſafe in the Downs, where the convoy left her; convoy never coming farther, and indeed ſeldom beyond Portſmouth. After ſhe had parted with the convoy, ſhe ſtruck on a bank called the Pan Sand, at Margate, and eleven of the fifty-one caſks of ſugar were waſhed overboard, and the reſt damaged. The ſhip was afterwards got off the bank, and proceeding up the river, arrived ſafe in the port of London, and was reported at the cuſtom-houſe. The ſugars ſaved were taken out at Margate, and after undergoing a ſort of cure, by a perſon ſent from town for that purpoſe, they were carried to London in other veſſels; and the forty hogſheads being ſold, produced 340l. inſtead of 800l. which was their valuation in the policy. The defendant had paid into court the value of the ſugars loſt, and a return of 8l. *per cent.* on 340l. The plaintiffs inſiſted, that they were entitled to have eight *per cent.* alſo returned on the valued price of the eleven hogſheads of ſugar which were loſt, and on the difference between what the remaining forty hogſheads produced, and their valued price. On the trial of the cauſe, a verdict was found for the plaintiffs, to the amount of their demand. On a rule to ſhew cauſe, why there ſhould not be a new trial, the queſtion was, Whether the word "*arrives*" applied only to the arrival of the ſhip?—Lord MANSFIELD, The ancient form of a policy of inſurance, which is ſtill retained, is, in itſelf, very inaccurate, but length of time, and a variety of diſcuſſion and deciſions, have reduced it to a certainty. It is amazing, when

(1) *Supra, Lilly* v. *Ewer, H.* 19. *Geo.* 3. p. 448.

additional

additional clauſes are introduced, that the merchants do not take ſome advice in framing them, or beſtow more conſideration upon them themſelves. I do not recollect an addition made which has not created doubts on the conſtruction of it. Here a word or two more would have rendered the whole perfectly clear. However I have no doubt how we muſt conſtrue this policy. Dangers of the ſea are the ſame in time of peace and of war, but war introduces hazards of another ſort, depending on a variety of circumſtances; ſome known, others not, for which an additional premium muſt be paid. Thoſe hazards are diminiſhed by the protection of convoy, and if the inſured will warrant a departure with convoy, there is a diminution of the additional premium. If the inſured will not warrant a departure with convoy, he pays the full premium, and in that caſe the under-writer ſays, "If it turn out that the ſhip de- "parts with convoy, I will return part of the premium." But a ſhip may ſail with convoy and be ſeparated from it by a ſtorm, or other accident, in a day or two, and loſe its protection. On a warranty to ſail with convoy, *that* would (1) not be a breach of the condition; but, to guard againſt that riſk, the inſured adds, in policies of the preſent ſort, "the ſhip "muſt not only ſail with convoy, but ſhe muſt *arrive*, to en- "title you to the return." The words "*and arrives*" do not mean that the ſhip ſhall arrive in the company of the convoy, but only that ſhe herſelf ſhall arrive. If ſhe does, that ſhews either that ſhe had convoy the whole way or did not want it. But, in the ſtipulation for the return of premium, no regard is had by the parties to the condition of the goods on the arrival of the ſhip. The conſtruction contended for by the defendant, is adding a comment longer than the text. If it had been meant that no return ſhould be made unleſs *all* the goods arrived *ſafe*, they would have ſaid, "if the ſhip arrive *with all the* "*goods*," or "*ſafely with all the goods*." The total or partial loſs of the goods was the ſubject of the indemnity, and muſt be paid for by the under-writer. But, as to the return of the additional premium, whether the goods arrive ſafe or not, makes no part of the queſtion. The ſingle principle which muſt govern is, that in the events which have happened, the war-riſk has been rated too high.—WILLES, ASHHURST, and BULLER, *Juſtices*, of the ſame opinion.—Rule diſcharged.

The inſurer on freight agreed to return part of the premium "if the ſhip ſailed with convoy and *arrived;*" held that the aſſured were entitled to that return, the ſhip having ſailed with convoy and arrived, though ſhe had been captured and re-captured, and the aſſured had been obliged to pay for ſalvage.—This was an action of aſſumpſit brought to recover a return of premium on a policy of inſurance. The facts, which were

Aguilar *et al.* v. Rodgers, Mic. Ter. 37 Geo. 3. 7 *Ter. Rep.* 421.

(1) *Vide ſupra, Lilly* v. *Ewer*, p. 448.

all

all admitted, were ſhortly theſe. On the 20th of June, 1796, the defendant underwrote for 200l. a policy on the freight in the ſhip, called the *Jackſon, at and from Jamaica to London, warranted to ſail at or before the 26th of July*, 1796, *with convoy* for the voyage, at the rate of ten guineas *per cent.*, to return 2l. *per cent.* "*if ſhe failed on or before the 1ſt of July*, 1796, *and* "*arrived.*" Afterwards, by a memorandum indorſed on the policy, 15th of Auguſt, 1796, and ſigned by the defendant, it was agreed, in conſideration of ten guineas *per cent.* additional premium, that the warranty of ſailing with convoy ſhould be annulled, and the defendant undertook to return 10l. *per cent.* "*if the* "*ſhip ſailed with convoy and arrived.*" The ſhip ſailed from Jamaica on the 26th of July with convoy, but ſeparated in bad weather, and was captured on the 26th of October by a French ſhip, recaptured by a King's ſhip on the 5th of November, and carried into Cork, where ſhe was delivered up to the owners on paying 9l. 14s. 7d. *per cent.* for ſalvage; and afterwards ſhe arrived at the port of London with her cargo on board. The defendant paid into court 19l. 9s. 2d., the amount of the ſalvage on the 200l. A verdict being taken for the plaintiffs, it was moved to ſet it aſide, on the ground that the evident meaning of the parties, in making the memorandum, was, that the additional premium ſhould not be returned unleſs the ſhip *arrived free from loſs occaſioned by the enemy.*—PER CURIAM: It muſt be admitted that every arrival of the ſhip at her port of deſtination would not be an arrival within the fair conſtruction of this memorandum; ſuch, for inſtance, as an arrival in the poſſeſſion of an enemy at a neutral port, ſuppoſed by the defendant; or an arrival at her port in England as the property of other perſons after a capture. But in order to ſatisfy the meaning of the memorandum it ſhould be an "arrival at the de-"ſtined port *in the courſe of her voyage;*" and in this caſe the ſhip did arrive at the port of London in the courſe of her voyage. It is now too late to controvert the authority of *Hamilton* v. *Mendez*, even if we were diſpoſed ſo to do, where it was holden that though the aſſured may abandon on hearing of a capture, yet if they do not abandon, and the ſhip be afafterwards recaptured, it muſt be conſidered as if ſhe had never been out of the poſſeſſion of the owners. It is eighteen years ſince the caſe of *Simond* v. *Boydell* was decided: that caſe muſt be well known in the commercial world; and if the parties in this caſe had intended to make an agreement different from that which the words uſed in this memorandum import, they would have added after *arrived* "ſafely from the enemy," or ſome words to that effect. But the words here uſed are not equivocal; and we ought not to depart from them; it would be attended with great miſchief and inconvenience if in conſtruing contracts of this kind we were not to decide according the words uſed by the contracting parties. Suppoſe this queſtion had ariſen on a contract under ſeal, and an action of

covenant

covenant had been brought, aſſigning as a breach the non-arrival of the ſhip at the port of London, the anſwer that in fact the ſhip did arrive there in the courſe of her voyage would have been deciſive. And if ſo, this memorandum muſt receive the ſame conſtruction in this action. On the grammatical conſtruction of the words, which is the ſafeſt rule to go by, the verdict ought to be ſet aſide.—Rule diſcharged.

If a riſque is not run, the inſurer ſhall retain only a proportionable part of the premium.—This was an inſurance upon a ſhip, at five guineas *per cent.* loſt or not loſt, at and from London to Halifax in Nova Scotia, warranted to depart with convoy from Portſmouth for the voyage, that is to ſay, the Halifax or Louiſbourgh convoy. Before the ſhip arrived at Portſmouth, the *convoy was* GONE. Notice of this was immediately given by the inſured to the under-writer: and at the ſame time, he was alſo deſired either to make the long inſurance, or to return part of the premium. The jury find that the uſual ſettled premium from London to Portſmouth is one and one-half *per cent.* They find alſo that it is *uſual* for the under-writer, in ſuch-like caſes, to return *part* of the premium; but the *quantum* is uncertain: (and the quantum muſt in its nature be uncertain; becauſe it depends upon uncertain circumſtances). It is ſtated that the plaintiff made to the defendant an offer of allowing him to retain one and one-half *per cent.* for the riſque he had run on ſuch part of the voyage as was performed under the policy, viz. from London to Portſmouth. THE QUESTION (on a ſpecial caſe reſerved at *niſi prius* on the trial of an action for money had and received, brought to recover back part of the premium) was, Whether the defendant was entitled to keep the whole premium?—PER CURIAM: Theſe contracts are to be taken with great latitude; the ſtrict letter of the contract is not to be ſo much regarded, as the object and intention of it. Equity *implies* a condition "That "the inſurer ſhall not receive the price of running a riſque, if "he runs none." This is a contract WITHOUT *any conſideration*, as to the voyage from Portſmouth to Halifax; for he *intended* to inſure *that* part of the voyage as well as the former part of it; and HAS NOT. Conſequently, the inſured received no conſideration for this proportion of his premium. And then this caſe is within the general principle of actions for monies had and received to the plaintiff's uſe. We do not go upon the *uſage:* for the uſage found is only "That in like "caſes, it is *uſual* to return *a part* of the premium; without "aſcertaining *what* part." *If the riſque* IS NOT RUN, though it is by the *neglect* or even the *fault* of the party inſuring, yet the inſurer ſhall *not retain* the premium. It has been objected, "That the voyage being *begun*, and *part of the riſque* being "already run, the premium cannot be apportioned." But there is no force in this objection, this is *not* a contract ſo entire

Stevenſon v. Snow, Mic. Ter. 2 Geo. 3. B.R. 3 *Burr.* 1237. 1 *Black. Rep.* 315, 318.

entire that there can be no apportionment. For there are two parts in this contract; and the *premium* may be *divided* into two diſtinct parts, relative, as it were, to two voyages. The practice ſhews, "That it has been *uſual*, in ſuch-like "caſes, to return a part of the premium;" though the *quantum* be not aſcertained. And indeed the *quantum* muſt vary, as circumſtances vary: ſo that it never can have been fixed with any preciſe exactneſs. But though the *quantum* has not been aſcertained, yet the *principle* is agreeable to the general ſenſe of mankind. Theſe kinds of contracts are by the writers on this head called *contractus innominati:* and the rule which they lay down concerning them is, "That they "are to be determined *ſecundum bonum et æquum.*"—*Poſtea* to the plaintiff.

Tyrie *v.* Fletcher, Mic. Ter. 18 Geo. 3. B.R. *Cowp.* 666.

Upon a policy "at and from ſuch a port to any other "port or place whatſoever for 12 months, at 9 *per cent.* war-"ranted free from capture," the riſk is *entire*; and therefore if *once* begun, there ſhall be no return of premium.—It was an action, in the uſual form, for money had and received to the plaintiff's uſe, for a return of part of the premium. And on the trial a verdict was found for the plaintiff, ſubject to the opinion of the Court upon the queſtion, WHETHER, under the circumſtances of the caſe, a proportionable part of the premium ought to be returned or not? If the Court ſhould be of opinion that a proportionable part of the premium ought not to be returned, then a nonſuit was to be entered. It now came before the Court upon a rule to ſhew cauſe, why a nonſuit ſhould not be entered; and the caſe, as it appeared from the report, was ſhortly this. The policy was on the ſhip Iſabella, at and from London, to any port or place, where or whatſoever, *for twelve months*, from the 19th of Auguſt, 1776, to the 19th of Auguſt, 1777, both days inclusive, at 9l. *per cent.* warranted free from captures and ſeizures by the Americans, and the conſequences thereof. In all other reſpects it was in the common form, againſt all perils of the ſea, &c. The ſhip ſailed from the port of London, and was taken by an American privateer about two months afterwards.—Lord *Mansfield:* It was very proper to ſave this caſe for the opinion of the Court, becauſe in all mercantile tranſactions, certainty is of much more conſequence, than which way the point is decided; and more eſpecially ſo in the caſe of policies of inſurance: becauſe, if the parties do not chooſe to contract according to the eſtabliſhed rule, they are at liberty as between themſelves to vary it. This caſe is ſtript of every authority. There is no caſe or practice in point; and, therefore, we muſt argue from the general principles applicable to all policies of inſurance. And I take it, there are two general rules eſtabliſhed applicable to this queſtion: the firſt is, that *where the riſk has not been run, whether*

whether its not having been run was owing to the fault, pleaſure, or will, of the inſured, or to any other cauſe, the premium ſhall be returned; becauſe a policy of inſurance is a contract of indemnity. The under-writer receives a premium for running the riſk of indemnifying the inſured, and to whatever cauſe it be owing, if he do not run the riſk, the conſideration for which the premium or money was put into his hands fails, and therefore he ought to return it. Another rule is, that *if the riſk has once commenced, there ſhall be no apportionment or return of premium afterwards. For though the premium is eſtimated, and the riſk depends upon the nature and length of the voyage; yet, if it has commenced, though it be only for 24 hours or leſs, the riſk is run; the contract is for the whole entire riſk, and no part of the conſideration ſhall be returned:* and yet it is as eaſy to apportion for the length of the voyage, as it is for the time. If a ſhip had been inſured to the Eaſt Indies agreeably to the terms of the policy in this caſe, and had been taken 24 hours after the riſk was begun by an American captor, there is not a colour to ſay, that there ſhould have been a return of premium. So much then is clear; and, indeed, perfectly agreeable to the ground of determination in the caſe of *Stevenſon* v. *Snow*. For in that caſe the intention of the parties, the nature of the contract, and the conſequences of it, *ſpoke* manifeſtly *two* inſurances, and a *diviſion* between them. The firſt object of the inſurance was from London to Halifax: but if the ſhip did not depart from Portſmouth with convoy (particularly naming the ſhip appointed to be convoy), then there was to be no contract from Portſmouth to Halifax: why, then, the parties have ſaid, "we make a contract from London to Halifax, "but on a certain contingency it ſhall only be a contract "from London to Portſmouth." That contingency not happening, reduced it in fact to a contract from London to Portſmouth only. The whole argument turned upon that diſtinction. Mr. *Yates*, who was counſel for the plaintiff, put it ſtrongly upon that head; and all the judges, in delivering their opinions, lay the ſtreſs upon the contract compriſing two diſtinct conditions, and conſidering the voyage as being in fact two voyages: and it was the equitable way of conſidering it; for, though it was at firſt conſolidated by the parties, there was a defeazance afterwards, though not in words. I think Mr. Juſtice *Wilmot* put it particularly upon that ground; but it was the opinion of the whole Court. There was an uſage alſo found by the jury in that caſe, that it was cuſtomary to return a proportionable part of the premium in ſuch-like caſes, but they could not ſay *what* part. The Court rejected this as an uſage for *uncertainty*; but they argue from it, that there being ſuch a cuſtom, plainly ſhewed the general ſenſe of merchants as to the propriety of returning a part

a part of the premium in ſuch caſes; and there can be no doubt of the reaſonableneſs of the thing. There has been an inſtance put of a policy where the meaſure is by time, which ſeems to me to be very ſtrong and appoſite to the preſent caſe; and that is, an inſurance upon a man's life for twelve months. There can be no doubt but the riſk there is conſtituted by the meaſure of time, and depends entirely upon it; for the under-writer would demand double the premium for *two* years, that he would take to inſure the ſame life for *one* year only: in ſuch policies there is a general exception againſt ſuicide. If the perſon puts an end to his own life the next day, or a month after, or at any other period within the twelve months, there never was an idea in any man's breaſt, that part of the premium ſhould be returned. A caſe of general practice was put by Mr. *Dunning*, where the words of the policy are, "At and from, provided the ſhip ſhall ſail on or before the 1ſt of Auguſt:" and Mr. *Wallace* conſiders in that caſe, that the whole policy would depend upon the ſhip ſailing before the ſtated day. I do not think ſo. On the contrary, I think, with Mr. *Dunning*, that cannot be. A loſs in port *before* the day appointed for the ſhip's departure, can never be coupled with a contingency after the day: but if a queſtion were to ariſe about it, as at preſent adviſed, I ſhould incline to be of opinion, that it would fall within the reaſoning of the determination of *Stevenſon* v. *Snow*: and that there were two parts or contracts of inſurance with diſtinct conditions. The firſt is, I inſure the ſhip in port, provided ſhe is loſt in port before the 1ſt of Auguſt: and 2dly, if ſhe be not loſt in port, I inſure her then during her voyage, from the 1ſt of Auguſt till ſhe reaches the port ſpecified in the policy. The loſt in port muſt happen before the riſk upon the voyage could commence; and, *vice verſâ*, the riſk in port muſt ceaſe the moment the riſk upon the voyage began. Let us ſee then what the agreement of the parties is in the preſent caſe. They might have inſured from two months to two months, or in any leſs or greater proportion, if they had thought proper ſo to do; but the fact is, that they have made *no diviſion of time at all*, but the contract entered into is one entire contract from the 19th of Auguſt, 1776, to the 19th of Auguſt, 1777, which is the ſame as if it had been expreſsly ſaid by the inſured, "If you the under-writer will inſure me "for twelve months, I will give you an *entire* ſum, but I "will not have any apportionment." The ſhip ſails, and the under-writer runs the riſk for *two* months. No part of the premium then ſhall be returned. I cannot ſay, if there had been a recapture before the expiration of the twelve months, that the policy would not have revived.—Mr. Juſtice *Aſton*: This caſe depends upon the words of the policy; and I am of opinion, it is one entire contract at a certain groſs ſum of 9l.

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per cent. for a certain period of time, *viz.* twelve months; and that no diviſion is to be implied. The determination in *Stevenſon* v. *Snow* went expreſsly upon this conſideration, that there were *two diſtinct voyages*, and no conſideration received by the inſured for the premium upon the ſecond voyage; and there certainly was not, for there never was any point of time when any riſk was run from Portſmouth. In *Bond* v. *Nutt* the loſſes inſured againſt were diſtinct, and unconnected with each other. 1ſt. A loſs of the ſhip in port, if any ſhould happen there. 2dly, A loſs in the paſſage home, provided ſhe ſailed on a certain day. The riſk in ſome policies may be diſtinct and diviſible in its nature. In the caſe of an inſurance on a life the ſum is entire, and time is entire for the whole year. So in this caſe I think the contract is one entire contract; and therefore that there ought to be no return of premium.—Mr. Juſtice *Wilſes* and Mr. Juſtice *Aſhhurſt* were of the ſame opinion.—*Per Curiam:* Let a nonſuit be entered.

So, where the ſhip was inſured for 12 months at the rate of ſo much per month, though the riſk ceaſed at the end of two. It was held that there ſhould be no apportionment, or return of premium. It was an action tried before Lord *Loughborough* at the aſſizes for the county of Northumberland, in which the plaintiff declared: That the defendant, in conſideration that the plaintiff, at his requeſt, had under-written ſeveral policies of inſurance as to certain ſums of money therein ſubſcribed againſt his name, on the ſhips, merchandizes, and other things, therein reſpectively ſpecified, without receiving the full premiums therein mentioned, undertook and promiſed to pay the plaintiff ſo much money as the premiums therein mentioned to be paid to him amounted to, with an averment that they amounted to 40l. There was another count for 40l. for money had and received by the defendant to the plaintiff's uſe. The defendant pleaded *non aſſumpſit* as to all except the ſum of 3l. upon which plea iſſue was joined; and as to the 3l. he pleaded a tender, and paid that ſum into Court. Upon the plea of tender, iſſue was alſo joined. The jury found a verdict for the defendant upon the tender, and for the plaintiff upon the other iſſue, for the ſum of 15l. ſubject to the opinion of the Court, whether he was entitled to recover that ſum of 15l. or the ſum of 3l. only, upon a caſe which ſtated, in effect, as follows: The plaintiff had under-written 200l. on a policy effected at Newcaſtle (which was ſet forth *verbatim* in the caſe), whereby the ſhip the Chollerford was inſured againſt capture by the enemy for *twelve months*, in the coaſting trade between Leith and the Iſle of Wight; beginning the 13th of March, 1799, and ending the 13th of the ſame month, 1780. In the body of the policy it was ſtated, "That the aſſurers confeſſed themſelves paid the conſidera-

Loraine v. Thomlinſon, Hil. Ter. 2 Geo. 3. B.R. 2 *Doug.* 584.

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" tion due unto them by the aſſured, *at and after the rate of* " 15*s. per cent per month.*" At the bottom, oppoſite to the plaintiff's ſubſcription, was written, "premium received 16th of " March, 1779;" and on the back was indorſed, " Newcaſtle, " the 15th of March, 1779. Mr. *John Gaul Tomlinſon*, on his " ſhip the Chollerford, himſelf maſter, *for twelve months*, in " the coaſting trade, at and between Leith and the Iſle of " Wight, beginning the 13th of March, 1779, and ending the " 12th of March, 1780. Enemy only. *At* 15*s. per cent per* " *month*, 18*l.*" The premium was not paid, though expreſſed in the policy to have been paid, it being the uſage in Newcaſtle not to pay the premium at the time of making the inſurance; but at various times after the policies are effected, and ſometimes not till twelve months after. The ſhip was loſt in a ſtorm, within the firſt two of the twelve months for which the inſurance was made, and the defendant tendered to the plaintiff 3l. as the premium for two months. The caſe then ſtated contradictory evidence given by witneſſes on both ſides, as to what had been done at Newcaſtle in ſimilar caſes; the Court of B.R. was afterwards of opinion, that it ought not to have been received. After the counſel for the defendant had been heard, the plaintiff's counſel was prevented by the Court from proceeding.—Lord *Mansfield:* This is a mere queſtion of conſtruction, on the face of the inſtrument, and therefore parol evidence ſhould not have been admitted to explain it. It is an inſurance for twelve months, for one groſs ſum of 18l. They have calculated this ſum to be at the rate of 15s. per month. But what was to be paid down? Not 15s. for the firſt month, and ſo from month to month; but 18l. at once. Two caſes have been mentioned. *Stevenſon* v. *Snow* was decided on the ground of there *being two voyages*. *Tyrie* v. *Fletcher* is directly in point againſt the defendant. There are two principles in theſe caſes: 1ſt. If the riſk has never begun, the whole premium is to be returned, becauſe there was no conſideration. 2d. When the riſk has begun, there ſhall never be a return, although the ſhip ſhould be taken in 24 hours.—*Aſhhurſt*, J. The 15s. per month is only a mode of computing the groſs ſum.—*Willes*, J. and *Buller*, J. concurred—*Poſtea delivered to the plaintiff.*

Kermon *v.* Woodbridge, Tr. Ter. 21 Geo. 3. B.R. 2 *Doug.* 782.

So, if there is an inſurance on a ſhip and goods, " at and " from A. to B. during her ſtay and trade there, at and from " thence to her port or ports of diſcharge in C., and at and " from thence back to A;" it is an entire contract; and if a loſs happen at any time after the commencement of the riſk, there ſhall be no apportionment or return of the premium.—A rule had been obtained to ſhew cauſe why there ſhould not be a new trial in a caſe which had come on before Lord *Mansfield* at Guildhall, where the jury found a verdict for the defendant. The caſe was this: It was an action on a policy

policy of insurance on the French ship Le Pactole, and her cargo, and the voyage was described in the policy in the following words: "At and from *Honfleur to the coast of An-* "*gola, during her stay and trade there, at and from thence to* "*her port or ports of discharge in St. Domingo, and at and* "*from St. Domingo back to Honfleur.*" The clause respecting the premium was as follows: "Slaves valued at 800 "*livres Tournois* per head; the ship at 1450l. sterling; other "goods, &c. as interest may appear; *at a premium of* 11 *per* "*cent.*" The ship sailed to Angola, and from thence, after staying some time there, to the West-Indies. On her way to Angola she put in at Cayenne, on the coast of America, and from Cayenne went to Martinico, confessedly out of the way to St. Domingo. In this cause the first question was a question of fact, whether the course taken was a deviation, or not, from the voyage insured. And after all the evidence had been heard the jury thought it was, and accordingly found a verdict for the defendant. Upon their declaring this opinion the counsel for the plaintiff insisted, that as there was a count in the declaration for money had and received, the voyage insured ought to be considered as composed of three distinct parts or voyages; namely, from Honfleur to Angola; 2dly, from Angola to St. Domingo; and 3dly, from St. Domingo to Honfleur; and, that as the voyage from St. Domingo to Honfleur had never commenced, the premium ought to be apportioned, and a return made of that part which was paid to insure the risk from St. Domingo to Honfleur.—LORD MANSFIELD took the opinion of the jury upon that point also; and they were clear there ought to be no return. Next day, however, his lordship said, he had turned that question in his mind, and that he entertained some doubts upon it, and as it was a question of law, desired Mr. *Lee* to move for a new trial on that ground. It was, however, afterwards moved on both grounds; namely, on the question of fact, whether the deviation was wilful; and 2dly, On the question of law, whether, supposing it wilful, there ought to be a return of premium. These questions were fully discussed, AND THE COURT also took time to consider: after which the Lord Chief justice delivered the unanimous opinion of the whole Court.—Lord *Mansfield*, after stating, that upon the question of fact they were perfectly satisfied with the verdict of the jury, proceeded thus: If, however, the plaintiff should succeed on the second point, the determination would virtually allow him a new trial on the whole of the cause, because no special case was reserved. But, on the fullest consideration, and after looking into all the cases (though my opinion has fluctuated), we are now all clearly of opinion, that there ought not to be any return. The question depends upon this: Whether the policy contains one entire risk on one voyage,

or whether it is to be ſplit into ſix different riſks? for, by ſplitting the words, and taking "at" and "from" ſeparately, it will make ſix, viz. 1ſt. *At Honfleur*; 2d, *From Honfleur to Angola*; 3d, *At Angola*, &c. The principles are clear. Where the riſk has never begun there muſt be a return of premium; and if the voyages, in this caſe, are diſtinct, the riſk from St. Domingo to Honfleur never began. On the other hand, if the riſk has once begun, you cannot ſever it, and apportion the premium. In an inſurance upon a life, with the common exceptions of ſuicide, and the hands of juſtice, if the party commit ſuicide, or is executed in twenty-four hours, there ſhall be no return. The caſe is the ſame if a voyage inſured is once begun. Is this one entire riſk? The inſured and inſurers conſider the premium as an entire ſum for the whole, without diviſion: it is eſtimated on the whole at 11l. *per cent.* And, which is extremely material, there is no where any contingency, at any period, out or home, mentioned in the policy, which happening, or not happening, is to put an end to the inſurance. The argument muſt be, that if the ſhip had been taken between Honfleur and Angola, there muſt have been a return. By an implied warranty every ſhip muſt be ſea-worthy when ſhe firſt ſails on the voyage inſured, but ſhe need not continue ſo throughout the voyage; ſo that, if this is one entire voyage, if the ſhip was ſea-worthy when ſhe left Honfleur, the underwriters would have been liable, though ſhe had not been ſo at Angola, &c; but according to the conſtruction contended for on behalf of the plaintiff, ſhe muſt have been ſea-worthy, not only at her departure from Honfleur, but alſo when ſhe ſailed from Angola, and when ſhe ſailed from St. Domingo. The caſes of *Stevenſon* v. *Snow* and *Bond* v. *Nutt*, were quite different from this. They depended upon this, that there was a contingency ſpecified in the policy, upon the not happening of which the inſurance would ceaſe. In *Stevenſon* v. *Snow* it depended on the contingency of the ſhip ſailing with convoy from Portſmouth, whether there ſhould be an inſurance from that place. This neceſſarily divided the riſk, and made two voyages. In *Bond* v. *Nutt* it was held, that there were two riſks, upon the ſame principle. "*At Jamaica*" was one; the other, viz. the riſk "*from Jamaica*," depended on the contingency of the ſhip having ſailed *on or before the firſt of Auguſt: that* was a condition precedent to the inſurance on the voyage from Jamaica to London. The two caſes of *Tyrie* v. *Fletcher*, and *Loraine* v. *Tomlinſon*, are very ſtrong, for if you could apportion the *premium* in any caſe, it would be in inſurances on time. Therefore, on very full conſideration, we think this one entire riſk; one voyage; and that there can be no return of *premium*.—Rule diſcharged.

Pleadings.]

Sarah Nicholson v. Sep. Croft, Tr. Ter. 1 Geo. 3. B. R. 2 *Burr.* 1188.

Pleadings.] In this case the question (upon the master's report) was, "Whether there were, or were not, *more counts* "inserted in the declaration than were necessary?" It was a *declaration upon a policy of insurance*, consisting of *seven* counts; 1st. For a *total* loss; 2dly, For an average loss: the three first counts were on a policy *subscribed by the defendant himself*; and the 4th, 5th, and 6th, exactly the same, with *this difference only*, that these three last alleged the policy to have been *subscribed* by one *Silva*, *the defendant's then agent*, *factor*, *or servant*.—PER CURIAM: On a declaration for a *total* loss, you may *recover an average loss*: yet *the plaintiff is not tied down* to declare *only* for a total loss; but is at liberty to declare *both* ways. And the latter method is often of service to a defendant, by pointing out the particular average that the plaintiff goes for. BUT it is unnecessary to declare double with respect to the signing of the policy; that is to say, once, as upon a policy signed by the defendant himself, and again as upon a policy signed by his agent for him. One alone of these two methods of declaring is sufficient: and the better way is to declare according to the truth; that is, upon a policy signed by *Silva* as agent for the defendant, duly authorised by him in that behalf.—PER CUR. Let the three first counts be struck out.

Marriage.

Hervey v. Hervey, at the Delegates, Hil. Ter. 13 Geo. 3. 2 *Black. Rep.* 877.

ON a suit for jactitation, evidence was given of a strong acknowledgment, and *an open avowal of a marriage* for eighteen years to plaintiff, but there was *no actual proof* of the marriage, which was previous to the statute 25 *Geo.* 2. BUT THE CHANCELLOR OF LONDON, Dr. *Bettesworth*, notwithstanding this evidence, thought himself bound, by the rules of the ecclesiastical law, to pronounce against the marriage: *The canons, he said, not allowing a marriage to be proved* inter vivos *by mere circumstantial evidence.* On appeal to the dean of the arches, Dr. *Hay*, he affirmed the sentence, declaring also his persuasion, from the evidence, that the parties never were married. But on appeal to the delegates, their lordships were of opinion, that this was not to be considered merely as circumstantial evidence of the marriage, but that it was (in all its branches) the most solemn and deliberate acknowledgment and avowal, on his part, of the truth of the marriage that could be devised: and that he should not now be admitted (especially on such light and flimsy evidence) to controvert or impeach it. And, therefore, they *unanimously* pronounced for establishing the marriage, and reversed the

two former ſentences, with coſts. A petition was afterwards preferred to the King for a commiſſion of review; which, after many days' hearing before the lord chancellor, to whom it was referred, was rejected.

Haydon *et al.* Executors of Haynes, *v.* Wilſhere, Tr. Ter. 29 Geo 3. B R. 3 *Ter. Rep.* 372.

A bond given by a father on the marriage of his daughter, to pay to the huſband a ſum of money within a limited time after the obligor's death, *if any of the iſſue of the marriage ſhould be living at that time*, extends to *the leaving of grandchildren*, there being children of the marriage who all died before the obligor.—The bond given by the defendant, and his late father deceaſed, to the teſtator, was (after reciting a marriage ſettlement in 1752, on an intended marriage between the teſtator and the defendant's ſiſter, on which the defendant's father was to advance to the teſtator 500l. for the then marriage portion of his daughter, and to ſecure the further ſum of 500l. to the teſtator within twelve months after his own death "in caſe his daughter, or any *iſſue* of her body "begotten by the teſtator, ſhould happen to ſurvive him," with intereſt in the mean time after the rate of 3l. 10s. *per cent.*), that the defendant's father ſhould yearly, during the joint lives of himſelf and any of the *iſſue* of the body of his daughter, begotten by the teſtator, pay to the teſtator, his executors, &c. 17l. 10s. as the intereſt of the 500l.; and alſo that the heirs, executors, &c. of the defendant's father ſhould within twelve months next after his deceaſe (*any of the iſſue of the body of his daughter, begotten by the teſtator, being living at the time of his deceaſe*) pay to the teſtator, his executors, &c. the ſum of 500l. In the lifetime of the defendant's father, in September, 1777, *W. Haynes, one of the two ſons of the body of the defendant's ſiſter, begotten by the teſtator*, intermarried with *E. Hudſon*, and during the lifetime of the defendant's father, in November, 1780, had iſſue of his body on the body of *Elizabeth* his wife, begotten one ſon, *J. W. Haynes*; and afterwards, and during the life of the defendant's father, in June, 1782, had other iſſue of his body on the body of *Elizabeth* his wife begotten another ſon, *G. Haynes*; which two ſons were both living at the time of the death of the defendant's father, and were ſtill living. It was objected, that in this particular caſe the words iſſue of "her body begotten by "the huſband," neceſſarily confine it to their children. And the caſes of *Alexander* v. *Alexander*, 2 *Vez.* 640, and *Adams* v. *Adams*, *Cowp.* 651, were cited; in which it was held that a power to appoint to *children*, in a marriage ſettlement, does not extend to *grandchildren*. Sed Per Cur. The caſes cited of *Alexander* v. *Alexander* and *Adams* v. *Adams* are very different from the preſent. For in thoſe, prior to the marriages, the parties ſtipulated for a certain proviſion for the children of the intended marriage; but, as the law does not allow of limitations to perſons beyond the next generations, thoſe limitations

limitations muſt of neceſſity be confined to the children of the marriage. But this is a contract of a very different nature: a proviſion was to be made by the father of the intended wife (his daughter), and he engaged to pay the intereſt of a certain ſum to the intended huſband during his life, and to pay a further ſum to the huſband, or his executors, &c. in caſe the daughter, or any of her iſſue, ſhould be living at the time of his death. This ſum is not ſtipulated to be paid to the immediate progeny of the marriage, the children, but it is to be paid to the father or his executors, in caſe any of the iſſue be living. Then the queſtion is, Whether there is any iſſue of this marriage? the word "iſſue" is *genus generaliſſimum*; and under the ſtatute *de donis* it takes in the moſt remote degrees. Then it was ſaid, that in caſe of perſonal property, "iſſue" is to be taken in its more ordinary acceptation, and to be confined to "children" only: but a variety of caſes might be put to ſhew that it extends to the moſt remote iſſue, even in the caſe of perſonality. There are many caſes where an intereſt is held too remote, becauſe it is to depend on an *indefinite failure of iſſue*; there the limitation is void, becauſe it includes all ſucceeding generations.—Judgment for the plaintiff.

A note, given fraudulently, to carry on a marriage treaty, ſhall be good againſt the maker, though given without any conſideration.—*Joſeph Monteſiori*, a Jew, being engaged in a marriage treaty; his brother *Moſes*, to aſſiſt him in his deſigns, and repreſent him as a man of fortune, gave him a note for a large ſum of money, as the balance of accounts between him and his brother *Joſeph*; which balance he (*Moſes*) acknowledged to have in his hands; though, in truth, no ſuch balance, or any thing like it, exiſted. After the marriage had, *Moſes* reclaimed this note, as being given on no conſideration; and the matter was referred to arbitration. The arbibrators awarded the note to be delivered up, which *Joſeph* refuſed to do; upon which, the court was moved for an attachment againſt him, for non-performance of this award; and on his part a croſs-motion was made, to ſet aſide this award; on a ſuggeſtion, that the arbitrators were miſtaken in point of law.—PER CURIAM. The law is, that where, upon propoſals of marriage, third perſons repreſent any thing material, in a light different from the truth, even though it be by colluſion with the huſband, they ſhall be bound to make good the thing, in the manner in which they repreſented it. It *ſhall be*, as repreſented to be. And the huſband alone is entitled to relief, as well as when the fortune, &c. ſo miſrepreſented has been ſpecifically ſettled on the wife: for no man ſhall ſet up his own iniquity as a defence, any more than as a cauſe of action. The arbitrators, therefore, being clearly miſtaken in point of law, the award muſt be ſet aſide.

Montefiori *v.* Montefiori, Ea Ter 2 Geo. 3. B R. 1 *Black* 363.

The King *v.* the Inhabitants of Northfield
Ea. Ter. 21 Geo. 3. B.R.
2 *Doug.* 658.
Cald. 115.

A marriage is void and no ſettlement is gained by it, if celebrated in a chapel erected ſince 26 Geo. 2. although marriages may have been *de facto* frequently celebrated there.—The two orders for the removal of a pauper, being removed by *certiorari* into this court, the only queſtion appeared to be, whether a marriage, upon the facts ſtated relative to the chapel wherein it was ſolemnized, was void, by the proviſions of the ſtatute of 26 *Geo.* 2. c. 33. The pauper intermarried with one *Joſeph Jones*, at Buerlyhill chapel, in the pariſh of Kingſwinford, in the county of Stafford, *which was erected in the year* 1765, and then duly conſecrated, and in which divine ſervice had been publicly and regularly celebrated ever ſince; *and wherein banns of marriage had been often publiſhed, and marriages celebrated previous to the marriage in queſtion.* The ſaid chapel was a new one, erected ſince the marriage act, and not erected on the foundation of one that was ancient; and no act of parliament was obtained for erecting the ſaid chapel, or for celebrating marriages there. —It is enacted, by § 1. 26 *Geo.* 2. c. 33. that, from and after the 25th of March, 1754, all banns of matrimony ſhall be publiſhed in the pariſh church, or in ſome public chapel, *in which public chapel banns of matrimony have been uſually publiſhed*, of or belonging to the pariſh or *chapelry* wherein the perſons to be married ſhall dwell; and, by § 8. that, if any perſon ſhall (from or after the date above mentioned) ſolemnize matrimony in any other place than a church, or public chapel where banns have been uſually publiſhed, unleſs by ſpecial licence, &c. every perſon knowingly and wilfully ſo offending, ſhall be deemed guilty of felony, &c. and all marriages ſolemnized (from and after, &c.) in any other place than a church, or public chapel (unleſs by ſpecial licence, &c.), *ſhall be null and void to all intents and purpoſes whatſoever.*—Lord MANSFIELD:—For a long time, I was much averſe to a determination of this point, in ſuch a queſtion, and between ſuch parties; but, upon more conſideration, I think we ought now to decide it. If there has been an abuſe, we ought to ſtop it as early as poſſible. A delay might lead to a ſuppoſition that we doubt, where in truth we do not; and any ſubſequent inconvenience, in conſequence of our ſuppoſed doubt, would be chargeable upon us. I remember, when I was attorney-general, I was obliged to proſecute the miniſter of the Savoy, who inſiſted on the right of marrying without licence, and taking advantage of a diſpute then ſubſiſting between the crown and the duchy of Lancaſter, ſheltered himſelf ſometimes under the one, and ſometimes under the other. He had married many couples in a year, and many children had been born under thoſe marriages. But it was neceſſary to ſtop the abuſe, even after it had gone ſo far; and he was convicted. Time, or the interpoſition of the legiſlature, may

cure

cure the marriages which have been already solemnized in this chapel (1). The act clearly meant chapels existing at the time. It says, church or chapel belonging to the parish or chapelry where the parties reside. There is no chapelry here.

That a marriage in a foreign country must be governed by the law of that country where the marriage was had, is in general true: but the marriages in Scotland, of persons going from hence for that purpose, may come under a very different consideration, according to the opinion of *Ruberas*, page 33, and other writers. No such case has yet been litigated in England, except one of a marriage at Ostend; which came before Lord *Hardwicke*; who ordered it to be tried in the Ecclesiastical Court: but the young man came of age, and the parties were married over again; and so the matter was never brought to a trial.——*Per Lord Mansfield.* Robinson *v.* Bland, Mic. Ter. 1 Geo. 3. B.R. 2 *Burr.* 1079. 1 *Black.* 259.

Militia.

THE 26 *Geo.* 3. c. 107. for raising men for the militia, enacts, that such men shall be chosen by ballot; with a proviso, s. 24. "That if any person, so chosen by ballot, shall produce for a substitute a man of the same county or riding, "or of some adjoining county or riding, able and fit for service, *who shall have not more than one child born in wedlock*, "*and who shall be approved of by the said deputy lieutenants*, "*&c.* such substitute, *so produced and approved*, shall be inrolled." Then the 33 *Geo.* 3. after directing how the families of militia-men, chosen by lot, shall be maintained, enacts, (s. 3.) "That if the family of any substitute, hired "man, or volunteer, serving in the militia when in actual "service, &c. shall become chargeable to the parish wherein "such family shall dwell, and such substitute shall not serve "for the same parish, it shall be lawful for the justice of the "peace, who shall make any order for the relief of such "family, at the same time to direct the overseers of the "parish, for which such substitute shall serve, to reimburse "the money so paid to the overseer or overseers, who shall "have advanced the same, in pursuance of the order before The King *v.* Willis, Hil. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 179.

(1) As soon as the determination of the Court, in this case, was known, Lord *Beauchamp* introduced a bill into parliament, which passed into a law, for making all marriages, which *had been* celebrated in any parish church or public chapel, erected since 26 *Geo.* 2. c. 33. and consecrated, valid in law; and to exempt the clergymen who had celebrated such marriages, from the penalties of that statute. *Vide* 21 *Geo.* 3. c. 53.

" mentioned, if ſuch pariſh ſhall be ſituated within the ſame " county, &c." In this caſe, one *Spry*, of the pariſh of Barnſtable, who was drawn by ballot to ſerve in the militia, procured one *Eaſtman*, of Monkleigh pariſh, to ſerve for him as his ſubſtitute; when *Eaſtman* appeared before the deputy-lieutenants, in order to be approved, *he repreſented himſelf as a ſingle man*; but it turned out in the ſequel that he was married and had ſeveral children. *Eaſtman* being approved and ſworn in, went out into actual ſervice; certain expences were incurred in maintaining his family; and the queſtion was, Whether that burden ought to be borne by the pariſh of Monkleigh, that had nothing to do with the principal militia-man; or, by the pariſh of Barnſtaple, for which the ſubſtitute ſerved? And it was contended, that the family of the ſubſtitute, the relief of whom is directed to be reimburſed by the pariſh for which the ſubſtitute ſerves, muſt neceſſarily mean the family of ſuch a ſubſtitute as may be accepted and enrolled under the proviſions of the 26 *Geo.* 3. c. 107; but that by the 24th ſection of that act it is made an indiſpenſable qualification, in the nature of a condition precedent to the obtaining an order for the re-imburſement, that the perſon offered as a ſubſtitute ſhould not have more than one child at the time he was accepted and enrolled. PER CURIAM: The words of the firſt ſtatute, 26 *Geo.* 3. are merely directory. The deputy-lieutenants ought to make every enquiry before they approve of a ſubſtitute; if he have more than one child, he ought to be rejected: but if the deputy-lieutenants do take him, then he becomes a legal ſubſtitute; and the pariſh for which the principal ſerves, muſt bear the expences of maintaining the family of the ſubſtitute. As therefore this ſubſtitute was approved and ſworn in, and actually did ſerve in the militia, the whole of the acts of parliament attached on him in that ſituation; and conſequently, the pariſh of Barnſtable, for which the principal was drawn, are liable to reimburſe the other pariſh the expences of maintaining the family of the ſubſtitute: a contrary determination would not only be againſt the intention of the legiſlature, but productive of the moſt dangerous conſequences to the whole body of the militia(1).

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(1) In the caſe of the K. v. Sir *Willoughby Aſton* and *John Dod*, eſq. Eaſter. 1 *Geo.* 3. B.R. 2 *Burr.* 1149. THE COURT held, under the old militia acts, 33 *Geo.* 2. c. 22. & 31 *Geo.* 2. c. 26. (ſince repealed), that ſubſtitutes were to be conſidered as militia-men, within the meaning of thoſe ſtatutes; and that their families were entitled to the ſame parochial relief as the families of militia-men.

But

But an order for reimburſement, under the ſtat. 33 *Geo.* 3. c. 8. ſ. 3. made upon the pariſh for which a ſubſtitute in the militia ſerves, to indemnify the pariſh in which ſuch ſubſtitute's family ſhall have become chargeable, and been relieved under an order of maintenance, muſt be made by the ſame magiſtrate, and at the ſame time, as the firſt order of maintenance; and notice of ſuch order of reimburſement ought to be ſerved upon the pariſh to be affected by it, before they can be proceeded againſt criminally for diſobedience to it.—The caſe, returned to the *certiorari*, ſtated, that *T. Eckley*, a pariſhioner of Wickton, in the pariſh of Stoke-Prior, in the county of Hereford, on the 24th of Auguſt, 1792, was drawn by ballot to ſerve in the militia of the ſaid county, and ſerved in the ſame as a ballotted man till the 7th of February, 1793, when the regiment being then and ſtill continuing embodied and called out into actual ſervice, *Eckley* engaged one *E. Brown*, of Ledbury, to ſerve in the militia as a ſubſtitute for him, who was ſworn in on the ſame day, to ſerve as ſuch ſubſtitute at Hereford, before one deputy-lieutenant, who was alſo commanding-officer of the regiment at the time; but *Brown* was never approved by two deputy-lieutenants, nor enrolled by the ſubdiviſion clerk, or the clerk of the general meetings; nor was any certificate or notice of his having taken ſuch oath tranſmitted to either of the ſaid clerks. Immediately after *Brown* was ſo ſworn in, he joined the regiment, was entered upon the muſter-roll and was regularly muſtered and exerciſed, and continued ſerving in the ſaid regiment during the whole of *Eckley*'s time, which expired in Auguſt laſt, and is now ſerving in the ſaid regiment till the end of the war. *Eckley*, as ſoon as *Brown* had taken the ſaid oath before the ſaid deputy-lieutenant, received his diſcharge, and has from that time reſided in Stoke-Prior. On the 8th of February, 1793, the wife of *Brown* applied to the overſeers of Ledbury for relief of herſelf and child about three years old, and produced the certificate of the ſerjeant of the Hereford regiment that her huſband was then ſerving as the ſubſtitute for *Eckley*; upon which, the overſeers *took her before Mr.* Cocks, *a magiſtrate for the county of Hereford, who ordered the overſeers of Ledbury to pay to* Brown's *wife four ſhillings weekly, for the maintenance of herſelf and child* (1), BUT NO SUMMONS

The King *v.* the Inhabitants of Ledbury, Ea. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 558.

(1) The following was the form of the order:—

"County of Hereford.—To the overſeers of the poor of the pariſh of Ledbury, in the ſaid county.—Whereas complaint upon oath hath been made unto me, *Richard Cocks*, eſq. one of his majeſty's juſtices of the peace in and for the ſaid county, by *Mary Brown*, now dwelling in your ſaid pariſh, wife of *Richard Brown*, a private militiaman, ſerving in the Herefordſhire regiment of militia, as a ſubſtitute for *Thomas Eckley*,

SUMMONS WAS ISSUED BY THE MAGISTRATES TO THE OFFICERS OF STOKE-PRIOR, TO SHEW CAUSE WHY THE ORDER ON LEDBURY SHOULD NOT BE MADE, nor did the parish of Stoke-Prior receive any notice of the original order of relief till the first of June, 1797; when they were informed, that if they did not pay the said money, an order of reimbursement would be made. The parties met in consequence of that information; but nothing being settled then, the parish-officers of Ledbury, on the 27th of October, 1797, received a letter from the officers of Stoke-Prior, declining to pay the money, and giving notice of their intention to appeal against any order that might be made to enforce payment. In consequence of the beforementioned order, the overseers of Ledbury regularly paid to *Brown*'s wife the weekly sums ordered to be paid from the 8th of February, 1793, to the 27th of November, 1797, amounting to 26l. 6s. *On the 29th of November, 1797, the overseers of Ledbury applied to the Rev.* M. Bowles, *a magistrate, for an order on Stoke-Prior to reimburse the officers of Ledbury the said sum of* 26l. 6s. (BUT NO PREVIOUS SUMMONS APPEARED TO HAVE BEEN ISSUED TO THE OFFICERS OF STOKE-PRIOR TO SHEW CAUSE AGAINST THE SAID ORDER); *which said magistrate, after taking the affidavits of the officers as to the expenditure of the said sum of* 26l. 6s. *made an order on the 29th of November,* 1797(1), *to the overseers of Stoke-Prior, to reimburse the same to the overseers of Ledbury*, a copy of which order was served on *Henry Caswell*, one of the officers of Stoke-Prior, on the 30th of November, 1797, which he then refused to pay.—*In consequence of this refusal, he was summoned to appear before* M. Bowles *on the 5th of December last, to shew cause why*

Eckley, of the parish of Stoke-Prior, in the said county, which militia are now embodied and in actual service, and have been ordered to march; and that she, the said *Mary Brown*, is not able to support herself and child, namely, *Edward Brown*, aged about one month; I do, therefore, hereby require you, the said overseers, (&c.) to pay unto the said *Mary Brown* the sum of four shillings weekly, for the support of her and her said child, until you shall be otherwise ordered to forbear the said allowance; which said weekly sum is to be reimbursed to you by the said overseers of the poor of the parish of Stoke-Prior aforesaid, *who are hereby required to reimburse the same* accordingly;" dated the 10th of Feb. 1793: signed and sealed by *Richard Cocks*.

(1) The following was the form of the order, containing an account wherein the overseers of the parish of Stoke-Prior are made debtors to the overseers of Ledbury, in the sum of 26l. 6s. for various sums paid by the latter to the said *Mary Brown*, for herself and child, from the year 1793 to 1797; to which account, verified on oath before *M. Bowles*, a magistrate, is subjoined the following order of reimbursement:—"I allow and order the overseers of the poor of the parish of Stoke-Prior, to reimburse the said sum of 26l. 6s. to the overseers of the poor of the parish of Ledbury aforesaid;" dated the 29th of November, 1797, and signed *M. Bowles*.

Be

he ſhould not pay the penalty of 5*l. under the ſtatute* 34 *Geo.* 3. c. 47. ſ. 3. On the ſame day he perſonally appeared, in purſuance of ſuch ſummons, before *M. Bowles*; but ſhewing no ſufficient cauſe, *he was convicted in the ſum of* 5*l.* which ſaid ſum *Caſwell* paid to the overſeers of Ledbury on the 8th of December following; *but on the day after the conviction, being the* 6*th of December, he gave a written notice of appeal* to the next ſeſſions *againſt the order* ſo made by *M. Bowles* on the 29th of November, 1797, and alſo another notice of appeal *againſt the conviction* on the 29th of December, 1797. *This appeal was tried at the Epiphany quarter-ſeſſions* at Hereford, in January, 1798, when the Court quaſhed the order of the 29th of November, 1797, and the conviction grounded thereon; but reſerved this caſe for the opinion of the Court: 1ſt, Whether the appeal could be maintained at all by the appellants againſt the order of the 29th of November, 1797, being ſubſequent to the conviction of the 5th of December? and 2dly, If the appeal could be maintained, whether the court of quarter-ſeſſions ought not to have affirmed the order of the 29th of November, 1797, and the conviction, and not have quaſhed the ſame? In ſupport of the order of ſeſſions, it was contended, that Mr. *Bowles*, the magiſtrate, had no authority under the militia laws to make the order of the 29th of November, 1797, on the pariſh of Stoke-Prior. Lord KENYON, Ch. J. The act of parliament directs, in poſitive terms, that the order for reimburſement ſhall be made *by the ſame juſtice*, and *at the ſame time*, as the order for maintenance; and ſuch has been the conſtruction before put on theſe words, in the caſe of the *King* v. *White*, infra. There ſeems alſo good reaſon for requiring that to be done; as the inhabitants of a pariſh are a fluctuating body, and it would be unjuſt that one ſet of perſons, at a great diſtance of time, ſhould be called on to diſcharge burthens which were incurred before they became inhabitants. Neither is there any difficulty in the order of reimburſement being made proſpectively. The 7th ſection of the 33 *Geo.* 3. c. 8. which directs, that *where allowances ſhall have been made* between the 1ſt of December, 1792, and the 4th of March, 1793, to the wives and families of ſuch ſubſtitutes, &c. by any order, recommendation, or other act of any juſtice of the peace, or by the payment of any pariſh-officer, &c. they ſhall be reimburſed to ſuch perſons *in like manner as is hereinbefore directed* to be done, with reſpect to the like payments authorized and required to be made by virtue of this act: and which has been relied on, as ſpecially authorizing the order of reimburſement in its preſent form, has reference to its being made *in like manner*, as is thereinbefore directed; namely, in the 3d ſection, upon which I have already given my opinion, that it muſt be made by the ſame magiſtrate, and at the ſame time as the order of maintenance; whereas

whereas this order was not made upon the parish of Stoke-Prior until above four years after the first order upon Ledbury, which cannot, therefore, be said to be in compliance with, or under the authority of, the act. And the concluding part of the first order cannot be taken to be an order on the parish of Stoke-Prior, being directed not to them, but to the overseers of Ledbury. If the objection had only been, that the substitute was not approved or enrolled, probably I should have thought (though it is not necessary to decide that point) that upon the principle of our determination in *R.* v. *Willis*, that provision in that statute was only directory; and that if the substitute were sworn, and actually served, he was entitled to all the benefits of the act; in the same manner as where the 17th *Geo.* 2. c. 3. s. 1. directs, that the poors'-rate shall be published in the church the next Sunday after the allowance of it, and that no rate shall be deemed valid without such notice; a person paying under such rate, will nevertheless gain a settlement (1) thereby—ASHHURST, J. The order should have been served on the parish of Stoke-Prior before any crime could attach on them for disobeying it. PER CURIAM: Rule for quashing the order of sessions discharged.

Rex v. White and Eling, Overseers, &c. Ea. Ter. 22 Geo. 3. B.R. *Cald.* 183.

Such previous orders, as are the foundation of the magistrate's authority, must be recited, or at least referred to, in an indictment for disobedience of such authority.—It was moved, in arrest of judgment upon an indictment against the defendants, for not obeying an order of a justice of peace, made under statute 19 *Geo.* 3. c. 72. s. 2. (since repealed) directing the defendants, overseers of the parish of St. John, in the town and county of Bedford, to reimburse a sum of money advanced by the overseers of the parish of Meppershall, in the said county, to the family of a substitute in the militia of the said county, for an inhabitant of the parish of St. John; and which family, at the date of the said order, dwelt in the said parish of Meppershall (2). To this indictment,

(1) Vid. the case of St. Giles's, Cripplegate, v. St. Mary, Newington, 19 *Vin.* 386.

(2) The indictment at large stated: that on the 18th day of July, 1781, *John Nesbitt*, esq. one of the justices, &c. did issue an order, under his hand and seal, in the words following: "County of Bedford. To the overseers of the parish of St. John, in the town of Bedford. It appearing to me, *John Nesbitt*, esq. one of his majesty's justices of the peace in and for the said county, on oath, that the overseers of the parish of Meppershall, in the said county, have paid to the wife of *John Hussiff*, for herself and three children, the sum of four shillings per week, for eighty-three weeks, beginning on the 24th day of June, in the year of our Lord 1773, and that the said *John Hussiff* served during all that time, as a substitute in the Bedford militia for *John Clayton*, of your said parish of St. John. These are, therefore, to order and direct you, the said overseers of the parish of St. John, in the town of Bedford, to pay to the overseers of the parish

ment, upon which the defendants were found guilty, three objections were taken: 1ſt, that it did not ſet out any order of maintenance previous to the order of reimburſement, without which firſt order there could be no legal foundation for the laſt. 2dly, That the order was retroſpective, being for the payment of a ſum ſuppoſed to have accrued under an order of maintenance, made long before; whereas the act directs (2), that the order of reimburſement ſhall be made *at the ſame time* with the order of relief or maintenance; and that it was for a groſs ſum for eighty-three weeks; and, as inhabitants may change in that time, they ought not to be ſo charged; as this circumſtance, or that of houſes being uninhabited, would produce an inequality in the aſſeſſment. 3dly, That it did not appear, upon the face of the indictment, either that the militia-man, for whom the ſubſtitute ſerved, was ballotted, or that the ſubſtitute was ſworn or enrolled. —Lord MANSFIELD: In indictments, the crime with which the defendants is charged, muſt appear with a ſcrupulous certainty: and here, it is diſobedience to the order of a juſtice. Now it muſt appear, upon the face of the indictment, that this was a legal order; for if it is not ſo, diſobedience to it is no crime. Then this is an *order of reimburſement*, which pre-ſuppoſes an *order of maintenance*. Such order neceſſarily muſt be; for, if the overſeers had made the diſburſement of their own accord, and without an order for that purpoſe, they could not legally be reimburſed. Such voluntary payment would not have entitled them to reclaim the ſum ad-

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pariſh of Mepperſhall, in the ſaid county, the full ſum of ſixteen pounds and twelve ſhillings. Given under my hand and ſeal, July 18th, 1781." That on the ſaid 18th day of July, at the pariſh of St. John, in the town of Bedford, within the county of Bedford aforeſaid, *John Bell*, then and now one of the overſeers of the poor of the ſaid pariſh of Mepperſhall, did produce and ſhew to *Thomas White* and *John Eling*, then and now overſeers of the poor of the ſaid pariſh of St. John, the ſaid order of the ſaid *John Neſbitt*, and did then and there demand of the ſaid *Thomas White* and *John Eling* the ſum of ſixteen pounds and twelve ſhillings in the ſaid order directed to be paid by the overſeers of the poor of the ſaid pariſh of St. John, to the overſeers of the poor of the ſaid pariſh of Mepperſhall. That the ſaid *Thomas White* and *John Eling*, then and now being overſeers of the poor of the ſaid pariſh of St. John, on the day and year aforeſaid, at the pariſh of St. John aforeſaid, unlawfully, knowingly, and wilfully did refuſe to pay to *William Lincoln* and the ſaid *John Bell*, or either of them, then and now overſeers of the poor of the ſaid pariſh of Mepperſhall, the ſaid ſum of ſixteen pounds twelve ſhillings, and ſtill do refuſe to pay the ſame, in contempt, &c.

(2) The words of the act are: "In caſe any ſubſtitute, whoſe family may become chargeable, ſhall not ſerve for the pariſh where his family ſhall dwell, it ſhall be lawful for the juſtice of peace, who ſhall make any order for the relief of ſuch family, *at the ſame time*, to direct the overſeers of the pariſh for which he ſhall ſerve, to reimburſe the money ſo paid, to the overſeer or overſeers, who ſhall have advanced the ſame in purſuance of the order beforementioned."

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vanced, becauſe they are not authorized to judge of circumſtances. Had the juſtice of peace recited the order of maintenance, 'tis admitted the indictment would have been good: and had he even in general terms referred to it, the Court might, perhaps(1), have preſumed ſuch order properly made. There would then have been ſome colour of authority for the juriſdiction exerciſed. But, ſo far from having recited it, he has not made the ſlighteſt reference to it. The indictment, therefore, cannot be ſupported. Beſides, the *order of reimburſement* is not at all connected with the *order of maintenance*; though the act requires, that they ſhould both be made by the ſame juſtice *at the ſame time*, *i. e.* that whatever ſhall be paid ſhall be reimburſed; but this is at the diſtance of a year, and for a groſs ſum.—WILLES, ASHHURST, *and* BULLER, *Juſtices*, concurring, judgment arreſted.

Mortgage.

Keech, Leſſee of Warne, *v.* Hall *et al.* Mic. Ter. 19 Geo. 3. B.R. 1 *Doug.* 21.

A MORTGAGEE may recover in ejectment (without giving notice to quit) againſt a tenant who claims under a leaſe from the mortgagor, *granted after the mortgage*, without the privity of the mortgagee (2). This was an ejectment brought for a warehouſe in the city, by a mortgagee, againſt a leſſee under a leaſe in writing for ſeven years, *made after the date of the mortgage*, by the mortgagor, who had continued in poſſeſſion. The leaſe was at a rack-rent. The mortgagee had no notice of the leaſe, nor the leſſee any notice of the mortgage. The defendant offered to attorn to the mortgagee be-

(1) It has been adjudged, that in an indictment, where the juriſdiction exerciſed is founded upon a former order, a general reference to ſuch order, without ſtating it, is not ſufficient to ſupport the indictment.—H. 20 *Geo.* 3. *Rex* v. *Winſhip* and *Grunwell*, overſeers, &c. *Cald.* 72. But in *Rex* v. *Thomas Mytton*, eſq. Eaſter, 25 *Geo.* 3. 1785, on an indictment on the 21 *Geo.* 3. c. 31. for diſobeying an order of ſeſſions at Shrewſbury, on an appeal againſt a conviction for not giving in a liſt of his male-ſervants, purſuant to the direction of the ſtatute, Mr. CALDECOT, on motion in arreſt of judgment, objected, that the indictment did not ſtate the proceedings before the juſtice, but only ſays, that the ſeſſions, on appeal, ordered, &c. &c.; and it is neceſſary to ſtate poſitively, that an order of juſtices was made.—THE COURT ſaid, that the order of ſeſſions was the foundation of the indictment, and if the ſeſſions have juriſdiction, you cannot go into the regularity of their proceedings; for ſo long as the order remains in force, it muſt be obeyed: and on the trial, nothing could ſerve the defendant but ſhewing that the ſeſſions have no juriſdiction.

(2) But if there is tenant from year to year, and the landlord mortgages, pending the year, the tenant is entitled to fix months' notice from the mortgagee. *Birch* v. *Wright*, *ante*, vol. i. p. 316.

fore the ejectment was brought. The plaintiff was willing to ſuffer the defendant to redeem. There was no notice to quit; ſo that, though the written leaſe ſhould be bad, if the leſſee was to be conſidered as tenant from year to year, the plaintiff muſt fail in this action. The queſtion, therefore, for the Court to decide was, Whether, by the agreement underſtood between mortgagors and mortgagees, which is, that the latter ſhall receive intereſt, and the former keep poſſeſſion, the mortgagee has given an implied authority to the mortgagor to let from year to year, at a rack-rent; or, whether he may not treat the defendant as a treſpaſſer, diſſeiſor, and wrong-doer?—Lord MANSFIELD, Ch. J. No caſe has been cited, where this queſtion has been agitated, much leſs decided. The only caſe at all like the preſent, is one that was tried before me on the home circuit (*Belchier* v. *Collins*); but, there, the mortgagee was privy to the leaſe, and, afterwards, by a knaviſh trick, wanted to turn the tenant out. I do not wonder that ſuch a caſe has not occurred before.—Where the leaſe is not a beneficial leaſe, it is for the intereſt of the mortgagee to continue the tenant; *and where it is, the tenant may put himſelf in the place of the mortgagor, and either redeem himſelf, or get a friend to do it.* The idea, that the queſtion may be more proper for a court of equity, goes upon a miſtake. It emphatically belongs to a court of law, in oppoſition to a court of equity; for a leſſee at a rack-rent, is a purchaſer for a valuable conſideration; and in every caſe between purchaſors for a valuable conſideration, a court of equity muſt *follow*, not *lead* the law. On full conſideration, we are all clearly of opinion, that there is no inference of fraud or conſent againſt the mortgagee, to prevent him from conſidering the leſſee as a wrong-doer. It is rightly admitted, that if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action (1); but here, the queſtion turns upon the agreement between the mortgagor and mortgagee: when the mortgagor is left in poſſeſſion, the true inference to be drawn, is an agreement that he ſhall poſſeſs the premiſes at will in the ſtricteſt ſenſe; and therefore no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, becauſe all is liable to the debt; on payment of which, the mortgagee's title ceaſes (2). The mortgagor has no power, expreſs or implied, to let leaſes, not ſubject to every circumſtance of the mortgage. If, by implication, the mortgagor had ſuch a power, it muſt go to a great extent;—to leaſes where a fine is taken on a renewal for lives. The tenant

(1) *Vide Weakly*, leſſee of *Yea*, v. *Bucknell*, *ante*, vol. I. p. 528.
(2) *Moſs* v. *Gallimore*, *infra*, 496.

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ſtands exactly in the ſituation of the mortgagor. The poſſeſſion of the mortgagor cannot be conſidered as holding out a falſe appearance. It does not induce a belief, that there is no mortgage; for it is the nature of the tranſaction, that the mortgagor ſhall continue in poſſeſſion. Whoever wants to be ſecure, when he takes a leaſe, ſhould enquire after and examine the title deeds. In practice, indeed (eſpecially in the caſe of great eſtates), that is not often done, becauſe the tenant relies on the honour of his landlord; but whenever one of two innocent perſons muſt be a loſer, the rule is, *qui prior eſt tempore, potior eſt jure.* If one muſt ſuffer, it is he who has not uſed due diligence in looking into the title. It was ſaid, at the bar, that if the plaintiff, in a caſe like this, can recover, he will alſo be entitled to the meſne profits from the tenant, in an action of treſpaſs, which would be a manifeſt hardſhip and injuſtice, as the tenant would then pay the rent twice. I give no opinion on that point; but there may be a diſtinction, for the mortgagor may be conſidered as receiving the rents, in order to pay the intereſt, by an implied authority from the mortgagee, till he determine his will (1). As to the leſſee's right to reap the crop, which he may have ſown previous to the determination of the will of the mortgagee, that point does not ariſe in this caſe, the ejectment being for a warehouſe; but, however that may be, it could be no bar to the mortgagee's recovering in ejectment. It would only give the leſſee a right of ingreſs and egreſs to take the crop; as to which, with regard to tenants at will, the text of *Littleton* is clear. We are all clearly of opinion, that the plaintiff is entitled to judgment (2).

Moſs v. Gallimore *et al.* Mic. Ter. 20 Geo. 3. B.R. 1 *Doug.* 278.

Alſo, a mortgagee, after giving notice of the mortgage to the tenant in poſſeſſion under a leaſe prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards; and he may diſtrain for it after ſuch notice.—On the trial of an action of treſpaſs, on not guilty pleaded, a verdict was found for the plaintiff, ſubject to the opinion of the Court, on a caſe reſerved. The

(1) It is expreſsly provided, by 4 *Ann.* c. 16. ſ. 10. "That no tenant "ſhall be prejudiced or damaged by payment of any rent to a conuſor or "grantor of any manors or rents, or of the reverſion or remainder of any "meſſuages or lands, or by breach of any condition for non-payment of "rent, before notice ſhall be given to him of the grant by the conuſee "or grantee."

(2) When the queſtion was argued at the bar, Lord *Mansfield* ſaid, he entirely approved of what had been done by *Nares*, juſtice, upon the Oxford circuit, and afterwards confirmed by this Court, in the caſe of *White*, leſſee of *Wheatley*, v. *Hawkins*, viz. not to ſuffer a leſſee, under a leaſe *prior* to the mortgage, to avail himſelf of ſuch leaſe on an ejectment by the mortgagee, if he has had notice before the action, that the mortgagee did not intend to turn him out of poſſeſſion.

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caſe ſtated as follows:—One *Harriſon*, being ſeiſed in fee, on the 1ſt of January, 1772, demiſed certain premiſes to the plaintiff for twenty years, at the rent of 40l. payable yearly on the 12th of May; and, in May, 1772, he mortgaged the ſame premiſes, in fee, to the defendant, Mrs. *Gallimore*. *Moſs* continued in poſſeſſion from the date of the leaſe, and paid his rent regularly to the mortgagor, all but 28l. which was due on and before the month of November, 1778, when the mortgagor became a bankrupt, *being, at the time, indebted to the mortgagee in more than that ſum for intereſt on the mortgage.* On the 3d of January, 1799, one *Harwar* went to the plaintiff, on behalf of *Gallimore*, ſhewed him the mortgage deed, and demanded from him the rent then remaining unpaid.—This was the firſt demand that *Gallimore* made of the rent. The plaintiff told *Harwar*, that the aſſignees of *Harriſon* had demanded it before, viz. on the 31ſt of December; but, when *Harwar* ſaid that *Gallimore* would diſtrain for it if it was not paid, he ſaid, he had ſome cattle to ſell, and hoped ſhe would not diſtrain till they were ſold, when he would pay it. The plaintiff not having paid according to this undertaking, the other defendant, by order of *Gallimore*, entered, and deſtrained for rent, and thereupon gave a written notice of ſuch diſtreſs to the plaintiff, in the following words: "Take notice, that "I have this day ſeized and diſtrained, &c. by virtue of an "authority, &c. for the ſum of 28l. *being rent, and arrears of* "*rent, due to the ſaid* Eſter Gallimore, *at Michaelmas laſt paſt*, "*for, &c. and unleſs you pay the ſaid rent, &c.*" He accordingly ſold cattle and goods to the amount of 22l. 2s. THE QUESTION was, Whether, under all the circumſtances, the diſtreſs could be juſtified?—And it was alſo objected, that the notice was irregular, being for rent due at Michaelmas, whereas the rent was only due and payable in May; and, on that account, the diſtreſs could not be juſtified. And though this irregularity, ſince the ſtatute of 11 *Geo.* 2. c. 19. ſ. 19. does not make the defendants treſpaſſors *ab initio*, the action of treſpaſs is ſtill left by that ſtatute, for ſpecial damages incurred in conſequence of the irregularity.—But Lord MANSFIELD obſerved, that the plaintiff was precluded, by the caſe, from going for ſpecial damages ariſing from any ſuppoſed irregularity in the ſale, no ſuch ſpecial damages being found, and the queſtion ſtated being only, whether the diſtreſs was juſtifiable? and BULLER, J. ſaid, that it was not neceſſary, by the ſtatute of *William* and *Mary*, to ſet forth, in the notice, at what time the rent became due.—The caſe was then argued upon the principal point. After which Lord MANSFIELD (the other judges concurring) delivered his opinion to the following effect: I think this caſe, in its conſequences, very material. It is the caſe of lands let for years, and afterwards mortgaged, and conſiderable doubts, in ſuch caſes, have ariſen in reſpect to

the mortgagee, when the tenant colludes with the mortgagor; for, the leaſe protecting the poſſeſſion of ſuch a tenant, he cannot be turned out by the mortgagee. Of late years, the courts have gone ſo far as to permit the mortgagee to proceed by ejectment, if he has given notice to the tenant that he does not intend to diſturb his poſſeſſion, but only requires the rent to be paid to him, and not to the mortgagor. This, however, is entangled with difficulties. The queſtion here is, Whether the mortgagee was or was not entitled to the rent in arrear? Before the ſtatute of queen *Anne*, attornment was neceſſary, on the principle of notice to the tenant; but, when it took place, it certainly had relation back to the grant; and, like other relative acts, they were to be taken together. Thus, livery of ſeiſin, though made afterwards, relates to the time of the feoffment. Since the ſtatute, the conveyance is complete without attornment; but there is a proviſion, that the tenant ſhall not be prejudiced for any act done by him, as holding under the grantor, till he has had notice of the deed. Therefore, the payment of rent before ſuch notice is good. With this protection, he is to be conſidered, by force of the ſtatute, as having attorned at the time of the execution of the grant; and here, the tenant has ſuffered no injury. No rent has been demanded which was *paid* before he knew of the mortgage. He had the rent in queſtion ſtill in his hands, and was bound to pay it according to the legal title. But having notice from the aſſignees, and alſo from the mortgagee, he dares to prefer the former, or keeps both parties at arms length. In the caſe of executions, it is uniformly held, that if you act after notice, you do it at your peril. He did not offer to pay one of the parties on receiving an indemnity. As between the aſſignees and the mortgagee, let us ſee who is entitled to the rent. The aſſignees ſtand exactly in the place of the bankrupt. Now, a mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is ſo only *quodam modo*. Nothing is more apt to confound than a *ſimile*. When the court, or counſel, call a mortgagor a tenant at will, it is barely a compariſon. He is *like* a tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this agreement when he pleaſes. He has the legal title to the rent; and the tenant, in the preſent caſe, cannot be damnified: for the mortgagor can never oblige him to pay over again the rent which has been levied by this diſtreſs. I, therefore, think the diſtreſs well juſtified; and I conſider this remedy as a very proper additional advantage to mortgagees, to prevent colluſion between the tenant and the mortgagor. The other judges agreed.

Doe, leſſee of Sir W. Gibbons, bt. *v.* Pott *et al.* Tr. Ter. 21 Geo. 3. B. R. 2 *Doug.* 709-10.

If a lord of a manor mortgage the manor in fee to *A.* and afterwards purchaſe copyholds held of the manor, and take ſurends

ſurrenders of them to himſelf in fee, they ſhall enure to the benefit of the mortgagee; and a ſettlement by the lord of all his eſtate mortgaged to *A.* ſhall paſs the equity of redemption of ſuch ſurrendered copyholds. Alſo if a mortgagor deviſes the mortgaged premiſes, and afterwards pays off the mortgage, and the mortgagee conveys the legal eſtate to a truſtee in truſt for the mortgagor, ſuch a transfer of the legal eſtate ſhall not operate as a revocation of the will.—Upon the trial of an ejectment a caſe was reſerved for the opinion of the Court, as follows: By leaſe and releaſe, dated the 29th and 30th of March, 1754, the manor or lordſhip of Stanwell, with the rents of aſſize, rents of the freehold and cuſtomary tenants, and all rights, privileges, and appurtenances, to the ſaid manor belonging, and divers freehold lands, and alſo the manor of *Shepcotts*, alias *Hammonds*, with the rights, members, and appurtenances thereof, and divers freehold meſſuages and lands, were, for a valuable conſideration, conveyed by the truſtees of the Earl of *Dunmore* deceaſed, to Sir *John Gibbons* and his heirs. By indenture, dated the 2d of April following, Sir *John Gibbons mortgaged all the aforeſaid premiſes to the ſaid truſtees, for a term* of 1000 years, *for ſecuring* 10,000*l. and intereſt*, being the ſum he was deficient of paying for his original purchaſe. By leaſe and releaſe, dated the 7th and 8th of April, 1755, Sir *John Gibbons mortgaged in fee, to* Agatha Child, *the manors and premiſes ſo purchaſed by him as aforeſaid of and from the truſtees of the Earl of Dunmore*, and therein particularly mentioned, for ſecuring 20,000l. and intereſt, out of which ſum the 10,000l. and intereſt due to the Earl of *Dunmore*'s truſtees was paid off, and the term of 1000 years aſſigned, by an indenture, dated the ſaid 8th of April, 1755, to a truſtee for the better ſecuring the 20,000l. which was not paid at the time ſtipulated in the mortgage. Between the time of *this laſt mortgage to Mrs.* Child, *and the year* 1767, *Sir* John Gibbons, *purchaſed ſeveral copyhold tenements and lands, (being part of the premiſes in queſtion), held of the manor of Stanwell, and the cuſtomary tenants, of whom he purchaſed them, ſurrendered them into the hands of the lord of the ſaid manor, by the rod (ſome into the hands of Sir* John *himſelf, and ſome by the hands and acceptance of the ſteward of the ſaid manor), unto the ſaid Sir* John Gibbons *(who was deſcribed in the ſurrenders as lord of the ſaid manor of Stanwell), his heirs and aſſigns for ever.* By leaſe and releaſe, dated on the 17th and 18th of April, 1755, certain *freehold* meſſuages, lands, tenements, and hereditaments, ſituated in Stanwell, were ſold and conveyed to Sir *John Gibbons*, and all and ſingular the ſaid laſtmentioned meſſuages, lands, tenements, and premiſes, were, by leaſe and releaſe, dated on the 19th and 20th of April, 1755, mortgaged in fee to Mrs. *Child*, for the further ſecuring the 20,000l. By leaſe and releaſe, dated on the 30th and 31ſt of Auguſt, 1771, in conſideration of a marriage

then intended between the leſſor of the plaintiff (the eldeſt ſon of Sir *John Gibbons*), and his now wife, and of her marriage portion (after reciting that Sir *John Gibbons* was ſeiſed of all that the manor, or reputed manor or lordſhip of Stanwell, and of the manor of Shepcotts, alias Hammonds, and of the capital meſſuages, and of divers other meſſuages, mills, lands, tenements, and hereditaments, which he purchaſed from the truſtees of the Earl of *Dunmore*, ſubject to a mortgage thereof made by him to *Agatha Child*), Sir *John Gibbons* conveyed to *William Buller* and *Joſeph Pickering*, in fee, all that the manor or lordſhip of Stanwell, with the rights, members, juriſdictions, privileges, rents of aſſize, rents of the freehold and cuſtomary tenants, and all other the appurtenances, thereto belonging, and alſo all that the manor of Shepcotts, alias Hammonds, with the rights, members, and appurtenances thereof, and all and ſingular the meſſuages, lands, tenements, hereditaments, and premiſes therein particularly deſcribed, *and are the ſame premiſes which he purchaſed of the ſaid truſtees of the Earl of* Dunmore, and which were conveyed to him by the indentures of the 29th and 30th of March, 1754, and *alſo compriſed* in the mortgage to the ſaid *Agatha Child*, of the 7th and 8th of April, 1755, to ſecure an annuity of 1000l. out of the ſame to the leſſor of the plaintiff, during his and his father's joint lives, and to the intended wife of the leſſor of the plaintiff, after the death of her ſaid intended huſband, as her jointure, and, ſubject thereto, to the uſe of Sir *John Gibbons* for life, remainder to truſtees to ſupport, &c. *remainder to the uſe of the leſſor of the plaintiff for life*, with ſeveral remainders over, *and the ultimate remainder to Sir* John Gibbons *in fee*. On the 22d of November, 1772, Sir *John Gibbons* made his will, whereby, after reciting the laſtmentioned leaſe and releaſe of the 30th and 31ſt of Auguſt, 1771, he deviſed the reverſion in fee of the ſaid manors of Stanwell and Shepcotts, alias Hammonds, *and all the lands, hereditaments, and premiſes which he purchaſed of the truſtees of Lord* Dunmore, *deceaſed, to Dr. Eraſmus Saunders* (ſince deceaſed), and *Joſeph Pickering*, in fee, upon certain truſts and to certain uſes not material to be ſtated. The will then recited, that he had made ſeveral very conſiderable purchaſes of *ſeveral other real eſtates at Stanwell* aforeſaid, and elſewhere in the ſame county, ſince the purchaſe of his ſaid manor of Stanwell, and other premiſes thereinbefore mentioned, made of the truſtees of the Earl of *Dunmore*, and he thereby gave to the ſaid Dr. *Eraſmus Saunders* and *Joſeph Pickering*, and their heirs, all other his meſſuages, lands, hereditaments, and *real eſtates* at Stanwell, or elſewhere in the ſaid county (of Middleſex), with their appurtenances (except ſuch parts thereof as were incloſed within his gardens and park), in truſt to ſell and diſpoſe thereof, and with the money ariſing from the ſale, to pay and diſcharge all principal and intereſt

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due on any mortgages, *or other incumbrances affecting the ſaid eſtate*, and from and after payment thereof, to apply the reſidue of ſuch purchaſe monies in paying and diſcharging the fortunes thereinbefore given to his younger children. At the time when Sir *John Gibbons* made his will, the manors of Stanwell and Shepcotts, alias Hammonds, were in mortgage to Mrs. *Child*, as before ſtated, and all the copyhold premiſes before mentioned were purchaſed by him after the mortgage made to Mrs. *Child*. By leaſe and releaſe, dated the 1ſt and 2d of March, 1776, in conſideration of the ſum of 20,000l. (Mrs. *Child*'s mortgage money), paid to the perſons then entitled to the ſame, by *Buller* and *Pickering*, the truſtees in the marriage ſettlement of the leſſor of the plaintiff, all the ſaid manors, and all the other meſſuages, lands, tenements, and hereditaments, contained in the ſaid mortgage of the 7th and 8th of April, 1755, and purchaſed by Sir *John Gibbons* of the ſaid truſtees of the Earl of *Dunmore*, were, at the requeſt of Sir *John Gibbons*, and of the leſſor of the plaintiff and his wife, releaſed and confirmed to the ſaid *Buller* and *Pickering*, and their heirs, to the ſame uſes and truſts as by the marriage ſettlement of the 30th and 31ſt of Auguſt, 1771, were limited concerning the ſame, freed and diſcharged from all equity, terms, proviſos, and conditions, of redemption. By leaſe and releaſe, dated on the ſame days reſpectively, and made between the ſame parties with thoſe laſt mentioned; after reciting that the 20,000l. and all intereſt had been paid, and that, thereby, the premiſes conveyed for better ſecuring the payment thereof were become releaſed and diſcharged, all and ſingular the capital meſſuage, and all other meſſuages, lands, tenements, hereditaments, and premiſes, in the leaſe and releaſe of the 19th and 20th of April, 1755, mentioned, were duly granted, releaſed, and conveyed to the uſe of the ſaid *Joſeph Pickering*, his heirs and aſſigns, free from the proviſo of redemption contained in the releaſe of the 20th of April, 1755, in truſt for Sir *John Gibbons* in fee. Sir *John Gibbons* died in June, 1776, without revoking or altering his will, greatly indebted to many perſons by bonds; leaving the leſſor of the plaintiff his heir at law: and the ſurviving truſtee under the will, conceiving himſelf entitled to the premiſes contained in the different ſurrenders hereinbefore mentioned, and alſo to the freehold premiſes contained in the leaſe and releaſe of the 17th and 18th of April, 1755, had agreed to ſell the ſame to pay Sir *John*'s debts, but the leſſor of the plaintiff alſo conceiving himſelf entitled to the ſame premiſes, he brought this ejectment for the recovery of the poſſeſſion thereof. Upon this caſe the queſtions ſtated for the opinion of the Court, were: 1ſt. Whether the leſſor of the plaintiff, as heir at law of his father, or as tenant for life in poſſeſſion of the eſtates compriſed in his marriage ſettlement, is entitled

to the premiſes contained in the ſaid ſurrenders? 2dly. Whether the leſſor of the plaintiff, as heir at law of his father, is entitled to the premiſes contained in the leaſe and releaſe of the 17th and 18th of April, 1755? IT WAS ARGUED FOR THE PLAINTIFF, upon the firſt queſtion, 1. That the copyhold lands paſſed to Sir *William Gibbons* for life by the terms of the marriage ſettlement; or, 2dly, That they were not compriſed in the will of Sir *John Gibbons*, and therefore deſcended to Sir *William*, as his heir at law. And upon the ſecond queſtion, 1ſt. That as the purpoſe of the ſecond deviſe was to pay off mortgages and *other incumbrances* affecting the lands, and which were a real lien, and would be a charge upon them into whatever hands they might come. The mortgage being paid off before the teſtator's death, the deviſe itſelf became void.—But 2dly, If this conſtruction ſhould not be adopted, ſtill an event happened after the making the will by which that part of it which relates to the freehold purchaſe was revoked. For, in this caſe, at the time of the will, the legal eſtate was in Mrs. *Child*, and, after the will was transferred from her, and conveyed to *Pickering*; and though the equitable intereſt may have remained the ſame after the conveyance to *Pickering*, yet there having been an alteration in the legal eſtate after the will, that ſhall operate as a revocation. The Court took time to conſider, and afterwards Lord MANSFIELD, Ch. J. delivered their opinion, as follows: We are all clear in the opinion I ſhall now deliver. This ejectment is brought to recover the poſſeſſion of two denominations of land; 1. Certain copyhold or cuſtomary tenements held of the manor of Stanwell, which were ſurrendered to Sir *John Gibbons*, prior to the ſettlement on the marriage of his ſon, the preſent leſſor of the plaintiff; and, 2dly, Certain freehold lands, which were purchaſed and mortgaged in fee, by Sir *John*, then, after the ſettlement, deviſed by will, and, after that, the mortgage upon them paid off, and a conveyance of them made by the mortgagee to a truſtee. I will take them ſeparately, becauſe the queſtions concerning them are entirely different, and independent. 1. As to the copyhold tenements, the facts, in ſubſtance, are ſhortly theſe: (Here his lordſhip ſtated the material part of the caſe, as far as concerned the copyholds, and ſaid, he thought, under the word "*manor*," all the conſequences and incidents would have paſſed, which, in theſe, as in all the common dragnet conveyances, were ſpecifically enumerated). The queſtion, on this part of the caſe is, Whether theſe copyhold tenements go to Sir *William* as tenant for life under the ſettlement, or whether they paſs by the will? and we are clearly of opinion, that they muſt go to the uſes of the ſettlement. To go by ſteps: After the mortgage, the mortgagee in fee had a right to the manor, and every thing held of it as parcel thereof. In

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notion of law, the mortgagor was only tenant at will, or, at moſt, from year to year. He had the loweſt eſtate poſſible. In *equity*, he was lord of the manor, ſubject to the charge upon it; but he could do nothing to weaken the ſecurity. In both views it is clear what he could do in conſequence of the ſurrenders. He had the option, if he had been abſolutely tenant in fee, either to continue the copyholds as parcel of the manor; by granting them out again by copy of court roll, becauſe the cuſtom is not broken by their merely having continued in the lord's hand, but they may, notwithſtanding, be alleged to have been demiſed and demiſeable, by copy of court roll, which is all that is neceſſary; or to ſever them from the manor, by any common-law conveyance, is a leaſe, &c. But the manor being mortgaged in fee, he could not ſever them, becauſe *that* would have diminiſhed the ſecurity; for the mortgagee had a right to the ſervices, quit-rents, eſcheats, forfeitures, and other caſualties. If we conſider *his* legal intereſt, being only tenant at will, he could not ſever the copyholds. The argument is ſtronger on the ſettlement, for the ſurrenders had then been made, and all is included in the ſettlement, ſo that, after *that*, he could not ſever in reſpect of the ſettlement. The next conſideration is, Had Sir *John* any idea of ſevering the copyholds? Did he mean to do it by his will? It is plain, on the face of it, that he did not; for, after reciting the ſettlement, he deviſes only *the reverſion* of the manors, and does not mention the cuſtomary lands. Then, he deviſes, "*all other*, his meſſuages, lands, hereditaments, "and real eſtates." Therefore *quâcunque viâ*, we are clearly of opinion, that Sir *William* is entitled to the copyhold tenements; becauſe, 1. They were ſettled as part of the manor, and could not be ſevered by the will; and, 2. If they could have been ſevered by the will, *that* was not done. 2. With regard to the freehold eſtate, the facts are as follows: (His lordſhip then gave an abridgment of the caſe as to what concerned the ſecond queſtion). Theſe lands are claimed by the leſſor of the plaintiff in this ejectment, as heir at law to his father. The objection to this is, that he cannot recover them in ejectment as heir at law, becauſe (independent of the deviſe), by the leaſe and releaſe of the firſt and ſecond of March, 1776, they were conveyed in fee to a truſtee, and the legal eſtate is in ſuch truſtee. It is anſwered, that this is indeed, *primâ facie*, true, but that it has been ſettled for years, that a mere truſt eſtate ſhall not be ſet up againſt a *ceſtui que truſt* (1); and, the conveyance to *Pickering* having operated

(1) Vide *Goodtitle* v. *Knot*, B.R. E. 14 *Geo.* 3. *Cowp.* 43. 46. *ante*, vol. III. p. 53. *Lade* v. *Holford*, B.R. E. 3 *Geo.* 3. Law of N. Pr. Ed. 1775. p. 110. *ante*, vol. III. p. 228. *Butterfield* v. *Heath*. B.R. H. 23 *Geo.* 3. ☞ *Doe*, leſſee of *Briſtowe*, *v. Pegge*, B.R. E. 25 *Geo.* 3. 1 *Term. Rep.* 758. n. (*a*), *infra*, p. 507. But, vide *Doe*, leſſee of *Hodſden*, v. *Staple*, B.R. M. 29 *Geo.* 3. 2 *Term Rep.* 684. *ante*, vol. III. p. 288.

as a revocation of the deviſe of theſe lands, he is a mere truſtee for the heir at law. Now, in the firſt place, the rule only is (and I hope it is ſo underſtood), that the truſt eſtate ſhall not be ſet up in an ejectment to defeat the *ceſtui que truſt* in a *clear* caſe. In ſuch a caſe, where the truſt is perfectly clear and manifeſt, the rule ſtands upon ſtrong and beneficial principles, becauſe, in ejectment, the queſtion is, who is entitled to the poſſeſſion. But, if the truſt is doubtful, a court of law will not decide upon it in an ejectment. It muſt be put into another way of enquiry. But, in the ſecond place, there ſeems to be no doubt here, that the perſon having the legal eſtate is not a truſtee for the heir at law. Sir *John Gibbons*, at the time of the deviſe, had merely the *equitable* fee in him. Mrs. *Child* was his truſtee. Then, on payment of the mortgage money, ſhe conveyed the legal eſtate in fee to *Pickering*, which was merely transferring it from one truſtee for Sir *John* to another; and I know of no determination, or caſe, in which a bare change of a truſtee has been held to revoke a will. *Watts* v. *Fullerton* (1), which has been cited, where it was held, that it does not, is a very ſtrong caſe. All

(1) *Watts et al.* v. *Fullarton, Canc. Tr. Ter.* 14 *Geo.* 3. 2 *Doug.* 718. *William Watts*, by his will, dated the 11th of May, 1762, deviſed all his real eſtate in Berkſhire, to certain truſtees, and their heirs, to the uſe of his firſt and ſecond ſons, and firſt and ſecond daughters ſucceſſively, in ſtrict ſettlement, with remainder to his own right heirs. On the 29th of February, 1764, he made a codicil to this will, reciting, that, ſince the publication thereof, he had contracted with the Duke of *Kingſton* for the purchaſe of certain lands in Buckinghamſhire, and thereby directed the truſtees and executors in his will, out of the *reſiduum* of his perſonal eſtate, to pay the purchaſe money, and, on payment thereof, he directed, that the ſaid purchaſed premiſes ſhould be conveyed, ſettled, and limited, to the ſame uſes, and on the ſame truſts, as by his will he had limited, and declared, concerning his eſtate in Berkſhire. Afterwards, the teſtator *himſelf* completed the purchaſe referred to in the codicil, and took a conveyance of the purchaſed premiſes, to certain truſtees therein named, in fee, in truſt for himſelf, and his heirs, ſoon after which he died. The bill was brought by the younger children, to have *(inter alia)*, the truſts in the will and codicil carried into execution, as to the new purchaſed eſtate. The *Maſter of the Rolls* having omitted to give any directions as to that point, the caſe came on, by petition and appeal, before the Lord CHANCELLOR, and the queſtion was, WHETHER the conveyance of the new purchaſed lands to the truſtees, ſubſequent to the will and codicil, was not, *pro tanto*, a revocation thereof? The teſtator *Watts*, at the time of making the codicil, the thing being *in fieri*, was in the nature of mortgagor, and the Duke of *Kingſton* a truſtee for him. Afterwards, before his death, the legal eſtate veſted in the new truſtees. Yet Lord BATHURST decreed, that there was no revocation, and that the truſts ſhould be carried into execution, *vide Greenhill* v. *Greenhill, Canc. H.* 1711. 2 *Vern.* 679; relying much on the general propoſition laid down by Lord HARDWICKE, in *Parſons* v. *Freeman, Canc.* 9 Nov. 1751. 3 *Atk.* 741. 749. *viz.* "That, "where a man has an equitable intereſt in fee, in an eſtate, and deviſes "it, and afterwards makes a conveyance of the legal eſtate to the ſame "uſes, this is no revocation."

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revocations, which are not agreeable to the intention of the teſtator, are founded on artificial and abſurd reaſoning. The abſurdity of Lord *Lincoln*'s caſe is ſhocking(1). However, it is now law. But here, *quâcunque viâ datâ*, Sir *William* cannot recover theſe freehold lands; for, 1. The truſt is at leaſt doubtful, which is ſufficient; but, 2. We think the will as to them is not revoked.—*Poſtea* to the plaintiff (2).

A ſecond mortgagee, who takes an aſſignment of a term to attend the inheritance, and has all the title deeds, may recover in ejectment againſt the firſt mortgagee, *not having had notice of ſuch prior mortgage* (3).—On the trial of this ejectment there was a verdict for the plaintiff, ſubject to the opinion of the Court on the following caſe. *R. Jones*, being ſeiſed in fee of the premiſes in queſtion, namely, the manor of Penmarke, and certain lands in Porthkerry, in Glamorganſhire, by indenture of demiſe, dated the 14th of April, 1761, granted them to *Margaret Aubrey* for nine hundred and ninety-nine years, ſubject to a proviſo for redemption, on payment of 500l. and intereſt at a day therein mentioned; which ſum was not paid at the day. On the 16th of Auguſt, 1768, by indenture of aſſignment of four parts, between *Margaret Aubrey* of the firſt part, *R. Jones* of the ſecond part, *John Lockwood* and *R. Morris* of third part, and *Richard Lockwood* of the fourth part, *Margaret Aubrey*, in conſideration of 7194l. 14s. due to her from *Jones*, for principal and intereſt on the mortgage of the 14th of April, 1761, and alſo on bonds, and which was paid her by the ſaid *John Lockwood* and *Robert Morris* by the direction of *Jones*, by the like direction of *Jones* and nomination of *John Lockwood* and *Robert Morris*, aſſigned all the premiſes compriſed in the indenture of demiſe of the 14th of April, 1761, to *Richard Lockwood*, his executors, &c. for the reſidue of the term of nine hundred and ninety-nine years, in truſt, as to the manor of Penmarke, for *Robert Jones*, and, in

Goodtitle *ex dim.* Edward Norris, J. Blagden Hale, Joſeph Partington, and Edward Jeffery and Mary his Wife, *v.* Joan Morgan, widow, and Richard David, Ea. Ter. 27 Geo. 3. B.R. 1 *Ter. Rep.* 755.

(1) In the *Earl of Lincoln* v. *Rolls Show. Par. Ca.* 154. 1 *Eq. Ca.* 411, 412. and 2 *Freeman*, 202. it was determined that equitable and legal eſtates as to implied revocations ſtand upon the ſame footing, and are governed by the ſame rule.

(2) Becauſe he was entitled to recover *part* of the premiſes.

(3) If a ſubſequent purchaſer or mortgagee HAS NOTICE of a former purchaſe or incumbrance, he ſhall not avail himſelf of an aſſignment of an old outſtanding term, prior to both, in order to get a preference. But if he had no notice of ſuch prior purchaſe or incumbrance, and has the firſt and beſt right to call for the legal eſtate, then if he gets an aſſignment of it, a court of equity will not deprive him of his advantage. If a ſecond mortgagee lend his money upon an eſtate upon which there is an old outſtanding term, and has notice at the ſame time of a certain incumbrance, prior to his own, the prior incumbrancer has the beſt right to call for the legal eſtate, and to ſatisfy himſelf of any other incumbrances upon the eſtate; although ſuch other incumbrances were not known to the ſecond mortgagee at the time he advanced his money *Willoughby et al. v. Willoughby et al.* in Chancery, June 19, 1756. MS. Notes of Lord Ch. J. Hardwicke, 1 Ter. Rep. 763.

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the mean time, to attend the inheritance, and as to the other lands in Porthkerry, comprized in the deed of 1761. in truſt for *John Lockwood* and *Morris*. By indenture of aſſignment, dated the 13th of December, 1769, *Robert Jones* and *Richard Lockwood* aſſigned all the premiſes in queſtion to *Richard Morland*, his executors, &c. for the remainder of the term of 999 years, in truſt for *Nathan Sprigg*, for ſecuring 10,000l. lent by *Sprigg* to *Jones*. By indentures of leaſe and releaſe, the 14th and 15th of December, 1769, *Jones* mortgaged the premiſes in fee to *Sprigg* for ſecuring the 10,000l. On the 9th of June, 1777, *Sprigg* by his will appointed *Richard Morland* and *Edward Norris*, one of the leſſors of the plaintiff, executors. *Morland* is ſince dead, having appointed *Joſeph Partingdon* and *J. Blagden Hale*, two others of the leſſors of the plaintiff, executors. *Mary*, the wife of *Edward Jeffery*, the other leſſor of the plaintiff, is the heir at law of *Sprigg* the mortgagee. The two defendants who defend ſeparately for different premiſes, but which are all in mortgage to *Sprigg*, ſet up mortgages in fee from *Robert Jones*, prior to that of *Sprigg*. The defendant, *Joan Morgan*, claims under a mortgage in fee of the manor of Penmarke by *Jones* to *W. Morgan*, dated the 3d and 4th of April, 1767. The other defendant, *Richard David*, claims under a mortgage in fee of the lands in Porthkerry, by *Jones* to him, dated the 27th and 28th of July, 1769. Both the defendants are in poſſeſſion by ejectments brought upon their ſeveral mortgages. *At the time of the mortgage to* Sprigg, *all proper ſearches were made on his part for incumbrances, and he had all the title deeds that could be found delivered to him at the time he advanced his money, except the demiſe of the* 14*th of* April, 1761, *and the aſſignment of the* 16*th of* Auguſt, 1768, *which were kept in the hands of* John Lockwood, *on account only of their containing other premiſes in mortgage to* John Lockwood, *and which were not included in the mortgage to* Sprigg, *nor aſſigned to* Morland *his truſtee, but counterparts of them were then delivered to* Sprigg. The queſtion for the opinion of the Court was, Whether the leſſors of the plaintiff were entitled to recover the premiſes contained in the two mortgages ſet up by the defendants? Which turned upon this point, WHETHER the term, aſſigned to the truſtee to attend the inheritance for the mortgagor, ſhall be conſidered to paſs by the releaſe of the mortgagor only, the truſtee not being a party to it? ASHHURST, J. No man ought to be ſo abſurd as to make a purchaſe without looking at the title deeds; if he is, he muſt take the conſequences of his own negligence. If the firſt mortgagee had uſed ordinary precaution, he muſt have known that this term was then outſtanding. And if he did know of it and neglected to take an aſſignment of it, it was enabling the mortgagor to commit a fraud by mortgaging the ſame eſtate again. By this therefore he became *particeps criminis*; and he may ſuffer for the conſequences of the fraud; and

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the leſſors of the plaintiff claiming under *Sprigg*, who have got the legal eſtate, muſt be preferred. BULLER, J. It is an eſtabliſhed rule in a court of equity that a ſecond mortgagee, who has the title-deeds, without notice of any prior incumbrance, ſhall be preferred; becauſe if a mortgagee lend money upon mortgage without taking the title-deeds, he enables the mortgagor to commit a fraud. If this has become a rule of property in a court of equity, it ought to be adopted in a court of law. Here the defendants took mortgages, without enquiring after the title-deeds; the ſubſequent mortgagee is a purchaſer without notice; and as he has taken the title-deeds, he has the better title. GROSE, J. of the ſame opinion.—Poſtea to the plaintiff (1).

But where a legal term is created for a particular purpoſe, if that purpoſe be ſatisfied, or it be unſatisfied and not connected with the litigating parties, it ſhall never be ſet up between them in ejectment (2). This was an ejectment brought for a moiety of the manor of Winkburne, &c. under the will of *D. Burnell*, as one of his co-heirs. By the teſtator's marriage ſettlement in 1748, two terms in truſt were created; one for ninety-nine years, to ſecure an annuity of 200l. to his mother; the other for one thouſand years, for raiſing 3000l. for his wife, in caſe ſhe ſhould have no iſſue; the money to be raiſed out of the rents and profits, or by ſale or mortgage. The teſtator died in 1774, having no iſſue, and deviſed all his eſtates to truſtees and their heirs, to the uſe of them and their heirs in truſt, after the death of his widow, who was entitled to a life eſtate under the marriage ſettlement, for ſuch perſon or perſons as according to the laws of deſcent ſhould be his heirs at law, and the heirs of their bodies, to take as tenants in common, &c. if more than one. The defendant filed a bill in chancery in 1776, againſt all perſons who were ſuppoſed to have any claim as heirs at law, and againſt the truſtees, and an iſſue was directed under which he was found heir at law by deſcent from a daughter of a common anceſtor. The leſſor of the plaintiff alſo had filed a bill in 1783, his claim having never been known before; but upon the death of the widow, he brought this ejectment, and proved his pedigree from another daughter of the ſame common anceſtor. At the trial the defendant ſet up theſe terms; the teſtator's mother being ſtill living, and her annuity regularly paid by the receiver appointed by the court of chancery; the 3000l. having likewiſe been raiſed for his widow, and the term aſſigned in mortgage. Mr. Juſtice HEATH, who tried the cauſe at the laſt aſſizes at Nottingham, nonſuited the plaintiff, with leave to move to ſet aſide the nonſuit, and enter a verdict for the plaintiff, if the Court ſhould be of opinion that he was entitled to recover. Lord MANSFIELD, Ch. J.—An eject-

Doe *ex dim.* Briſtow *v.* Pegge, Ea. Ter. 25 Geo. 3 B.R. 1 *Ter. Rep.* 758.

(1) *Vide* 2 *Brown's Ch. Ca.* 650.
(2) See *Doe* v. *Staple*, *ante*, vol. III. p. 288.

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ment is a fictitious remedy to try the title to the poſſeſſion of lands; it is of infinite conſequence that it ſhould be adapted to attain the ends of juſtice, and not entangled in the nets of form. Great difficulties have ariſen as to the legal form of paſſing land, from the modes of conveyancing in England ſince the ſtatute of uſes. Truſts are a mode of conveyance peculiar to this country. In all other countries, the perſon entitled has the right and poſſeſſion in himſelf. But in England, eſtates are veſted in truſtees, on whoſe death it becomes difficult to find out their repreſentatives; and the owner cannot get a complete title. If it were neceſſary to take aſſignments of ſatisfied terms, terrible inconveniences would enſue from the repreſentatives of the truſtees not being to be found. Sir *E. Northey*'s clerk was truſtee of near half of the great eſtates in the kingdom; on his death it was not known who was his heir or repreſentative. So that where a truſt term is a mere matter of form, and the deeds were muniments of another's eſtate, it ſhall not be ſet up againſt the real owner. It is therefore ſettled, that a ſatisfied truſt ſhall be taken to be a truſt for the benefit of the heir at law. A truſt ſhall never be ſet up againſt him for whom the truſt was intended. It is a mere form of conveyance. And it is admitted, that where the term is in truſt for the benefit of the leſſor of the plaintiff, the defendant ſhall not ſet it up in ejectment as a bar to his recovery. To go a ſtep further; third perſons may have titles, and therefore, the Court ſay, that where there is a tenant in poſſeſſion under a leaſe, which is a bar to the recovery of the leſſor, he being to recover by the ſtrength of his own title, yet to prevent this from being turned improperly againſt the perſon entitled to the inheritance, whoſe right is not diſputed by the tenant, if the leſſor diſpute the property only againſt another, and give notice to the tenant that he does not mean to diſturb his tenancy, the Court will never ſuffer the tenant to ſet up the leaſe as a bar to the recovery. There is another diſtinction to be taken; whether, ſuppoſing a title ſuperior to that of the leſſor of the plaintiff exiſts in a third perſon, who might recover the poſſeſſion againſt him, it lies in the mouth of a defendant to ſay ſo in anſwer to an ejectment brought againſt himſelf by a party having a better title than his own. I found this point ſettled before I came into this Court, that the Court *never ſuffers a mortgagor to ſet up the title of a third perſon againſt his mortgagee.* For he made the mortgage, and it does not lie in his mouth to ſay ſo, though ſuch third perſon might have a right to recover poſſeſſion. Nor ſhall a tenant who has paid rent, and acted as ſuch, ever ſet up a ſuperior title of a third perſon againſt his leſſor, in bar of an ejectment brought by him; for the tenant derives his title from him. Laying down theſe principles, let us now ſee the application of them to this caſe. *There are diſputes between the plaintiff and the defendant, who are co-heirs; as ſuch, the plaintiff*

tiff claims half of the property, and wiſhes to be admitted into poſſeſſion of the premiſes with the defendant. He proves his deſcent. Then what is the defence ſet up? A truſt for a third perſon: an annuity, is ſet up. The plaintiff admits the charge, and ſays, that he only claims ſubject to the incumbrances. The truſtees do not aſſert their title. Then, ſhall others be admitted to ſet it up? It is clear that the other co-heirs ſhall not be permitted to diſpute the title with him. He and the defendant have an equitable title as tenants in common, and the plaintiff muſt recover a moiety. WILLES, J. concurred. ASHHURST, J. In ſuch a caſe as this, a legal bar ſhall never be ſet up in ejectment againſt the juſtice of the caſe. The truſtees may perform their functions as well, after both the parties are in poſſeſſion. The old doctrine is relaxed in many inſtances. BULLER, J. I entirely agree with my lord. An objection has been taken at the bar, that the plaintiff in ejectment muſt recover by the ſtrength of his own title: the old caſes certainly ſay ſo; but for the laſt forty or fifty years, conſtant exceptions to this rule have been admitted. One caſe which is received as clear law, and is an exception to it, is, that of a tenant who cannot ſet up the title of the mortgagee againſt the mortgagor; becauſe he holds under the mortgagor, and has admitted his title. There was a caſe before me at Guildhall, and I believe another upon the Oxford circuit, of the ſame nature, where a leſſee for years had got poſſeſſion of ſome mortgage deeds, and endeavoured to ſet up that title againſt the mortgagor; but though this ſhewed that the plaintiff had no right to recover as againſt the mortgagee, yet I permitted him to do ſo in that inſtance; and the deciſion was acquieſced under. It is not therefore true, that an outſtanding unſatisfied term is always an anſwer to a plaintiff in ejectment. *So long ago as the time of Juſtice* Gundry, *when an outſtanding ſatisfied term was offered by a defendant in ejectment as a bar to the plaintiff's recovery, that judge refuſed to admit it, ſaying, that there was no uſe in taking an outſtanding term, but for the ſake of the conveyancers' pockets:* ſince which time it has been the uniform doctrine, that if the plaintiff be entitled to the beneficial intereſt he ſhall recover the poſſeſſion. The next objection is, that this is a reverſionary intereſt; but that is not material; for it has been further ruled of late years, that a leſſor of a plaintiff may recover in an ejectment a reverſionary intereſt, ſubject to a leaſe and right of preſent poſſeſſion exiſting in another. The annuitant is only entitled to her 200l. *per annum*; and not to the poſſeſſion itſelf whilſt there is no default: indeed ſhe does not require it. But the heir at law is entitled to the poſſeſſion ſubject to that charge. The annuitant, however, is in a different ſituation from the mortgagee; for the latter is entitled to receive the whole in diminution of the principal and intereſt. So that the plaintiff muſt have a general judgment for that part which is not

not in the poſſeſſion of the receiver; and as to that which is, he muſt enter into a rule not to diſturb that poſſeſſion; ſubmitting to the mortgage and the annuity.—Rule abſolute. (1)

Chapman *ex dim.* Staverton *v.* Emery, Ea. Ter. 15 Geo. 3. B.R. *Cowp.* 278.

One *after marriage* made a ſettlement of certain premiſes, and three years afterwards mortgaged the ſame to a perſon, who was told that there was a ſettlement; and the Court held the ſettlement as void againſt the mortgagee within the ſtatute 27 Eliz. c. 4. On the trial of this ejectment, a verdict was found for the plaintiff, ſubject to the opinion of the Court on the following caſe. By indentures of leaſe and releaſe the 3d and 4th of October, 1769, between *Richard Emery, and the defendant* Mary *his wife* on the one part, and *Deodatus Staverton* of the other part, the ſaid *Richard Emery* made a mortgage in fee of the premiſes in queſtion to *Staverton* for ſecuring the payment of 750l. There was alſo a covenant to levy a fine, but no fine was ever levied, nor were the deeds executed by the defendant *Mary*. *Staverton* died June 13, 1771, leaving the leſſor of the plaintiff his heir at law. Before the above mortgage by indentures of leaſe and releaſe the 28th and 29th of March, 1766, between the ſaid *Richard Emery*, and *Mary* his wife of the one part; and *Thomas Plumer* and *Joſeph Turner*, of the other part, the ſaid *Richard Emery*, in conſideration of 10s., and for divers other good cauſes, and conſiderations, conveyed the ſaid premiſes to the ſaid *Thomas Plumer* and *Joſeph Turner*, in truſt for the ſaid *Richard Emery* for life, remainder to his wife for life, remainder to the iſſue of the ſaid *Richard Emery*, and *Mary* his wife, in tail; and in default of iſſue remainder to the right heirs of the ſaid *Richard Emery* in fee, which ſaid indentures were executed by all the parties thereto. It was proved, that while the negociation for the loan of the 750l. was carrying on, *Staverton*, and alſo the leſſor of the plaintiff, was adviſed by one *Gates* to be careful what he was about, for that he, the ſaid *Gates*, believed that *Emery* had made a ſettlement of the eſtate; for that *Emery*'s wife had told him the eſtate was ſettled upon her and her children: but *Emery* denied having made ſuch ſettlement, and the negociation was ſtopped twice or thrice on that account. THE QUESTION was, Whether under the circumſtances of this caſe the leſſor of the plaintiff was entitled to recover?—For the plaintiff it was inſiſted, that this ſettlement was a voluntary conveyance, and therefore void under the ſtatute of 27 *Eliz.* c. 4. as againſt the mortgagee. On the other hand, the defendant contended, that the ſtatute of 27 *Eliz.* c. 4. relates only to purchaſers; and that a mortgagee is not a purchaſer within that ſtatute, and *Townſend* v. *Windham*, 2 *Vez.* 10. was cited, where LORD HARDWICKE ſaid, "If there is a voluntary conveyance of a real "eſtate, or chattel intereſt by one not indebted at the time; if

(1) See *Doe* v. *Staple*, *ante*, vol. III. p. 288.

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" ſuch voluntary conveyance be for a child, and no particular " evidence or badge of fraud to deceive ſubſequent credidors, it " will be good, though the party afterwards became in- " debted." LORD MANSFIELD: I rather doubt Lord *Hardwicke*'s ſaying that. When a woman, about to marry a ſecond huſband, makes a ſettlement of her eſtate upon the children by her firſt huſband, ſuch ſettlement has been held good.—IT WAS then ſuggeſted, that in fact the defendant had in conſideration of this ſettlement given up his intereſt in 1,470l. South Sea annuities for her life.—LORD MANSFIELD: That would have been a very material part of the caſe; and if upon enquiry the fact ſhould turn out to be really ſo, you may move for a new trial; but upon the caſe, as ſtated at preſent, no ſuch fact appears; and there is no doubt but a mortgagee is a purchaſer. As to the point of notice, it is held that notice makes no difference, becauſe it is of a conveyance made void by the ſtatute (*Vide* 5 *Rep.* 60. and *Eq. Ca. Abr.* 334.) SUSPEND the delivery of the poſtea for a few days to ſee if you have any evidence that can coupel the wife's giving up her annuity with the ſettlement made upon her and her children, ſo as to ſhew it was not a mere voluntary ſettlement, but made upon a ſufficient conſideration.—It never came before the Court again.

There is a diſtinction in the court of chancery, that if 5l. *per cent.* be reſerved for intereſt on a mortgage, with a condition to accept 4l. *per cent.* if punctually paid; this condition muſt be ſtrictly performed; and the debtor ſhall not have relief in equity after the day of payment is elapſed (becauſe the 1l. *per cent.* was to be abated upon a condition which is not performed): but if 4l. *per cent.* be reſerved with an agreement that if the 4l. be not punctually paid at the day, the mortgagee ſhall pay 5l. This ſhall be conſidered as a penalty added, and the court of equity will in ſuch caſe relieve againſt it. Bonafous *v.* Rybot, Ea. Ter. 3 Geo. 3. B.R. 3 *Burr.* 1374.

Where there are two or more mortgages, the Court will not compel a redemption of one, without the reſt.—*Kaye* was a mortgagee for 1141l. 6s. 6d. There were alſo two other mortgages to *Kaye* of different premiſes, to ſecure 525l. and 200l. with intereſt. And a motion was made on the behalf of the aſſignees of the mortgagor to redeem the firſt mortgage only, on payment of principal, intereſt, and coſts, under the ſtatute. *Kaye*, on ſhewing cauſe, inſiſted, that all ſhould be redeemed or none; eſpecially the third mortgage for 200l. which he apprehended to be a ſcanty ſecurity. AND THE COURT refuſed to compel a redemption of the firſt mortgage only, and diſcharged the rule, with coſts. Roe *ex dim.* Kaye *v.* Soley aſſignee, Mic. Ter. 11 Geo. 3. C.B. 2 *Bl. Rep.* 726.

The Court will not ſtay the proceedings in an ejectment brought by a mortgagee againſt a mortgagor, on the latter paying principal, intereſt, and coſts, if the latter has agreed to convey the equity of redemption to the mortgagee. Goodtitle *ex dim.* Tayſum *v.* Pope, Ea. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 185.

Buckley *v.* Buckley, Ea. Ter. 27 Geo. 3. B.R. 1 *Ter. Rep.* 647

A tenant to a mortgagor, who does not give him notice of an ejectment brought by the mortgagee to enforce an attornment, is not liable to the penalties of the 11 *Geo.* 2. c. 19. ſ. 12. for ſecreting ejectments.—PER CURIAM: The ſtatute only extends to caſes where ejectments are brought, which are inconſiſtent with the landlord's title. They obſerved likewiſe that the ejectment was brought for the purpoſe of compelling the tenant to attorn to the mortgagee, which the act expreſsly permitted him to do.

Berthen *v.* Street, Tr. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 326.

In this caſe the Court referred it to the Maſter to compute what was due for principal and intereſt, upon a mortgage ſecured by covenant, on which this action was brought. for this caſe does not differ in principle from thoſe on bills of exchange, and promiſſory notes, and it is no anſwer to ſimilar applications in thoſe caſes that a ſuit in chancery is depending (1).

Burnell *v.* Martin, Tr. Ter. 20 Geo. 3. B.R. 2 *Doug.* 417.

A party having a mortgage and alſo a bond, as a ſecurity for the ſame debt, may bring an action on the bond, and arreſt the defendant, pending a ſuit in equity for a foreclosure.—In this caſe it was moved for a rule to ſhew cauſe, why the defendant ſhould not be diſcharged out of cuſtody on filing common bail, upon an affidavit, ſtating, That *having borrowed* 300*l. of the plaintiff, he had given him, by way of ſecurity, a mortgage of a term for forty-five years of an eſtate let at* 40*l. a year, and alſo a bond*; *that, the intereſt being in arrear, the plaintiff had filed a bill of foreclosure, had ſoon after got into poſſeſſion of the eſtate, and had ſerved the defendant with a ſubpœna to hear judgment as on the* 29*th of May*; *after which ſervice he had arreſted him in an action on the bond in this court*; *and that the mortgaged premiſes were an ample ſecurity for the debt.* LORD MANSFIELD ſaid, the motion could not be complied with; for that it had been ſettled over and over again, that a perſon, in ſuch a caſe, is at liberty to purſue all his remedies at once; and the rule was refuſed.

Murder.

The King *v.* J. Borthwick, and ſixteen others, Tr. Ter. 19 Geo. 3. B.R. 1 *Doug.* 207.

ON an indictment for murder, if the jury find a ſpecial verdict, it is neceſſary, in order to affect principals in the ſecond degree, to ſtate, either, 1. that they were actually preſent; or, 2. ſome acts done by them at the very time, which unavoidably ſhew that they were preſent; or 3. that they were of the ſame party, on the ſame purſuit, and under the ſame engagements and expectation of mutual defence and ſupport with the

(1) On ſhewing cauſe againſt the rule for referring it to the Maſter, it was argued, that the Court had never gone ſo far as to grant the rule prayed for in covenant for payment of money; and further that the defendant had filed a bill in equity, praying an account.

perſon

perſon who did the fact.—A ſpecial verdict was found on the trial of an indictment for murder.—The indictment ſet forth, That, on the 7th of December, 19 *Geo.* 3. the priſoners feloniouſly, &c. upon one *Thomas Nichols* made an aſſault; That *Borthwick* (1) with a large ſtick, which he then held in both his hands, ſtruck the deceaſed ſeveral times, giving him thereby a mortal bruiſe on the head, of which he died the next day; and that the other priſoners at the time of the felony and murder by the ſaid *Borthwick* committed, feloniouſly, &c. were *preſent, aiding, abetting*, &c. the ſaid *Borthwick* the felony and murder aforeſaid, in manner and form aforeſaid, to commit, "and ſo the jurors aforeſaid, &c. ſay that "the ſaid *John Borthwick, Edward Barry*, &c. (naming all the "others,) him the ſaid *Thomas Nichols*, in manner and form "aforeſaid, feloniouſly, &c. did kill and murder."—One of the perſons indicted died before the trial. The others pleaded not guilty.—The verdict ſtated the circumſtances of the caſe, and the counſel for the proſecution came prepared to argue the general queſtion of the legality of preſſing; by a parol delegation of the power veſted in the lieutenant, the priſoners having acted under an impreſs-warrant. But as they had acted only under, and not by an indorſement on it in writing, as is uſual, and by which only they can be legally authorized: and it was admitted by the counſel for the priſoners, that they were treſpaſſers. It was ſtated (as none of them could be conſidered as more than principals in the ſecond degree, the jury not having found who it was that gave the blow) that the verdict was defective, in not ſtating them to have been *preſent, aiding and abetting*. To prove that this was eſſential, 1 *Hale*, 438. was cited *Rex* v. *Meſſenger* (2), and *Rex* v. *Royce* (3). In anſwer to this, it was obſerved, that the technical words "*preſent, aiding and abetting*," are not neceſſary in a ſpecial verdict, as they are in an indictment, and that enough was found, for the Court to imply, either an *actual* or a *conſtructive* preſence. To ſhew that the latter was ſufficient, a caſe in 3 *Ed.* 3. *Coron.* 350. and Lord *Dacre's Caſe*, cited in 1 *Hale*, 439. were relied on.—THE COURT took time to conſider; and WILLES, *Juſtice*, now delivered their opinion: He obſerved that it was unneceſſary to argue the general queſtion, whether the warrant ſtated in the ſpecial verdict was legal or not. For, unleſs the priſoners had a power to execute it, and conducted themſelves legally in the execution, there is no occaſion for the Court to conſider that queſtion. It was admitted by the counſel for the priſoners, that they were not ſtrictly juſtifiable in the execution of the warrant, and therefore were treſ-

(1) If ſeveral are indicted, *A.* as giving the mortal blow, and the others as preſent, aiding, &c. evidence that one of the others gave the blow, and that *A.* was only preſent, &c. will maintain the indictment, 1 *Hale*, 437, 438.

(2) *Kel.* 70. (3) *E.* 7. *Geo.* 3, 4 *Burr.* 2073, under the title RIOTS,

paſſers. The Court were all of that opinion, on reading the verdict; for the authority given by the warrant could not be delegated by *parol* to other perſons. On this ground the Court ſtopped the counſel in the argument of the general queſtion, and it is become unneceſſary to conſider the degree of guilt which might have been imputed to the priſoners, for we are all of opinion that the verdict is ſubſtantially defective. It is not expreſsly found that they all were *preſent aiding and aſſiſting* when the blow was given, or even when the affray began. That either an *actual* or a *conſtructive* preſence was neceſſary to involve the priſoners in the homicide, was rightly admitted. But it was contended, 1. That enough is ſtated to warrant us in implying that all the priſoners were *actually* preſent the whole time; 2. That an *actual* preſence is not neceſſary, and that, as the priſoners all went together on one common illegal deſign, *that* conſtituted a *conſtructive* preſence, and would, in law, involve all of them in the ſame degree of guilt. 1. As to the firſt point, in ſo penal a caſe as this, where the preſence is of the eſſence of the crime, the Court will not preſume it. It is undoubtedly true that no technical words are neceſſary in a ſpecial verdict. It is not neceſſary to ſay, in words, that the priſoners were all *preſent*. If it were ſtated that they did ſome act at the time, that would be ſufficient, becauſe the Court muſt then unavoidably ſee that they were preſent. In *Meſſenger's Caſe*, reported in *Kelynge*, the judges ſay, "where ſeveral acts of force are found "to have been actually committed in purſuance of the de"ſign, there is no need to find the priſoners to have been "*aiding and aſſiſting*, for that is only neceſſary to be found "where the jury find a perſon was there amongſt them, and "find no particular act of force done by him, but only his "preſence. There it is neceſſary to find he was preſent "*aiding and aſſiſting*" (1). *Francis's Caſe* (2) was much ſtronger than the preſent. This was an indictment for a highway robbery. All the priſoners were found to be in company together. *Francis* ſtruck the money out of *Cox's* hand, and, upon his offering to take it up from the ground, they threatened to knock out his brains, whereupon he deſiſted; and the jury further found that the priſoners *then and there* immediately took up the money, and rode off with it, and *Cox* immediately purſued. To conſtitute a highway robbery, a taking "in the preſence of the perſon robbed" is neceſſary; and all the judges held that, on that finding, they could not imply that the money was taken up in *Cox's* preſence, and that a ſpecial verdict cannot be made good by intendment or conſtruction. In the preſent caſe, it is not found that the priſoners did any act, during the affray, or that they were *preſent aiding and aſſiſting*; and the Court cannot intend that they

(1) *Kel.* 78. (2) *E.* 8. *Geo.* 2. *Str.* 1035. *Com.* 478.

were

were. 2. As to the ſecond point, and the authorities relied on; in 3 *Ed.* 3. *Coron.* 350. all the priſoners were *actually* preſent. In Lord *Dacre's Caſe*, all went with a deſign to reſiſt every oppoſition. In *Moore* (1) it is ſtated, that they went "under an agreement to kill all who ſhould reſiſt them," and it appears, by that report of the caſe, as well as by what is ſaid in *Foſter* (2), that they were all acting in the ſame purſuit at the time when the murder was committed. *Foſter* ſays, "it was ſufficient that, at the inſtant the fact was committed, they were all of the ſame party, and upon the ſame purſuit, and under the ſame engagement and expectation of mutual defence and ſupport with thoſe that did the fact." In the preſent caſe, as it is not found that all the priſoners were of the ſame party, and on the ſame purſuit, &c. *when the fact was committed*, as it is not found who gave the blow, or who was preſent, we are all of opinion that the priſoners muſt be diſcharged.—The priſoners were diſcharged.

If an officer on the impreſs-ſervice, acting under an impreſs-warrant, duly indorſed, fire upon a veſſel *in the uſual manner to bring veſſels to, and hit the haulyards*, and thereby kill a man, it is only manſlaughter. Rex *v.* Rowland Philips, Tr. Ter. 14 Geo. 3. B.R. *Cowp.* 830.

Muſic.

A MUSICAL compoſition (3) is a writing within the ſtat. 8 *Anne*, c. 19. for the encouragement of learning, by veſting the copies of printed books in the authors or purchaſers of ſuch copies, during the times therein mentioned.—PER CURIAM: The words of the act of parliament are very large: *Books* AND OTHER WRITINGS, it is not confined to language or letters: Muſic is a ſcience, it may be written, and the mode of conveying the ideas, is by ſigns and marks; a perſon may uſe the copy by playing it; but he has no right to rob the author of the profit, by multiplying copies, and diſpoſing of them to his own uſe. If the interpretation contended for was to hold, it would equally apply to algebra, mathematics, arithmetic, hieroglyphics: all theſe are conveyed by ſigns and figures: there is no colour for ſaying that muſic is not within the act. Bach *v.* Longman, *et al.* Tr. Ter. 17 Geo. 3. B. R *Cowp.* 623.

Naval Stores.

A PERSON convicted of concealing naval ſtores may be adjudged to pay the penalty of 200l. *or be puniſhed corporally*, The King *v.* W. Bland, Mic. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 370.

(1) 86. (2) 354.

(3) The compoſition in queſtion was a *Sonata* for the harpſichord, which the defendants had pirated.

at the election of the Court.—The defendant having been convicted on an indictment for concealing naval ſtores, was brought up for judgment. And it was moved on the part of the Crown, for a corporal puniſhment on the defendant. The ſtatutes relating to this offence, are the following:—By 9 & 10 *W.* 3. c. 41. ſ. 2. it is enacted "that ſuch perſon (as in the "defendant's ſituation) ſhall forfeit ſuch goods, and the ſum "of 200l. together with the coſts of proſecution, AND ſhall "alſo ſuffer impriſonment until payment and performance "of the ſaid forfeiture." The ſtat. 9. *Geo.* 1. c. 8. ſ. 4. enables the Court "to mitigate the penalty for the ſame, as they "ſhall ſee cauſe, and to commit the offender, ſo convicted, to "the common gaol of the county, there to remain without "bail or mainprize until payment be made of the penalty "and forfeiture impoſed by this and the former act (9 & 10 "*W.* 3.), or mitigated as aforeſaid, *or to puniſh ſuch offender "corporally*, by cauſing him to be publicly whipped, or committed to ſome public workhouſe, there to be kept to hard "labour for ſix months, or a leſs time, as to ſuch judge, &c. "in his diſcretion ſhall ſeem meet." The ſtat. 17 *Geo.* 2. c. 40. ſ. 10. after reciting doubts whether the two former ſtatutes gave juriſdiction to juſtices of aſſize, juſtices of the peace, &c. to try ſuch offences, enacts and declares "That juſtices of "aſſize, &c. may hear and determine ſuch offences, &c. and "may impoſe any fine, not exceeding 200l. and mitigate "the penalty inflicted by thoſe acts, and commit the offender to the common gaol of the county, there to remain until "payment, &c. *or in lieu thereof* to puniſh ſuch offender in "the premiſes corporally, by cauſing him to be publicly "whipped and committed to ſome houſe of correction or "public workhouſe, there to be kept to hard labour for "three months, or leſs time, as, &c."—THE COURT ſaid that the words of the ſtatutes were in the disjunctive, enabling them either to impoſe a penalty, or *to puniſh the offender corporally*. And that this conſtruction had already been put on the ſtatutes in ſeveral inſtances, particularly in the caſe of *R.* v. *J. Newel* (*M.* 33 *G.* 3.) And this appearing to the Court to be a groſs caſe, they ſentenced the defendant to Clerkenwell priſon for three months, there to be kept to hard labour; and, during that time, to be publicly whipped on Clerkenwell Green for the ſpace of 100 yards (1).

(1) In the laſt term a defendant *(A. Chappie)* was brought up for judgment for a ſimilar offence; and *Broderick* moved that he might be adjudged to pay the whole penalty of 200l. *and the coſts*; obſerving that though there was no inſtance in which a perſon convicted on theſe acts had been compelled to pay the coſts, there could be no doubt but that under the words of the ſtat. 9 and 10 *W.* 3. c. 41. ſ. 2. the Court had the power of awarding coſts; when *The Court* adjudged the defendant to pay the penalty of 200l. together with the coſts, which were taxed at 12l.

BY

New Foreſt.

Biddlecombe v. Kervel, Hil. Ter. 1 Geo. 3. B.R. 2 *Burr.* 1117.

BY the ſtat. of 9 & 10 *Wil.* 3. c. 36. for the increaſe and preſervation of timber in New Foreſt, Hampſhire, which gives the King liberty to incloſe two thouſand acres; (1000 immediately, and the other 1000 at a ſpecified time): and afterwards, 200 in each year, for 20 ſucceſſive years.—It is enacted by ſ. 9. "That every perſon having any right of common of paſture or pannage, or any privileges within the "ſaid foreſt, or any part thereof, ſhould enjoy the ſame for the "future, IN MANNER FOLLOWING, *viz.* their ſaid right of "PANNAGE, *between 14th September and 11th November* "*yearly*, from and after *Michaelmas*, 1716, and not before; on "*forfeiture* of any hog, pig, or ſwine, that from and after "the Feaſt of *St. Michael* next, and before the time aforeſaid, ſhall be found in the *waſtes* of the ſaid foreſt: and "their ſaid right of common of paſture ſhall be, and is "hereby, continued to them in and through ſuch of the ſaid "waſte ground of the ſaid foreſt, *at ſuch time and times as* "*the ſame ſhall not be incloſed* as *aforeſaid*; the time of the "fence month (*viz.* 15 days before and 15 days after the "Feaſt of *St. John the Baptiſt*, yearly), and at the time of "the winter-heyning (*viz.* from the 11th November to the "23d of April yearly), excepted."—PER CURIAM: The act gives the Crown the power of incloſing 6000 acres in the whole, for the ſake of increaſing and preſerving the growth of timber; and this is to be always free from common, and all rights, &c. whilſt it remains incloſed: but as to the *unincloſed*, the right remains as it was, under certain limitations and exceptions. And it is clear that the ſtatute meant, that the right of COMMON in the *incloſed* parts ſhould be reſtrained ABSOLUTELY, ſo long as they ſhould *remain incloſed*; but be continued in the UN*incloſed parts only*, under certain *limitations* and exceptions: but the right of PANNAGE is *abſolutely* taken away, for *eighteen* years; and after that, *reſtrained to a particular limited time*; and the hogs diſtrained in this caſe were there found, at a time when they ought *not* to have been there. And 2dly. although the Crown has only incloſed 1000 acres as yet: the incloſure of the *whole* is not neceſſary; it is *not* a condition *precedent*, "that the whole ſhall be firſt incloſed, before "the reſtriction of common ſhall at all take place."

New Trial.

Ducker v. Wood, Tr. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 277.

THE Court may in any caſe grant a new trial upon the ground of exceſſive damages.—On a motion to ſet aſide a verdict on account of exceſſive damages—Lord *Mansfield* ſaid, there was no doubt but that the Court had the power of taking the opinion of a ſecond jury in any caſe where the damages were exceſſive; but that all theſe queſtions depend-

ed on their own circumſtances, on which the Court would exerciſe their diſcretion. But in this caſe, which was an action of aſſault, upon hearing the report of the judge, the Court thought fit to reject the motion.

Fabrilius *v.* Cock, Mic. Ter. 6 Geo. 3. B.R. 3 *Burr.* 1771.

A new trial was granted in this caſe, ſubornation of witneſſes having been diſcovered ſince the former trial.—On the trial of an action of trover for 6000 pagodas, of the value of eight ſhillings each, or 2400l. ſterling; a verdict was given for the plaintiff, the defendant afterwards moved for a new trial upon the ground, "That the whole was a FICTION, ſupported by *per-*"*jury*, which he could not be prepared to anſwer. That *ſince* "the trial, many circumſtances had been diſcovered, to *detect* "the iniquity, and to ſhew the ſubornation of the witneſſes." And THE COURT, after a very ſtrict ſcrutiny, granted a new trial on payment of coſts. And the plaintiff never dared to try it again. Afterwards there was a rule for the plaintiff's not proceeding.—Judgment as in caſe of a nonſuit.

Broadhead *v.* Marſhall and Wife, Executors of William Hagget, Tr. Ter. 14 Geo. 3. C.B. 2 *Black.* 955.

Diſcovery of new evidence by the attorney of an executor defendant (then abſent from *England*), though in the actual cuſtody of the attorney himſelf, yet not known by him ſo to be, is a ground for a new trial.

Liſter *v.* Mundell. Ea. Ter. 39 Geo. 3. C.B. 1 *Pul.* & *Baſ.* 427.

So, if the teſtimony of witneſſes on which a verdict has proceeded be founded on, and derives its credit from, particular circumſtances, and theſe circumſtances be afterwards clearly falſified by affidavit, the Court will grant a new trial.—At the trial of this cauſe, the principal point in diſpute was, whether a certain ſum of money had been loſt at the Scarborough races in Auguſt, 1793, or in Auguſt, 1792, the latter not being within twelve months previous to the bankruptcy; and to prove that it was loſt in 1793, the plaintiff produced three witneſſes, all of whom ſwore to the fact of the money having been loſt in 1793, and two of them founded their teſtimony on particular circumſtances within their recollection, *viz. J. D.* That till 1793 he had lived at H. in Yorkſhire, and on his leaving that place had come immediately to Scarborough: and *F. W.* that a child of his died about a month after the race in queſtion took place. It was moved for a new trial on two affidavits contradicting the particular circumſtances on which the two witneſſes founded their teſtimony: *viz. firſt*, the affidavit of two perſons who had been overſeers of the poor in 1791, and ſwore that *J. D.* was maſter of the poor-houſe then, and was paid off and diſcharged on the 22d November in that year, and that within a few days afterwards, he went and reſided at Scarborough. *Secondly*, the affidavit of two other perſons, who together with the vicar of the pariſh where *F. W.* reſided, had examined the regiſtry of burials, and found that a child of his had been buried there on the 17th of Auguſt, 1792; and that no other child had been buried there ſince that time; and the certificate of the vicar to that effect was alſo produced.—THE COURT obſerved that it was unuſual

uſual to grant a new trial on evidence contradicting the teſtimony on which the verdict had proceeded, diſcovered ſubſequent to the trial, yet as the very facts on which the witneſſes had founded themſelves, was falſified by the affidavits produced, they thought it afforded a ſufficient ground for a new trial, and the rule was made abſolute.—(*See alſo Turner* v. *Pearte*, *ante*, vol. III. p. 404.)

A new trial may be granted in ejectment cauſes.—After cauſe ſhewn againſt granting a new trial, in an ejectment-cauſe, Lord MANSFIELD ſaid: Its being an *ejectment*-caſe is no reaſon at all againſt granting a new trial: for, though a new ejectment may be brought, yet here will be a change of poſſeſſion; by which the defendant will be a ſufferer. This objection againſt granting a new trial, "*becauſe* a new ejectment may be brought," has been over-ruled again and again. YATES, J. New trials are often granted in ejectment caſes as well as in others, where the party praying a new trial would ſuffer by a change of poſſeſſion. Goodtitle *ex dim.* Alexander v. Clayton *et al.* Eaſter. 8 Geo. 3 B R. 4 *Burr* 2224.

So in this caſe, on a motion for a new trial, Lord MANSFIELD, Ch. J. It has been ſaid, that in ejectment the Court will not readily grant a new trial. It is true, where a verdict has been given for the defendant; but where the plaintiff has obtained a verdict, it is a great difference to the defendant, whether he has a new trial, or is forced to become plaintiff on a new ejectment.——Ejectments are ſubſtituted in the place of real actions, in which the title appeared upon the pleadings, and gave no room for ſurprize. We ſhould therefore rather lean to new trials on behalf of defendants, in the caſe of ejectments, eſpecially on the footing of ſurprize. Another good rule for granting or refuſing new trials, is that, upon the whole, ſubſtantial juſtice has not been, or has been, done to the parties.—Rule diſcharged. Leſſee of Clymer v. Littler, Mic. Ter. 2 Geo. 3 B R. 1 *Black. Rep.* 348.

On the trial of an action of treſpaſs, aſſault, and falſe impriſonment, the jury were much divided in their opinions, and wiſhed to have found, by way of ſpecial verdict, that the plaintiff was impriſoned by *Suja Dowla*, an independent prince in India (1), in conſequence of a letter from the defendant who was preſident of Calcutta (ſtating it), and then left it to the Court, whether ſuch impriſonment was an impriſonment by the naboh or by the defendant. But the Chief Juſtice telling them, that this would be to find evidence and not facts, they with ſome reluctance agreed to find the general verdict above mentioned. And now it was moved for a new trial on two grounds; 1ſt, The diſſatisfaction of the jury at being forced to give a general verdict, whereas they wiſhed to have found it ſpecial, if they had known how. 2dly, That *Suja Dowla* was a ſovereign prince; and that by the conſtitution of his government, the impriſonment of *Rafael* was no Rafael v. Vereſt, *et al.* Hil. Ter. 15 Geo. 3 C.B. 2 *Black. Rep.* 983.

(1) Vid. vol. I. p. 170, 586.

treſpaſs in him, therefore it could not be a treſpaſs in *Vereſt* by whoſe advice he was determined. That he who counſels, aids, or aſſiſts in a treſpaſs cannot be convicted, unleſs the principal be liable to conviction. *Stiles* and *Cox*, *Vaugh.* 113. *Gould*, J. I incline that a new trial ſhould be granted. The ſpecial jury were diſſatisfied with their own verdict, and wiſhed to have found the matter ſpecially. *Blackſtone*, Juſtice, alſo thought there ſhould be a new trial in this caſe. Though I concur with the Lord Chief Juſtice in thinking, that the ſpecial matter, propoſed to be found by the jury, was merely evidence, and not a fact reſulting from evidence, and therefore could not be received in that ſhape; yet, as they expreſſed a doubt upon the whole queſtion, and were deſirous of referring the matter of law (if any ſuch there was) to the Court, it would have been right to have ſtated ſuch facts ſpecially, upon which a legal queſtion might ariſe. Such as the nature of *Suja Dowla*'s ſovereignty; the degree of influence which the defendant's letter conveyed; whether requeſt, advice, inſtigation, procurement, command, or compulſion; and then have concluded to the judgment of the Court. Whether ſuch degree of influence, under ſuch circumſtances, impreſſed upon ſuch a potentate, did in conſtruction of law make the act of *Sujah Dowla* to be the act of the defendant himſelf. The opinion which the Court might then form, might have been reviewed in the ſeveral ſtages of a writ of error; as ſo new and ſo important a queſtion deſerves. As therefore this verdict is given by a *doubting* and an *unwilling* jury, who miſtook the directions of the judge, that they were not to find *evidence*, for a prohibition againſt finding *ſpecial facts*, I think the parties ought not to be concluded by ſuch a verdict. *Nares*, Juſtice, of the ſame opinion. *De Grey*, Chief Juſtice *(Contra)*. In exerting the juriſdiction of granting new trials the Court is not arbitrary, nor has any diſcretionary power. The only intrinſic grounds upon which they can be granted, are, that the verdict is againſt evidence, againſt law, or erroneous through the exceſs of damages. The latter objection does not occur in the preſent caſe. Neither is this verdict againſt evidence. The Court will not ſet it aſide, merely becauſe they might have given it another way. The evidence aroſe from a combination of facts of which the jury was to judge. On the one hand the nabob is independent of the company by conſtitution; ſuſpected and watched by the company; on the other, was from accidental circumſtances obliged to be ſubſervient to their views, and had an Engliſh army of Seapoys in his very court. What effect the defendant's letter had upon him in this ſituation depends on the weight of evidence. I think that as a judge I was not at liberty to weigh it. That was the province of the jury. As to the matter of law it never

was

was, nor can be a ground for a new trial, to ſtate facts upon the record, in order to introduce a queſtion of law, which was not ſtarted at the trial itſelf; but is a mere after-thought, ariſing from the ingenuity of the bar. However, as my brothers are of a different opinion, the rule muſt be made abſolute, for a new trial, on payment of coſts.

In an action on the caſe for diverting the plaintiff's water-courſe, where the jury under circumſtances of aggravation gave 3000l. damages, the Court granted a new trial on the ground that the damages given greatly exceeded the amount of the injury proved.—It being a mere queſtion of property as ſtated on the record, where there was ſomething whereby to meaſure the damages, namely, the deterioration of the property itſelf; and therefore not like caſes of perſonal injuries, as actions for adultery, ſlander, &c. Though, they ſaid, that even in ſuch a caſe as the preſent, which was attended with ſeveral circumſtances of aggravation, they would not meaſure the damages which the jury had given in a nice balance; but, making every liberal allowance in that reſpect, they were ſtill bound to take care that the verdict ſhould not greatly exceed the damage proved. BUT THE COURT having referred to ſeveral precedents, particularly one in *Sty.* 466. by which it appeared to have been the practice in ſuch caſes to let in the defendant to a new trial upon the terms of the former verdict ſtanding as a ſecurity in the mean time for the damages which might be given upon another trial, they thought the rule was founded in juſtice and convenience, and fit to be enforced not only upon this but upon all future occaſions of the ſame kind. Upon thoſe terms therefore the rule for ſetting aſide the former verdict and granting a new trial was made abſolute. Pleydell *v.* The Earl of Dorcheſter, Hil. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 529.

Where the jury have found a verdict for the plaintiff upon a preſumption contrary to evidence, the Court will not grant a new trial if the plaintiff be entitled to recover in conſcience and equity.—This was an action on a promiſſory note for 180l. given to the plaintiff by the defendant in conſideration of the plaintiff's marrying his daughter. The defence ſet up was, that, *though there was a marriage in fact, it was not a legal one, becauſe the parties were married by licenſe when the plaintiff was under age, and there was no conſent by his parents or guardian.* In fact both his parents were dead when the marriage was celebrated, and there was no legal guardian; but the plaintiff's mother, who ſurvived the father, on her death bed deſired a friend to become guardian to her ſon, with whoſe approbation the marriage was had. It alſo appeared, that when the plaintiff came of age, his wife was lying *in extremis* on her death-bed, and died in three weeks afterwards: but in her life-time ſhe and the plaintiff were always treated by the defendant and all his family as man and wife. Upon theſe Wilkinſon *v.* Payne, Mic. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 468.

theſe facts, *Groſe*, J. before whom this action was tried, left it to the jury to preſume a ſubſequent legal marriage, which they did accordingly, and found a verdict for the plaintiff. It was afterwards moved, to ſet the verdict aſide.—PER CURIAM (after cauſe ſhewn): In the caſe of new trials it is a general rule, that in a hard action, *Salk.* 644, 648, where there is ſomething on which the jury have raiſed a preſumption agreeably to the juſtice of the caſe, the Court will not interfere by granting a new trial, where the objection does not lie in point of law. In this caſe, though the firſt marriage was defective, a ſubſequent one might have taken place: the parties cohabited together for a length of time, and were treated by the defendant himſelf as man and wife; theſe circumſtances therefore afforded a ground on which the jury preſumed a ſubſequent marriage. And if there were any ground of preſumption, it is ſufficient in a caſe like this. And we ſhould ill exerciſe the diſcretion veſted in the Court, if, after the jury had preſumed a ſubſequent legal marriage under all the circumſtances of this caſe, we were to ſet aſide their verdict.

Marſh and Wife *v.* Bower and Wife. Mic. Ter. 13 Geo. 3. C. B. 2 *Black.* 851.

Where a verdict in an action for words is clearly againſt evidence, yet if the damages on a right verdict could have been only trivial, a new trial ſhall not be granted.—On the trial of an action for words. The defendant's wife had ſaid to the plaintiff's wife, who had been evidence on a writ of enquiry, "You have forſworn yourſelf, and your ears "ought to be nailed to the pillory." But the jury found a verdict for the defendant. Lord *Mansfield*, who tried the cauſe on the home circuit, reported, that he expected a verdict for the plaintiff, but with *very ſmall damages*; as the words were ſpoken in heat and paſſion, and never afterwards repeated. *The Court* unanimouſly declared, that they would not grant a new trial for the ſake of ſixpence damages; in mercy to the plaintiff as well as the defendant.

Reavely *v.* Mainwaring, eſq. Walker, *et al.* Hil. Ter. 2 Geo. 3. B R. 3 *Burr.* 1306.

The Court will not grant a new trial in a hard caſe.—This was an action of treſpaſs *vi et armis*, for taking five boys, apprentices to the plaintiff, out of the hands of the plaintiff. Theſe were apprentices regularly bound to *Reavely*, for the ſea ſervice. The action was treſpaſs *vi et armis*, for taking them. It was proved, on the part of the plaintiff, that they were voluntarily indentured to him; and were by his direction delivered to one *Jones*, to be kept by him, to prevent their running away. Part of *Jones*'s houſe was a priſon; part, a public-houſe. The juſtices, at their ſeſſion of gaol-delivery, upon a complaint of "An intention to ſell "them in Guinea," diſcharged them. *Reavely* ordered them to be put into the hands of *Jones*. *Walker* ſent a note to *Jones*, to deliver them to the lieutenant of a tender of a man-of-war; who thereupon delivered them, and took a receipt for them. This was the evidence for the plaintiff. On the

the part of the defendants, it appeared that one *Lane* told *Walker* of the boys' complaints, and of the affecting ſcene that he had ſeen. One of the boys alſo gave evidence of *Blackwood*'s picking them up; and of their being deceived and ill uſed at *Jones*'s, and their endeavours to eſcape. That *Walker* and *Pell* came to the priſon; and the boys made their complaints to them. Upon which they were ſent for to the court-houſe; and they all made their complaints to the juſtices, of their being deceived, impriſoned, ill uſed, &c. and their apprehenſions of being ſold. The plaintiff next morning ſent coaches to carry them away. They reſiſted. *Walker* (who was lieutenant of a man-of-war) being preſent, aſked them if they were willing to ſerve the king. They aſſented. He ſent a preſs-gang. They went with their own conſent. They begged of the juſtices to be ſet at liberty. They were brought into court before the juſtices as priſoners. But no commitment being produced, the juſtices diſcharged all and each of them, by writing againſt their names—"Diſ-"charged." *Walker* bid *Jones* to keep them *that night*. But there was no order to deliver them to *Walker*: they were only diſcharged from being kept as priſoners. Whereupon *Walker* aſked if they were willing to ſerve the king: to which they aſſented. And *Walker* gave *Jones* a guinea to take care of them that night. At the trial all the defendants were found "*Not guilty*;" as well the juſtices as the lieutenant.—Lord MANSFIELD, Ch. J. It was objected at the trial, that *Walker* could not be liable to an action of treſpaſs *vi et armis*: for that *Jones* delivered them up *voluntarily* to the lieutenant. But I thought then, and now think that he *was* liable to this action; becauſe he ſent a *force*, a preſs-gang, to take them. As to the juſtices, there was no colour to maintain the action againſt them. A ſpecial jury of gentlemen found all the defendants *not* guilty. I think they *ought* to have found *Walker guilty*, upon the evidence that was laid before them. Yet it would have been very hard, if *Walker* had ſuffered for his behaviour upon this occaſion; becauſe he ſeems to have acted with good intentions. Therefore there ought *not* to be a new trial.

A new trial may be granted after two concurring verdicts.—After two verdicts for the plaintiff, the defendant had moved for another new trial. It was an action of treſpaſs: and the trials had been in Cheſter. The defendant was an attorney. At the firſt trial the jury found that he had acted beyond his office and authority, or his duty as an attorney; and gave a verdict for the plaintiff: which verdict was ſet aſide, and a new trial granted. The ſecond verdict was alſo found for the plaintiff: which ſecond verdict was now prayed to be ſet aſide alſo; and a third new trial was prayed. A rule was made upon the plaintiff to ſhew

Goodwin *v.* Gibbons, one, &c. Tr. Ter. 7 Geo. 3. B.R. 4 *Burr.* 2108.

ſhew cauſe. Upon ſhewing cauſe, the judge's report was read; and the queſtion was much litigated: but it is not neceſſary to ſpecify the particulars; becauſe only the general doctrine laid down is meant to be here taken notice of.—PER CURIAM: There is no ground to ſay that a new trial ſhall not be granted after a former new trial has been once granted before. There is an index to a report book (1), which miſtakes a deciſive *particular reaſon* in a particular caſe, for a GENERAL *rule*. See Modern Caſes, index, under the word "Trial." But there is no ſuch general rule as has been ſuppoſed. A new trial muſt depend upon anſwering the ends of juſtice. A ſecond new trial may be granted, as well as a firſt, *if* the reaſons for granting it be ſufficient. 'Tis very difficult to lay down any certain rule. Indeed, if two or three juries have determined upon the ſame point and the ſame circumſtances, it may be a matter of diſcretion, not to grant a new trial, but to leave the matter at reſt. Upon the circumſtances of the preſent caſe, however, no new trial ought to be granted.

Parker *v.* Anſell, Hil. Ter. 15 Geo. 3. C.B. 2 *Black.* 963.

Where there are two contrary verdicts, and the latter is ſatisfactory to the Court, the loſing party is not *entitled* by any rule or practice to a third trial.—In this caſe it was inſiſted, that there having been two contrary verdicts, the defendant was by law and conſtant practice entitled to a third trial. But it was declared by *De Grey*, chief juſtice, and *tot. Cur.* that they knew of no ſuch rule, either at law, or even in equity (which was moſt inſiſted on for the defendant, ſee 2 *Wms.* 563. 2 *Atk.* 378). And therefore they diſcharged the rule.

Camden *v.* Cowley, Tr. Ter. 3 Geo. 3. B.R. 1 *Black. Rep.* 418.

After a full trial by a competent jury, if no freſh light can be thrown in, a new trial ſhall not be granted.—This was a motion for a new trial in an action on a policy of inſurance (2); the verdict being (as was ſuggeſted) contrary to the ſenſe and meaning of the parties. But Lord *Mansfield*, chief juſtice, ſtated to the Court, That he had left it to the jury, which was a very capable one, that the inclination of his opinion was the contrary way; but he thought it was thoroughly tried, and that no new light could be thrown in. And therefore he was againſt granting a new trial; which, if the verdict ſhould be contradictory, muſt in the end produce a third.—*Deniſon*, J. accordant.—*Wilmot*, J. alſo accordant.

Sampſon *v.* Appleyard, Mic. Ter. 12 Geo. 3. C.B. 3 *Wils.* 272.

In treſpaſs, the defendant preſcribed for a way over the cloſe in which, &c. and miſtook the *terminus a quo*, in his plea; there was a verdict for the defendant: and the Court refuſed to grant

(1) 6th Modern; where the index ſays—"After a trial at bar, a new "trial denied." *Sed qu.*

(2) See Vol. III. p. 392; and p. 343, *ante*.

a new

a new trial, the merits having been tried.—Treſpaſs, *quare clauſum fregit.* The defendant pleaded 1ſt, Not guilty. 2dly, He preſcribed for a certain way (leading from a certain common *highway* in Birkin) into, through, and over the plaintiff's cloſes, in which, &c. the plaintiff, by his replication, traverſed the preſcription, whereupon iſſue was joined. At the trial, the council for the defendant having admitted the treſpaſs, called ten witneſſes, who clearly proved the defendant's right of way. But it appeared upon the evidence, that this *way* did not lead from a *common highway*, but did lead from a certain *private way* in Birkin; whereupon it was objected at the trial, that the defendant had not proved his preſcription to the way, it being laid in his plea that the *terminus a quo* was from a common *highway*, whereas the proof was, that it was from a *private way*; but the right to the way over the plaintiff's cloſes, in which, &c. being clearly proved, *Gould*, J. before whom the cauſe was tried, left it to the jury (nine of which jury having had a view), who found a verdict for the defendant for his right of way. And it was now moved for a new trial, objecting that the defendant had failed in proving the preſcription as laid in his plea; that the *termini a quo*, and *ad quem* over what land ought to be laid, and proved with the utmoſt certainty, that here the *terminus a quo* was laid to be a *common highway*, but was proved to be a *private way*; and *Lit. Rep.* 295. was cited. PER CURIAM: Upon this record, it is certain that the defendant was bound to prove his right of way as it is pleaded; he has proved it to a common intent; the *terminus a quo* is pleaded to be a *common highway* (it is not deſcribed to be the king's highway), and a *common highway* may be a *private way* in common ſenſe and underſtanding; however, the merits have been tried, and therefore a new trial ought not to be granted. The Court never grants a new trial when they clearly ſee the merits have been fairly and fully tried. In pleading a right of *way*, you need not deſcribe the *terminus a quo*, becauſe the plaintiff may reply *extra viam*, which will be a matter for evidence.—New trial refuſed *per totam Curiam.*

But in this caſe, a new trial was granted, although there was evidence on both ſides, becauſe all the witneſſes ſubſcribing to a releaſe were not called and examined.—On the trial of an action of debt upon a bond, where the defendant had pleaded a general releaſe, and the plaintiff replied *non eſt factum*, a verdict was found for the defendant. It was moved for a new trial, upon an affidavit that very ſtrong circumſtances of forgery and perjury appeared upon the trial. The *Chief Baron* reported, that at the trial the defendant produced a general releaſe, ſuppoſed to be executed by the plaintiff the 10th of October, 1768, to which *Albert* and *Goff* appeared to be ſubſcribing witneſſes; *Albert* was called, and ſwore, that in October,

Norris v. Freeman, Mic. Ter. 10 Geo. 3. C.B. 3 *Wils.* 38.

tober, 1768, he was ſent for, to go to the plaintiff's houſe to be a witneſs; that he went thither, and there ſaw the plaintiff ſeal and deliver the releaſe produced in evidence, alſo ſaw the defendant execute another general releaſe to the plaintiff (that the other ſubſcribing witneſs was a poor labouring man, but he was not called to prove the releaſe); that this was done about one o'clock that day, at the plaintiff's houſe, which is about thirty miles diſtant from Worceſter. *John Webb*, a clergyman, and *Joſeph Collins*, were called for the plaintiff, who ſwore they had often ſeen the plaintiff write, and that the plaintiff's name ſubſcribed to the releaſe, was not of his hand-writing, as they believed; and that on the 10th and 11th of October, the plaintiff and witneſſes were at Worceſter all day; it was the mayor's feaſt day. Then *Thomas Homer* was called (for plaintiff), who ſwore he heard the defendant ſay, he would let judgment go by default in this cauſe, and file a bill in *chancery* againſt the plaintiff for an account, and did not pretend he had any releaſe from the plaintiff. It alſo appeared, that the declaration in this cauſe was of trinity term 1768, and that the releaſe was not pleaded until trinity term laſt. In reply, the defendant called ſeveral witneſſes, who ſwore, they believed the name ſubſcribed to the releaſe produced, to be the plaintiff's hand-writing. Upon ſumming up the evidence, the *Chief Baron* acquainted the jury, that he thought the ſtrength of the evidence was with the plaintiff; but they found a verdict for the defendant.—CURIA: There are many caſes where the Court will grant new trials, notwithſtanding there was evidence on both ſides, as where all the light hath not been *let in* at the trial which might and ought to have been; we think the other ſubſcribing witneſs, *Goff*, ought to have been called and examined to the execution of the releaſe; and he not having been called, we think it would be hard the plaintiff ſhould be bound by this verdict, eſpecially as the releaſe is not in the power of the plaintiff, and ſo he cannot prefer an indictment for forgery. The *Lord Chief Juſtice* ſaid, he thought the evidence was very ſtrong on the part of the plaintiff, and that if the cauſe had been tried before him, he would (under the circumſtances appearing) have called out for *Goff*, the other ſubſcribing witneſs; and if he had not been produced, he ſhould have thought it a very ſtrong caſe for the plaintiff, and directed the jury to have found a verdict for him.—New trial granted.

Spong v. Hog, Hil. Ter. 12 Geo. 3. C.B. 2 *Black.* 802.

A new trial ſhall not be granted, becauſe the counſel thought it prudent to omit evidence which they had in their briefs; nor, becauſe another jury, in a cauſe nearly ſimilar, gave a different verdict.—The defendant had intruſted the plaintiff to look after his houſe at Twickenham, during his abſence in Oxfordſhire; and, on his return, finding his drawers, &c. broke open, and his houſe rifled, charged the plaintiff

plaintiff with the robbery; and on the 19th of June, 1771, got a ſearch-warrant from a juſtice of peace, and ſearched the plaintiff's houſe, but found nothing therein to juſtify his ſuſpicions. On the 21ſt he renewed his accuſation of the plaintiff, and carried him before a juſtice on the 22d, who diſcharged him. Upon this, *Spong* the plaintiff brought two actions againſt *Hog*; one for treſpaſs, in ſearching his houſe, &c. without ſufficient cauſe, on the 19th; the other, for ſlander on the 21ſt. But the action for ſlander was ſet down, and tried firſt; and the counſel for the defendant not thinking it prudent to give any evidence in mitigation of damages, which might ſeem like a juſtification; the jury gave the plaintiff a verdict with 100l. damages. Next came on the trial on the action of treſpaſs; when the defendant made a full defence, and gave ſuch evidence of a reaſonable cauſe of ſuſpicion, that the jury found a verdict for the defendant. And it was now moved for a new trial in the action of ſlander; the damages appearing to be exceſſive, from the circumſtances that came out on the ſecond trial. —But, by *De Grey*, Chief Juſtice. The only grounds upon which this rule can be ſuppoſed, are, either 1ſt. Becauſe the defendant might have given evidence in mitigation of damages, which then it appeared prudent to omit. This never was a ground for a new trial. Hardly a caſe happens where evidence, of ſome kind or other, is not in diſcretion kept back. *And it would be of fatal conſequence to give the parties an opportunity of introducing new evidence, when they ſee where the cauſe preſſes.* Or, 2dly, Becauſe, upon diſcloſing the whole matter upon the ſecond trial, that jury thought the ſuſpicion ſufficiently ſtrong to juſtify the treſpaſs complained of. But, we cannot impeach the opinion of a jury in one cauſe, by the opinion of a jury in another; eſpecially where the evidence is different, and the point in iſſue not exactly the ſame. It is one thing, to ſay, there was reaſonable cauſe for making the ſearch on the 19th; and another, to ſay, there was ſufficient provocation to reiterate the charge on the 21ſt, when the ſearch on the 19th had ſhewed his ſuſpicions ill founded. And ſuppoſe, on a ſecond trial, with all theſe facts before them, another jury ſhould confirm the former verdict in the action of ſlander; would it not, upon theſe principles, be a ground to ſay, the jury had done wrong in acquitting the defendant upon the treſpaſs? Nor, upon the whole, do I think 100l. to be outrageous damages, for deliberately charging a man, who muſt be ſuppoſed innocent, at three ſeveral times, with a capital offence.—*Gould*, *Blackſtone*, *Nares*, Juſtices, of the ſame opinion.

In this caſe it was held, that ſubſequent declarations of the jury ſhall not vitiate a general verdict, given according to the

Clark v. Stevenſon, executor, Hil. Ter. 12 Geo. 3. C.B. 2 *Black.* 803.

the merits of the caſe.—*Aſſumpſit* for buſineſs done for *John Stevenſon* the teſtator. It appeared in evidence on the general iſſue, that the plaintiff was introduced to the teſtator, by *Edward Stevenſon* his ſon, but was retained and employed by the father for upwards of a year, as agent in many large pecuniary tranſactions; and particularly for half a year, in attending the ſon, who became *non-compos*, and againſt whom a commiſſion of lunacy was afterwards ſued out; he having a fortune of his own, independent of his father. The ſpecial jury on the trial ſeemed to think it equitable, that part of the payment ſhould fall on the eſtate of the ſon, and not the whole on the aſſets of the father: and, therefore, after an abſence of two hours, deputed two of their body, to come into court, and aſk *Nares*, Juſtice, who tried the cauſe "out of whoſe effects the damages they ſhould "give were to come." He told them, unqueſtionably out of the father's aſſets, the action being brought againſt his executors, and they having paid money into court; but if there was any equitable claim on the eſtate of the ſon, the parties muſt ſettle it between themſelves, the jury having nothing to do with it. After an abſence of another hour they returned with a verdict for 1000l. And being, after ſome interval, aſked by the judge whether they looked upon the ſervice as joint, or ſeveral; firſt, one of the jury, and afterwards the foreman anſwered, joint. Upon this the defendants moved for a new trial, upon the ground, that the jury had miſconceived the nature of the action, and had given damages againſt the father's executors, for ſervices performed to the ſon; and, if the contract was joint, then the action lay only againſt the ſon, who ſurvived the father. BUT THE WHOLE COURT upon conſideration held, that the verdict was right, both in form and ſubſtance, as there was no evidence of any retainer or employment by the ſon; and, though the jury might think, that as great part of the ſervice was performed for the benefit of the ſon, the father's repreſentatives had a right to a contribution from the ſon's effects; yet, as the judge had informed them, that in this action damages could only be recovered againſt the father's aſſets, they would not intend, from this ambiguous declaration of the jury, that they underſtood this verdict would affect the ſon. *Wherefore, and for the danger that might happen, if a ſubſequent declaration of the jury ſhould be let in, to explain a general verdict given upon full conſideration, they diſcharged the rule to ſhew cauſe why a new trial ſhould not be awarded.*

Aylett *v.* Jewel, executor, Tr. Ter. 19 Geo. 3. C.B. 2 *Black.* 1299.

So alſo in this caſe it was held, that a ſubſequent confeſſion of a juryman to the defendant's attorney, that the jury drew lots which ſix of them ſhould determine the verdict, not otherwiſe proved to the Court, is no ground for a new trial,

trial, for it is too dangerous to call a verdict in queſtion, deliberately given, upon ſo looſe and ſlight a ſuggeſtion.

Leeman v. Allen *et al.* Ea. Ter. 3 Geo. 3. C. B. 2 *Wilſ.* 160.

Impriſonment for a few hours and 300l. damages was held not exceſſive, and a new trial refuſed; neither will the Court ſet the verdict aſide for a variance between the iſſue delivered, and the record of *niſi prius* after a defence.—In treſpaſs, aſſault, and impriſonment, to the plaintiff's damage of 300l. The defendant pleaded the general iſſue; upon the trial the jury gave a verdict for the plaintiff, and 300l. damages; in the paper book of the iſſue, delivered to the defendant with notice of trial, the damages (by miſtake) were laid only at 200l. but the record of *niſi prius* was right and agreeable to the roll, which was 300l. damages; after a defence made at the trial, it was now moved to ſet aſide the verdict upon two matters, 1ſt, Becauſe there is a variance between the iſſue book delivered; and 2dly, Becauſe the damages are exceſſive. It appeared in evidence at the trial, that the plaintiff kept the Rummer Tavern in Chancery-lane; that the defendants are perſons calling themſelves reforming conſtables, and under pretence of a warrant from one *Kinaſton*, a juſtice of peace, entered the plaintiff's houſe with ſtaves, there ſeized and carried her into the yard, and ſaid, "*Now we have got* "*her, and will carry the bitch to New Priſon;*" the defendants would not ſay what crime ſhe was guilty of, or charged with; *Allen* the conſtable had a warrant, but he did not ſhew it; that the next morning the plaintiff went to Mr. *Kinaſton*'s houſe, but he was not at home; then ſhe went to juſtice *Cox*'s, and again to Mr. *Kinaſton*'s, but none of the defendants appeared to proſecute her. *John Slade*, the waiter at the tavern, proved, that a man and a woman came to plaintiff's houſe (who looked like fellow ſervants) between 9 and 10 o'clock one evening in Eaſter week, a few minutes before this impriſonment was done; that they appeared to be honeſt ſober perſons, and came to refreſh themſelves; that he ſaw the defendants, armed with bludgeons, take and ſeize the plaintiff his miſtreſs; that *Allen* laid hold of her, and ſaid, "*Now damn you for a bitch we have got you, and* "*we are determined you ſhall go to New Priſon;*" other witneſſes gave evidence to the like effect; that theſe defendants called themſelves reformers; about 20 witneſſes proved the Rummer Tavern to be a houſe of good repute, and no body proved the contrary; it was alſo proved that one of the defendants ſtruck the plaintiff. That the defendants never proſecuted the plaintiff, nor did they appear againſt her when ſhe went before the juſtice next day. For the defendants, one *William Gardiner*, who was accidentally preſent in court at the trial, ſwore he was at the Rummer when this affair happened, and that he heard no oaths, nor the word *bitch*, *&c.* It appeared that the warrant was granted and ſigned by juſtice *Kinaſton*, to enter this houſe, upon an allegation that the plaintiff kept a lewd and diſorderly houſe;

that they had two warrants, one for London, and another for Middleſex, becauſe this houſe ſtands partly in and out of the city, which they kept five weeks before they executed them; that they frequently watched the houſe, and when they imagined any lewd perſons went into the houſe they took that opportunity to execute the warrant; this is the ſubſtance of the evidence, whereupon the jury found for the plaintiff, and 300l. damages. PER CURIAM: 1ſt. As the defendants made a defence at the trial, the Court will not ſet aſide the verdict for the variance between the iſſue book delivered in paper; and the record of *niſi prius*, which was not mentioned or objected to at the trial; and if the record of *niſi prius* had been wrong, the Court would have mended it by the roll, after a verdict and a defence made. 2dly, As to the exceſſiveneſs of damages, Courts ſhould be very cautious how they overthrow verdicts that have been given by 12 men upon their oaths; however, if damages be unreaſonable and outrageous indeed, as if 2000l. or 3000l. was to be given in a little battery, which all mankind might ſee to be unreaſonable at firſt bluſh; certainly a Court would ſet aſide ſuch a verdict, and try whether a 2d jury would not be more reaſonable. The rule in the caſe of *Aſh* and *Aſh*, *Comb.* 357, laid down by Lord *Holt*, is a good one; "That the jury are "to try cauſes with the aſſiſtance of the judges, and ought "to give their reaſons, when required, that if they go upon "any miſtake they may be ſet right;" and for their not doing ſo, and for exceſſiveneſs of damages, a new trial was granted. And this rule is univerſal, and extends to all ſorts of actions. But it may be ſaid what rule has the Court to govern themſelves by as to matters of *tort?* The Court muſt be able to ſay the damages are beyond all meaſure unreaſonable, though they cannot ſay exactly what damages ought to be given. The damages are not exceſſive in the preſent caſe. The whole Court refuſed to ſet aſide the verdict; and the plaintiff had judgment.

Huckle *v.* Money, Mic. Ter. 4 Geo. 3. C.B. 2 *Wilſ.* 205.

So in this caſe on the trial of an action of treſpaſs, aſſault, and impriſonment, it was proved for the plaintiff, that he is a journeyman printer, and was taken into cuſtody by the defendant (a king's meſſenger) upon ſuſpicion of having printed the North Briton, number 45; that the plaintiff kept him in cuſtody about ſix hours, but uſed him very civilly by treating him with beef-ſteaks and beer, ſo that he ſuffered very little or no damages; the defendant attempted to juſtify under the general warrant of a ſecretary of ſtate, to apprehend the printers and publiſhers of the ſaid North Briton, number 45. (vide vol. III. p. 837, 841) by virtue of the ſtat. of *Jac.* 1. and the ſtat. 24 *Geo.* 2. c. 44. but was overruled by the Lord Chief Juſtice; and the jury gave 300l. damages. It was now moved, that the verdict might be ſet aſide and a new trial had. Lord CAMDEN, Ch. J. In all motions for new trials, it is as abſolutely neceſſary for the Court to enter into the nature of the cauſe, the evidence, facts,

facts, and circumstances of the case, as for a jury; the law has not laid down what shall be the measure of damages in actions of *tort*; the measure is vague and uncertain, depending upon a vast variety of causes, facts, and circumstances; *torts* or injuries which may be done by one man to another are infinite; in cases of criminal conversation, battery, imprisonment, slander, malicious prosecutions, &c. the state, degree, quality, trade, or profession of the party injured, as well as of the person who did the injury, must be and generally are considered by a jury in giving damages; the few cases to be found in the books of new trials for *torts*, shews that courts of justice have most commonly set their faces against them; and the courts interfering in these cases would be laying aside juries; before the time of granting new trials, there is no instance that the judges ever intermeddled with the damages. The personal injury done to the plaintiff was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20l. damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light, in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the king's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the king's counsel, and saw the solicitor of the treasury, endeavouring to support and maintain the legality of the warrant in a tyrannical and severe manner; these are the ideas which struck the jury on the trial, and they have done right in giving exemplary damages; to enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish inquisition; a law under which no Englishman would wish to live an hour, it was a most daring public attack made upon the liberty of a subject: I thought that the 29th chapter of Magna Charta, *Nullus liber homo capiatur vel imprisonetur, &c. nec super eum ibimus, &c. nisi per legale judicium parium suorum vel per legem terræ, &c.* which is pointed against arbitrary power, was violated. I cannot say what damages I should have given if I had been upon the jury; but I directed and told them they were not bound to any certain damages, against the solicitor general's argument. Upon the whole, I am of opinion the damages are not excessive, and that it is very dangerous for the judges to intermeddle in damages for *torts*; it must be a glaring case indeed of outrageous damages in a *tort*, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages. *Bathurst*, J. of the same opinion. *Per Curiam*, new trial refused.

Arthur Beardmore, an attorney v. Nathan Carrington, James Watſon, Thomas Adrian, and Robert Blackmore, four of the king's meſſengers in ordinary, Eaſter Term. 4 Geo. 3 C.B. 2 *Wilſ.* 224.

So in this caſe, on the trial of an action of treſpaſs and falſe impriſonment, the plaintiff proved, that on the 11th day of November, 1762, all the defendants were in the plaintiff's houſe, and in the private office there, opening the drawers and taking out papers; that they demanded the plaintiff's file of letters, and examined them back till the year 1752; defendant, *Carrington*, then ſaid, "that was ſufficient," afterwards they went into the public-office, and there opened the deſk, took out the books, and looked into the ledgers, but did not break any deſks or drawers open, becauſe the plaintiff opened the ſame for them; afterwards, they took the plaintiff and his witneſs away in a coach; this witneſs proved, that the plaintiff was then concerned in a great many cauſes depending, as an attorney; that he ſent to Mr. *Winbolt* to manage his buſineſs while he ſhould remain in confinement, that no violence was offered to the perſon of the plaintiff, and that his wife was permitted to be with him; that this witneſs had actions depending againſt the defendants and Lord *Halifax*; that the defendants refuſed to permit one Mr. *Collet*, who was a client of the plaintiff, to converſe privately with him about his buſineſs; that while the plaintiff and his witneſs were confined in the houſe of the defendants, he, the plaintiff, was ſuffered to go into any part of the houſe, and after ſix days' impriſonment, they were both diſcharged, upon entering into recognizances to appear in the King's-Bench the then next term, and for their good behaviour, without paying any fees. The defendants juſtified, under a warrant from Lord *Halifax*, as one of the ſecretaries of ſtate: and it was admitted, on all ſides, at the trial, that there had been a great many precedents of warrants, of the like ſort with the preſent, for ſeizing perſons and papers, &c. and for all ſorts of crimes or offences, let the offence be what it would. The jury found a verdict for the plaintiff for 1000l. and it was moved to ſet the verdict aſide, on the ground of exceſſive damages.—PER CURIAM. We are called upon, on our oaths to ſay, whether theſe are exceſſive damages or not, and ought to have very clear evidence before we can ſay they are exceſſive. The jury were directed to aſſeſs damages for the plaintiff according to the evidence given, under an idea, that the defendants could not, by law, juſtify the treſpaſs under this warrant, by any manner of plea whatſoever. It is clear, that the practice of granting new trials is *modern*, and that courts anciently never exerciſed this power; but, in ſome particular caſes, they corrected the damages from evidence laid before them. There is great difference between caſes of damages which may be certainly ſeen, and ſuch as are ideal; as between *aſſumpſit*, *treſpaſs for goods*, where the ſum and value may be meaſured, and actions of *impriſonment*, *malicious proſecution*, *ſlander*, *and other perſonal torts*, where the damages are matter of opinion, ſpeculation, ideal; there is alſo a difference between a principal verdict of a jury, and a writ of enquiry of damages; the latter being only an in-

queſt

queſt of office to inform the conſcience of the Court, and which they might have aſſeſſed themſelves, without any inqueſt at all; only in the caſe of *maihem*, Courts have, in all ages, interpoſed in that ſingle inſtance only: as to the caſe of the writ of enquiry, in the year-book of *H.* 4. we doubt whether what is ſaid by the Court in that caſe be right, *that they would abridge the damages, unleſs the plaintiff would releaſe part thereof*, becauſe there is not one caſe to be found in the year-books wherever the Court abridged the damages after a principal verdict, and this is clear down to the time of *Palmer*'s *Rep.* 314. much leſs have they interpoſed in increaſing damages, except in the caſe of *maihem*; one ſide ſays, no *attaint* lies (in caſes of tort) for exceſſive damages; the other ſide ſays, it does: we give no opinion as to that point; but it is ſaid, in 100 caſes in the books that an attaint does lie. See 10 *Rep.* 119. Lord *Cheney*'s caſe.—All, or moſt of the caſes of new trials, are where juries have miſdemeaned (1) themſelves contrary to their oath; in the caſe in *Stiles*, 466. the miſconduct of the jury was certainly an ingredient, and ſo it appears from the caſe in 1 *Lev.* 97. Some books ſay, it was a trial at bar, and it is highly probable there was ſome evidence that the jury had been tampered with; and this was certainly the very firſt caſe of a new trial, and from that period the Court have exerciſed the power of granting new trials in ſeveral caſes; as when the jury find, contrary to the judge's directions in point of law; when they find directly contrary to the evidence, (that is to ſay) againſt evidence all on one ſide; for if there be evidence on both ſides, the Court never interpoſes in that caſe. As to granting the firſt new trial in *Stiles*, 466. there is great reaſon (as was ſaid before) to think it was miſbehaviour in the jury; it was an action for words; ſo was the caſe of Lord *Townſend*, 2 Mod. 250. for words, and 4000l. damages, where the Court refuſed to grant a new trial; and if a Court could not ſay that thoſe damages were exceſſive, they can hardly ſay that damages are exceſſive in any caſe of ſlander whatever; and this caſe has never been contradicted or denied to be law. The caſe of *Aſh* and *Aſh*, *Comb.* 357. was plainly for the miſdemeanor of the jury in refuſing to anſwer the judge when he aſked what ground or reaſon they went upon; to be ſure, judges are to adviſe but not to control juries; and my Lord *Holt*, and the King's Bench, did right in granting a new trial in that caſe. In the caſe of *Wilmot* v. *Berkley*, Trin. 31 and 32 *Geo.* 2. B.R. which was an action for criminal converſation, the jury gave 500l. damages againſt the defendant; and upon affidavits that he was only a clerk in low circumſtances, and unable to pay ſo

(1) The judge who tried the cauſe uſed to certify to the Court the miſbehaviour. *Cro. El.* 189, 411, 616. 3 *Keb.* 351. *Styl.* 448. *Moor*, 451, 452. *Bacon* v. *Hutchinſon*, eaſter term, 8 *Ann.* C.B. a rule to ſtay the judgment until the judges certificate. *Palm.* 325. Concerning miſdemeanor of juries, ſee 2 *H. P. C.* 306, 307, &c. *Cro. Jac.* 210, c. 2.

large a ſum, it was moved for a new trial, but the Court refuſed to grant even a rule to ſhew cauſe; becauſe, in caſes of *tort*, the jury are the only proper judges of the damages.—We are now come to the caſe in 1 *Stra.* 691. *Chambers* v. *Robinſon*, which ſeems to be the only caſe wherever a new trial was granted merely for the exceſſiveneſs of damages only: we are not ſatisfied with the reaſon given in that caſe, and think it of no weight, and want to know the facts upon which the Court could pronounce the damages to be exceſſive. The principle, on which it was granted, mentioned in *Strange*, was *to give the defendant a chance of another jury*. This is a very bad reaſon; for if it was not, it would be a reaſon for a third and fourth trial, and would be digging up the conſtitution by the roots; and, therefore, we are free to ſay, this caſe is not law; and that there is not one ſingle caſe (that is law) in all the books to be found, where the Court has granted a new trial for exceſſive damages in actions for *torts*(1). It was ſtrongly argued, at the trial of this cauſe, that the jury were to meaſure the damages by what the defendant had ſuffered by this treſpaſs, and ſix days and an half impriſonment; but this was thought a groſs abſurdity by the judge who preſided there. We deſire to be underſtood, that this Court does not ſay, or lay down, any rule that there can never happen a caſe of ſuch exceſſive damages in *tort*, where the Court may not grant a new trial; but in that caſe, the damages muſt be monſtrous and enormous indeed, and ſuch as all mankind muſt be ready to exclaim againſt, at firſt bluſh. The nature of the treſpaſs, in the preſent caſe, is joint and ſeveral; and the plaintiff has ſtill another action againſt Lord *Halifax*; who, it is ſaid, is more culpable than the defendants, who are only ſervants, and have done what he commanded them to do, and therefore the damages are exceſſive as to them: but we think this is no topic of mitigation; and, for any thing we know, the jury might ſay, "we will make no difference between the miniſter who exe-"cuted, and the magiſtrate who granted this illegal war-"rant;" ſo the Court muſt conſider theſe damages as given againſt Lord *Halifax*. And can we ſay, that 1000l. are monſtrous damages as againſt him, who has granted an illegal warrant to a meſſenger who enters into a man's houſe, and prys into all his ſecret and private affairs, and carries him from his houſe and buſineſs, and impriſons him for ſix days: it is an unlawful power aſſumed by a great miniſter of ſtate. Can any body ſay that a guinea *per diem* is ſufficient damages in this extraordinary caſe, which concerns the liberty of every one of the King's ſubjects: we cannot ſay the damages of 1000l. are enormous; and, therefore, the rule

(1) N. Hil. Ter. 8 *Geo.* 2. B.R. *Smith* v. *Boucher*. In treſpaſs and impriſonment, damages on a writ of enquiry, 200l. *Skinner* moved to ſet it aſide, for exceſſive damages; but PER CURIAM, in tort the jury are the proper judges

to

to ſhew cauſe why a new trial ſhould not be granted, muſt be diſcharged(1). *Per totam Curiam.*

For a trifling aſſault and battery, 200l. damages were held not exceſſive, and a new trial was refuſed.—On the trial of an action of aſſault and battery, by a ſpecial jury, the jury gave a verdict for the plaintiff, and 200l. damages; and it was moved to have the verdict ſet aſide, and a new trial for exceſſiveneſs of damages. The caſe was in ſubſtance this: On a diſpute between the plaintiff and defendant, about a turtle, the defendant ſhoved the plaintiff out of his houſe with his elbow, who, thereupon aſked the defendant if he would waive his privilege of parliament, but the defendant refuſed to do it: plaintiff then ſaid to him, you are a ſcoundrel, and defendant gave him a blow upon the face, which cauſed a black eye.—PER CURIAM. This was a quarrel between two gentlemen, and has been properly tried by a ſpecial jury of merchants of London, who are the proper judges of the damages. When a blow is given by one gentleman to another, a challenge and death may enſue; and, therefore, the jury have done right in giving exemplary damages: the plaintiff has been uſed unlike a gentleman by the defendant, in ſtriking him, withholding his property, and inſiſting upon his privilege, all of them tending to provoke him to ſeek his revenge in another way than by law; and, therefore, we think the damages are not exc ſſive.—Rule diſcharged.

Grey *v.* Sir A. Grant. bt. M. P. Tr. Ter. 4 Geo. 3. C.B. 2 *Wils.* 252.

And in this caſe the Court refuſed to quaſh a writ of enquiry, on account of exceſſive damages, though the Court acknowledged them to be ſo from the peculiar circumſtances of the caſe.—It was an action brought againſt the defendant, who was colonel of the Middleſex militia, for ordering the plaintiff, who was a common man therein, and had a furlough from the major, to be ſtripped, and to receive 20 laſhes from two drummers.—It was moved to ſet aſide this verdict, for EXCESSIVENESS *of damages.* Lord MANSFIELD ſaid, In the preſent caſe, he was not diſſatisfied with the verdict: for Sir Thomas had manifeſtedly acted arbitrarily, unjuſtifiably, and unreaſonably. He had ordered this innocent man to be flogged (though unjuſtly and improperly), merely out of ſpite to his major; becauſe the major (Spinnage) who gave the man the furlough, had offended him: in which he acted *malo animo*, and out of mere ſpite and revenge. And the man, though not much hurt indeed, was ſcandalized and diſgraced by ſuch puniſhment. The defendant is a man of ſuch ſubſtance as to be very able and ſufficient to pay this ſum; and could only ſave a *part* of it by having a new writ of enquiry, if we were to direct one. His lordſhip acknowledged that he thought the damages were very great, and beyond the proportion of what the man had ſuffered: and yet, under the whole circumſtances of the caſe, he was not for granting a new trial. WILMOT and ASTON, Juſtices, concurred: And the Rule was diſcharged.

Benſon *v.* Sir Thomas Frederick, bart. Hil. Ter. 6 Geo. 3. B.R. 3 *Burr.* 1845.

(1) *Markham* v. *Middleton*, Trin. 19 *Geo.* 2. B.R. PER CURIAM, the jury are the ſole judges of the damages in caſes of tort.

Maurice v Brecknock, Mic. Ter. 21 Geo. 3. B. R. 2 *Doug.* 299.

And in this case it was admitted to be a general rule, that the Court will not aside a verdict, in an action for a tort, on account of the smallness of the damages (1).—This was a motion to set aside the inquisition taken upon a writ of enquiry on account of the smallness of the damages. It was an action on the case, for maliciously suing out a commission of bankruptcy against the plaintiff, and also for maliciously holding him to bail for 1020*l*. The defendant let judgment go by default, upon which a writ of enquiry was executed, and the jury gave only 5*l*. damages. And the affidavit upon which the motion was grounded, stated that the plaintiff's attorney had proved, before the jury, that his bill of costs to the plaintiff, for superseding the commission of bankruptcy, amounted to upwards of 30*l*. and that no evidence was produced on the part of the defendant. PER CURIAM: He has confessed *malice*, in point of *form*, and merely for the purpose of letting the plaintiff in, to prove the degree of injury he has received.—The Rule discharged.

Gilbert v. Burtenshaw, Mic. Ter. 15 Geo. 3. B.R. *Cowp.* 230.

So in this case, which was an action for maliciously indicting the plaintiff for perjury.—The second and third counts were for defamation, in saying, the plaintiff was a perjured knave and scoundrel, after acquittal, and he would prove it. Upon shewing cause why a new trial should not be granted on the ground of excessive damages (the jury having given 400*l*. damages); it appeared, by the report, that the verdict was taken upon two counts: upon the first, *for maliciously indicting the plaintiff of perjury:* and upon the second, for calling him *a perjured rascal, and saying he would prove it.*—There was evidence in support of both counts; therefore, the whole ground of the application rested on the point of excessive damages. LORD MANSFIELD, Ch. J. I should be sorry to say, that in cases of personal torts, no new trial should ever be granted for damages which manifestly shew the jury to have been actuated by passion, partiality, or prejudice; but it is not to be done without very strong grounds indeed; and such as carry internal evidence of intemperance in the minds of the jury. It is by no means to be done where the Court may feel that if they had been on the jury they would have given less damages; or, where they might think the jury themselves would have completely discharged their duty in giving a less sum. Of all the cases left to a jury, none is more emphatically left to their found discretion than such a case as this, and, unless it appears that the damages are flagrantly outrageous and extravagant, it is difficult for the Court to draw the line: but in this case, where the defendant has been guilty of repeated defamation against the

(1) Though, if the smallness of the damages arises from a mistake *in point of law*, of the *sheriff* (as in *Markham* v. *Middleton*, 2 *Strange*, 1259) or of the *jury* (as in *Woodford* v. *Eades*, 1 *Str.* 425.), the Court will set aside the verdict.

plaintiff,

plaintiff, after a fair trial and acquittal, upon a malicious prosecution, it is impossible for the Court to go into a nice examination and admeasurement of what ought to have been the damages. ASTON, J. agreed; and said, that even if it stood upon the second count only, he should doubt whether the Court ought to interpose, on account of the largeness of the damages, in favour of a man who has been guilty of charging another with so foul a crime, and declaring in public he would prove it upon him. WILLES, J. and ASHHURST, J. agreed.—Rule discharged.

The Court will not grant a new trial, in an action for criminal conversation, merely because the damages appear to them to be excessive.—On the trial of this action, for criminal conversation, the defendant, in answer to the case proved on the part of the plaintiff, gave evidence of many indecent familiaries between him (the defendant) and the plaintiff's wife, in the presence of her husband, from whence the jury were pressed to draw the inference of connivance on his part.—Lord KENYON, in summing up the evidence, told the jury that, if they were of opinion that the husband had consented to the infidelity of his wife, it took away altogether the ground of the action; and they should find a verdict for the defendant. If they thought that, though he had not gone that length, yet he had been guilty of gross negligence or inattention to her conduct with respect to the defendant, that would go far in mitigation of the damages; and to this opinion he himself most strongly inclined. But if they saw no ground for imputing even such negligence to the plaintiff, then they were to assess what damages, under all the circumstances, he was entitled to. The jury found a verdict for the plaintiff with 5000l. damages. It was afterwards moved, that the verdict might be set aside, and a new trial had on two grounds: 1st, as a verdict altogether against evidence; 2dly, on the ground of excessive damages. Lord KENYON, Ch. J. It has been pressed upon the Court, that, this question of damages being within the sole province of the jury to determine, an application for a new trial, on the ground of excess, is an appeal from the proper jurisdiction to another which has no cognizance of such a question: but, in general cases, the opinions of juries have been revised in some shape or another from all times. The ancient method of correcting the errors of juries, was by the harsh proceeding of attaint, which was productive of no remedy to the aggrieved party; and, therefore, the Courts did wisely to rid themselves of such an inconvenience in the administration of justice, by the milder remedy of setting aside an enormous verdict, and sending the case back to the revision of another jury. This is by no means encroaching upon the jurisdiction of the jury, nor drawing the question to the examination of a different tribunal from that to which the constitution has referred it: for

Duberley v. Gunning, Ea Ter. 32 Geo. 3 B R. 4 Ter. Rep. 651.

for it is not ſubſtituting a different judgment in the place of that which has been pronounced; but requiring the ſame juriſdiction to reconſider that opinion which appears to be erroneous. Without this general power in the Court, injuſtice would be done in many caſes With regard to the preſent caſe, two points have been ſubmitted to the Court; the firſt of which goes to impeach the verdict altogether. But upon the evidence given, I do not think the ground of the action is altogether done away. A leading caſe upon this ſubject is, that of *Cibber* v. *Sloper*, *Bull. N. P.* 27, where the huſband, who brought the action, was proved to have left his bed for *Sloper*. If ſuch a man could have recovered a verdict, the very ſource and firſt principles of juſtice would have been contaminated. The Court, therefore, held clearly, that the jury were bound to find for the defendant. Other caſes there are, where the conduct of the huſband may be ſaid to border upon vice, though, perhaps, not amounting to vice itſelf: there the circumſtances go in diminution of damages. This caſe, in my opinion, approximates moſt clearly to that line of caſes. Here was, at leaſt, evidence of much indiſcretion on the part of the plaintiff. Then comes the queſtion as to the exceſs of damages. [Here is lordſhip went through the detail of the evidence, and concluded with ſaying:] Under all the circumſtances, I think *the damages were much larger than ought to have been given.* But here, I doubt what concluſion I ought to draw from all the premiſes: and my difficulty ariſes from being unable to fix any ſtandard, by which I can aſcertain the exceſs which, according to my view of the caſe, I think the jury have run into. *In many caſes, where the Court have ſaid that the damages were too great, they have had ſome grounds to proceed upon, by which the exceſs might be fairly meaſured. But where there is no ſuch ſtandard, how are the errors of the jury to be rectified? What meaſure can we point out to them, by which they ought to be guided? If we can ſet aſide a verdict in ſuch a caſe as this, for exceſs of damages, I preſume we ſhall be equally warranted in ſo doing where we think the damages too ſmall*; and yet, in Lord *Strafford*'s caſe, although the Court thought that 1s. damages given againſt him were much too ſmall, they did not think themſelves warranted in granting a new trial on that account, becauſe they had no rule to go by. According to my judgment of this caſe, I think the damages are a great deal too much: nay, I ſhould have been ſatisfied even if nominal damages only had been given; but as the jury have formed a different judgment upon the evidence, I know not why my judgment ſhould be preferred to their's upon ſuch a ſubject. —It is plain that Lord *Mansfield*, in the caſe of *Wilford* v. *Berkeley*, thought that the Court could not interfere in ſuch a caſe. We have known inſtances of much greater damages than theſe given in theſe kind of caſes, which were never got rid of by granting new trials. Knowing, therefore, no in-

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ſtance in which a new trial has ever been granted in ſuch a caſe, upon the ground of exceſſive damages, and the opinion of the Courts having leaned ſtrongly againſt ſuch interference, even in caſes which ſeem to call for it as well as this, I confeſs, although I feel great difficulties on the one ſide as well as on the other, I have not courage enough to make the firſt precedent of granting a new trial under ſuch circumſtances as the preſent.—ASHHURST, J. concurred in opinion, that the Court, before they could ſet aſide the verdict merely for exceſs of damages, ought to be able to aſcertain ſome rule by which the damages are to be meaſured, and to which the facts may be applied. BULLER, J. *(contra)* The law on this ſubject is now clearly ſettled to be, that if the huſband conſent to his wife's adultery, it goes in bar of his action: if he be only guilty of negligence, or even looſe, or improper conduct, not amounting to a conſent, it only goes in reduction of damages. [He then went into a conſideration of the whole evidence; from whence he inferred, that there was conſent on the part of the plaintiff, and, therefore, that the verdict ought to have been in favour of the defendant.] *But, at any rate, I am of opinion, that the Court ought to grant a new trial on the ground of exceſſive damages.* I do not apprehend that the power of the Court to grant new trials in any caſe, if a proper ground be laid for it, has been denied even at the bar. It is certainly eſtabliſhed by a variety of authorities, in general terms, without making any exception whatever. And this power is repeatedly exerciſed in caſes where the ſtandard for damages is full as uncertain as in the preſent caſe. Every caſe muſt ſtand on its own particular circumſtances; there is no laying down any fixed rule for aſcertaining the damages in many inſtances. New trials have been granted from the year 1655, at leaſt, as appears by a caſe of that date, *Wood* v. *Gunſton*, *Sty.* 462, 466: and there, one of the grounds was that of exceſſive damages; and that has been admitted in almoſt every other caſe ſince. In *Beardmore* v. *Carrington*, *C. B.* 2 *Wilſ.* 244, all the judges agreed, that the Court *might* grant a new trial for exceſs of damage. There are, beſides, many old caſes which ſhew that the inſtance of the exerciſe of this power in 1655, was not the firſt. One caſe is as far back as 7 *Hen.* 4. 31. *b.* though, I think, the Court there carried their controlling power too far. For the damages, in that caſe, being thought by the Court to be exceſſive, they ſaid, they would ſtay judgment till the plaintiff agreed to relinquiſh the exceſs. In that reſpect, indeed, they were wrong; becauſe that was taking upon themſelves to determine the exact amount of what the damages ought to have been, which is clearly the province of the jury to decide. The only power which the Courts now claim is, to ſend the caſe back to the reviſion of another jury, when they think that the damages given are enormouſly diſproportionate to the caſe proved in evidence. *We all of*

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us agree, that the damages are enormous in this case; and that being admitted, I cannot bring my mind to say that there shall not be a new trial. Before we can come to such a determination, we must blot out every expression in the books relative to this subject; and in many of them, it is expressly said, that the Court may grant a new trial for excessive damages. I agree, that there must be facts for the Court to proceed upon in ascertaining the excess of damages, and granting a new trial on that account: but there are many such facts in this case. Besides, the scandalous and indecent liberties which the husband permitted the defendant to take with his wife in his own presence, while he was engaged in a similar conduct with another woman at the time: there is another fact in this case, which is the proof of the plaintiff's having kept another woman at the time, whom he was in the constant habit of visiting. Let this fact be considered with reference to the proceedings of another Court. In an action for a breach of promise of marriage, if the case be so circumstanced that a woman could not formerly have enforced the contract in the ecclesiastical court, no action for damages will lie. If the husband has himself been guilty of adultery, the Ecclesiastical Court will not grant a divorce; and, therefore, by a parity of reasoning, that consideration ought to have weight in the question of damages in an action brought by him. All these facts, which have been clearly proved, shew, that the plaintiff does not come into court with a fair case to ask for damages: but they seem to have been entirely overlooked by the jury; and, therefore, I think, we ought to grant a new trial, that the case may be revised by another jury. Nor can I agree, that the granting of this rule will put another jury under any restraint upon the subject of damages: the question will go to them unfettered; they will give what damages they please. *It is enough for us to say that these damages are excessive.*—GROSE, J. agreed with Lord *Kenyon*, Ch. J. and *Ashhurst*, J. and said, I am not prepared to say that no case can possibly occur upon the subject of excessive damages for criminal conversation, in which the Court ought to grant a new trial. But, certainly, this would be the first instance, were we to grant the present rule. Now, though I think that the conduct of the plaintiff appears, in several respects, to have been highly culpable, yet this was for the peculiar consideration of the jury: and they have drawn their own inference from the whole of the case. And I think, we ought not to interfere for the first time in a case like the present where the adulterer is a married man, and has taken away his friend's wife. Therefore, I can see no ground, in point of discretion, for making this the first instance of such an interference.—Rule discharged.

Jones *v.* Sparrow, Ea. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 257.

But in an action of assault and battery, tried before Lord *Kenyon*, where it appeared in evidence, that the plaintiff, who was

was a ſervant to the defendant, after having received a ſlight blow from his maſter, for impertinent behaviour, violently beat him; and the jury gave a verdict for the plaintiff with 40l. damages. On a motion to ſet aſide the verdict, on the ground of exceſſive damages, the caſe of *Duberley* v. *Gunning* being mentioned, to ſhew, that in caſes of *tort*, where there is no certain rule by which the damages can be aſcertained, the Court will not grant a new trial on the ground of exceſſive damages. Lord KENYON, Ch. J. ſaid, it muſt be remembered that, although the caſe of *Duberley* v. *Gunning* was decided after a very full diſcuſſion of the ſubject, the Court were not unanimous in the determination. But, whether rightly or not decided, that is a caſe *ſui generis*, and cannot govern the preſent. PER CURIAM, rule abſolute.

So in treſpaſs againſt a cuſtomhouſe-officer, for an unſucceſsful ſearch after prohibited and uncuſtomed goods. Verdict for the plaintiff, with 500l. damages. *Perrot*, B. who tried the cauſe, reported the damages to be very exceſſive, and that he adviſed an application for a new trial, which being accordingly moved for—PER CURIAM: It has never been laid down, that the Court will not grant a new trial for exceſſive damages in any caſes of *tort*. It was held, ſo long ago as in *Comb.* 357. that the jury have not a deſpotic power in ſuch actions. The utmoſt that can be ſaid is, and very truly, that the ſame rule does not prevail upon queſtions of *tort*, as of contract. In contract, the meaſure of damages is generally matter of account, and the damages given may be demonſtrated to be right or wrong. But in *torts*, a greater latitude is allowed to the jury: and the damages muſt be exceſſive and outrageous to require or warrant a new trial. In the preſent caſe, there is great reaſon to ſuppoſe them ſo: but then the caſe is peculiarly circumſtanced. It is admitted, that the preſent defendant has recovered in a former action, a ſmuggling penalty of 300l. againſt the now plaintiff. This he offers to ſet off againſt this 500l., but the preſent defendent refuſes it. This ſhews a want of candour on his ſide, and he is therefore entitled to no aſſiſtance. *Per tot. Cur.*—Diſcharge the rule.

Sharpe *v.* Brice, Ea. Ter. 14 Geo. 3. C B. 2 *Black.* 942.

But the Court will not grant a new trial, for exceſſive damages in a caſe of tort; unleſs they be outrageouſly diſproportionate to the nature of the injury, or the circumſtances of the parties.—Sir *Alexander Leith*, a young Scotch baronet, being diſtreſſed for ready money, and not over delicate in the means of obtaining it, borrowed 3600l. of the defendant *Pope*, to ſecure which, he gave him an aſſignment of the equity of redemption of his houſe in Newman-ſtreet, and a bill of ſale of all his goods; but it was agreed, that Sir *Alexander* ſhould retain ſome, to furniſh his country houſe at Shiplake, in Oxfordſhire. He accordingly, in April, 1778, ſent openly in a waggon drawn by his coach-horſes, a large quantity of goods to Shiplake—but *Pope*, who ſtood by and ſaw the inventory made

Leith, bart. *v.* Pope, Mic. Ter. 20 Geo. 3. C. 2 *Black.* 1327. B.

made by Lady *Leith*, and the goods carried off, without giving any obſtruction, complained that Sir *Alexander* had deceived him, and threatened a criminal proſecution againſt him and one *Watts*, a ſalesman, if he had not juſtice done him. In the mean time, Sir *Alexander* cauſed two *qui tam* actions for uſury to be brought againſt *Pope*; and filed a bill in chancery againſt him. About a month after which, *Pope* made an information upon oath againſt Sir *Alexander* for horſeſtealing, broke open his houſe and ſtables at Shiplake, by a ſearch warrant, and carried Sir *Alexander* before Sir *John Fielding*, as a felon, who admitted him to bail. And at the July ſeſſions 1778, *Pope* indicted Sir *Alexander* capitally at the Old-Bailey, for ſtealing all the goods before mentioned, and alſo three coach geldings. On the trial of which, *Pope*, being croſs-examined, confeſſed, that the true reaſon of this proſecution was to get rid of the actions for uſury.—Upon which, Sir *Alexander* was acquitted, and had a copy of his indictment granted. Upon which, he brought an action for a malicious proſecution againſt *Pope:* and on the trial, the jury found a verdict for the plaintiff, with 10,000l. damages.—It was moved for a new trial: 1ſt, On the footing of ſurprize, by the abſence of one *Winter*, a material witneſs for the defendant, but which proved to be a mere pretence. 2dly, On account of the outrageouſneſs of the damages, which exceeded (it was ſaid) all example.—PER CURIAM: In caſes of tort, the Court will not interpoſe on account of the largeneſs of damages, unleſs they are ſo flagrantly exceſſive as to afford an internal evidence of the prejudice and partiality of the jury. That is, unleſs they are moſt outrageouſly diſproportionate, either to the wrong received, or to the ſituation and circumſtances of either the plaintiff or defendant. 1ſt, The wrong is a criminal charge (for what (if any) was merely a civil injury, tranſacted openly, and with the entire knowledge of the defendant, who made no objection), a charge of felony, of capital felony, found by the jury (and not now denied) to be malicious and without probable cauſe. A proſecution thus aimed at the life of the plaintiff, and proceeding from ſuch wicked motives, muſt evidence a moſt depraved and corrupt heart: for which, had he had an aſſociate, both might have been indicted for conſpiracy and have received the moſt infamous, called emphatically the *villenous* judgment. In ſuch a caſe, the Court cannot ſay that any ſum aſſeſſed by the jury is too much, if the circumſtances of the parties will warrant it.—2dly, Now the plaintiff is a man of family, a baronet, an officer in the army, and a member of parliament: all of them reſpectable ſituations, and which may render the value of an injury done to him, eſpecially when directed againſt his life, adequate to 10,000l.—3dly, The defendant appeared upon evidence to be exceedingly wealthy, and well able to ſuſtain ſuch a verdict. In poſſeſſion, upon record of ſeventy-

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ſeven judgments, to the amount of more than 100,000l. in the actual receipt of near 3000l. per annum annuities for young gentlemen's lives.—Rule diſcharged.

When there is a bill of exceptions, a new trial ſhall not be moved for on the point of law contained therein.—On the trial of an action of treſpaſs and falſe impriſonment a queſtion was moved, Whether an action lay in England, for an injury committed againſt a mere native of the iſland of Minorca? and *Gould*, Juſtice, before whom it was tried, ruled that it well lay; upon which a bill of exceptions was tendered and ſealed. The jury gave a verdict for the plaintiff with 3000l. damages. And now it was moved for a new trial, 1ſt, On the point of law contained in the bill of exceptions. 2ndly, For exceſſive damages.—SED PER CURIAM: The bill of exceptions is ordained by the legiſlature to be in nature of a writ of error. And it would be highly unbecoming in us to ſtop it *in tranſitu*, unleſs you will waive the bill of exceptions: which the defendant declining to do, the Court refuſed to hear his counſel on the point of law. And as to the exceſs of damages, the Court were all of opinion, that it was very difficult to interpoſe with reſpect to the *quantum* of damages in actions for any perſonal wrong. Not that it can be laid down, that in no caſe of perſonal injury the damages can be exceſſive. Some may be ſo monſtrous and exceſſive, as to be in themſelves an evidence of paſſion or partiality in the jury. In the preſent caſe the injury was great, and the jury (not the Court) are to eſtimate the adequate ſatisfaction.—Rule diſcharged.

Fabrigas v. Moſtyn, Mic. Ter. 24 Geo. 3. C.B. 1 *Black. Rep.* 929.

A new trial is never granted in actions upon penal laws.—In an action upon the ſtatute againſt bribery, there was a verdict for the defendant; and it was now moved for a new trial, as being againſt evidence. But *per totam Curiam*, We never grant new trials in actions on penal laws; and it has been ſo held for more than fifty years paſt. The Court condemned a caſe in 2 *Keb.* 226.

Fonereau v. —— Ea. Ter. 10 Geo. 3. C.B. 3 *Wils.* 59.

So alſo in this caſe, it was held that there ſhall not be a new trial where there is a verdict for a defendant in a criminal proſecution.—A criminal motion was put off, till the validity of a rate ſhould be tried in a feigned iſſue, "Whether it was an equal, or a partial one?" And a verdict having paſſed for the defendant, upon ſuch iſſue, a new trial was moved for, the verdict having been given contrary to evidence. But the Court were clear againſt granting a new trial; becauſe it was within the ſame reaſon as if it had been in a criminal proſecution. For, as this iſſue was directed in order to know "Whether this was an illegal and partial rate?" and if it had been found to be partial, the conſequence would have been either an attachment or an information; it was juſt the ſame thing as if it had been a verdict found for the defendant upon an information: and if it had been upon an information, the Court would not have ſet aſide the verdict and granted a new trial, although the acquittal had been contrary to the weight of the evidence. However, it was agreed that when the original motion ſhould come on again, it would be open

Rex v. Praed et Rex v. Edwards, Mic. Ter. 9 Geo. 3. B R. 4 *Burr.* 2257.

open to any other objections to the legality of the rate; only taking it for a fact, "that it was not a partial one."

Dickſon *v.* Fiſher, Mic. Ter. 9 Geo. 3. B R. 4 *Burr.* 2267. 2270. 1 *Black* 664.

The Court will, under particular circumſtances, permit a motion for a new trial to be made, though the four days be elapſed which are by the rule and practice of the Court limited for making motions of that ſort —After argument on a ſpecial verdict, and the poſtea ordered to be delivered to the plaintiff, it was delayed for two days to give the defendant an opportunity of moving for a new trial; which he could not do, by the practice of the Court, without laying a ſpecial ground for ſuch a motion; and the ſuggeſtion was, that there was reaſon to apprehend that the judge who tried the cauſe was of opinion againſt the verdict. Cauſe was ſhewn againſt the rule to ſhew cauſe why the defendant ſhould not be at liberty to move for a new trial. That by a general rule of the Court, no new trial can be moved for, after the firſt four ſitting days (*i. e.* Sundays excluded) of the term; unleſs ſpecial leave be aſked and obtained for this purpoſe. And the counſel for the plaintiff relied on this eſtabliſhed practice of the Court. There was no reaſon, they ſaid, to take this caſe out of the common rule; no ſpecial ground laid, to induce the Court to depart from it. Afterwards the judge's report was read, which ſpecified the evidence, and did not expreſs any diſſatisfaction with the verdict. PER CURIAM.—This was a motion for liberty to move for a new trial, though the four days were elapſed, which are by the rule and practice of the Court limited for making motions of that ſort; and it has been objected, "that no ſuch motion can be "made after that limited time; as no leave was given for it." But if there appear, under the particular circumſtances of the caſe, ſufficient grounds to us, to excuſe the delay; and that, to attain juſtice, there ought to be a new trial; we may make an exception to the general rule of practice. And therefore we deſired (amongſt other material circumſtances) to have the judge's report of the evidence. The judge does not declare any diſſatisfaction at the verdict. He certifies the particulars of the evidence; and that the jury gave their verdict upon believing a witneſs for the plaintiff, though he was contradicted by ſome of the defendant's witneſſes. The jury had a right to judge of the credit of the witneſs: it was their proper province. There does not appear to be ſufficient reaſon to ſet aſide this verdict and direct a new trial. Therefore the rule muſt be diſcharged.

Birt *v.* Barlow, Eaſ. Ter. 19 Geo. 3 B.R. 1 *Doug.* 170.

So in this caſe, Wedneſday, the 21ſt of April, was the firſt day of the term, and, by the practice of this Court, all new trials (in cauſes tried in vacation) muſt be moved for within four days of the beginning of the term, including the firſt; ſo that Saturday, the 24th of April, was the laſt day for moving. However, *Rous* having ſtated that he had underſtood that the four days were reckoned excluſive of the firſt, and BLACKSTONE, Juſtice, having deſired at the trial, that the opinion of the Court ſhould be taken, the Court entertained the motion, which

which was founded on the ground of a misdirection in point of evidence; and the rule was granted.

A defendant convicted on a criminal prosecution cannot move for a new trial *after the first four days of the next term*; though if it appear to the Court at any time before judgment that injustice has been done by the verdict, they will interpose, and grant a new trial. — The defendant was brought up to receive judgment, having been convicted upon two informations; and his counsel desired first to be heard upon a motion which he intended to submit to the Court for a new trial in both cases: *and, upon a suggestion by the Court that he was out of time for such a motion, the four first days of the term having elapsed,* he stated that *the rule concerning the moving for new trials within the four first days of the term applied only to civil, and not to criminal cases*; that there were instances in which the Court had awarded new trials in the latter subsequent to the four first days, although no motion had been made to that effect before. And he mentioned several cases in which he conceived this distinction had been adopted or recognized. *Rex* v. *Gough*, *T.* 21 *G.* 3. *Dougl.* 791. *R.* v. *Atkinson*, *M.* 24 *G.* 3. & *M.* 25 *G.* 3. (1). *R.* v. *Aylett*, *T.* 25 *G.* 3. (2). and *R.* v. *Spottiswoode*, *H.* 28 *G.* 3. (3). In ad-

Rex *v.* Daniel Holt, Mic. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 436.

(1) In *R.* v. *Atkinson* the defendant was convicted of perjury at the sittings after Trinity Term, 1783. In the Michaelmas Term following, on the 8th of November, Lord *Mansfield* observed to the bar that an intimation had been given that a motion was intended to be made for a new trial in this case, that "this was the third day of the term, and no motion had yet been made;" and that no such motion could be made unless the defendant were present in Court. On the 26th of June, 1784, the defendant *Atkinson* appeared in Court, when it was on his behalf desired that the consideration of this business might be postponed for the purpose of moving for a new trial, on the judge's report. LORD MANSFIELD said, no motion could be made for a new trial: *but if it came out incidentally by the report that it was proper, the Court might grant one.* The defendant was then committed to prison. On the 28th of June Lord *Mansfield* (who had desired to have affidavits from some of the Commissioners of the victualling-office respecting part of the transaction which gave rise to the prosecution) said he wished to apprize the counsel concerned of the method which the Court were taking. That there was no rule for a new trial, nor was it intended that there should be. His Lordship added, "I have directed these enquiries for the satisfaction of my own mind, and of the world at large: *if the Court conceive a doubt that justice is not done, it is never too late to grant a new trial,* but not on the application of the party." The defendant was brought up again, and after hearing the affidavits, the Court were clearly of opinion that they ought not to grant a new trial.

(2) The defendant was convicted of perjury at the sittings after Easter term, 25 *Geo.* 3. The Trinity term began on the 27th of May. On the first day of June, *Erskine* for the defendant (having had leave until that day) applied for a new trial, but, the defendant not being present, the Court said that no such motion could be made. *Erskine* then moved for an *habeas corpus* to bring him up (he being then in custody), and for leave to move on the morrow, which the court granted. Bu this rule for a new trial was afterwards discharged on hearing the merits.

(3) The defendant, who was convicted of perjury at the sittings after

dition to which *Birt* v. *Barlow*, *Dougl.* 170. was afterwards adverted to. The Court, however, conſidered the practice to be otherwiſe; and deſired the matter to ſtand over.—PER CURIAM: In the caſe of the *King* v. *Gough*, the objection to the verdict was taken by the Court themſelves, who thought that ſubſtantial juſtice had not been done. And there are not wanting other inſtances of the ſame kind, where the Court in criminal caſes have ſhewn themſelves anxious to be ſatisfied whether or not the defendant had been properly convicted, without any motion of the party for that purpoſe. This was done by Lord *Mansfield* in the *King* v. *Morris*, 2 *Burr.* 1189. and the ſame has often occurred in other caſes. *But all objections to the verdict, intended to be made by the party intereſted, muſt regularly be made within the four firſt days of the term.* And this point being now clearly aſcertained, if the counſel for the defendant have any thing to offer, in order to ſhew that juſtice has not been adminiſtered to the defendant in this inſtance, the Court will readily hear it.

On the motion for a new trial it was objected againſt the verdicts, that with reſpect to one libel, the defendant offered evidence, that the paper publiſhed by him was not his compoſition, but had been publiſhed in the year 1783, by other perſons now in office under government, who had not been proſecuted for it, and that he had only reprinted the ſame work; which evidence was rejected by the judge. LORD KENYON, Ch. J. The conſequence of admitting that evidence would have been, that thoſe perſons, who were not only not called upon, but could not have had any opportunity to defend themſelves againſt this charge, might have been pronounced to be guilty. Such evidence would lead to the moſt dangerous conſequences; and the guilt or innocence of thoſe perſons could not affect the deciſion of this caſe. If the defendant could have ſhewn that he had publiſhed the paper in queſtion without knowing its contents, as that he could not read and was not informed of its tendency until afterwards, that argument might have been preſſed upon the jury. But as the defendant knew of the contents of the paper before he publiſhed it, and as it is not diſputed but that the paper is criminal, I confeſs that I cannot ſee the relevancy of the evidence which was tendered. It has been argued, however, that the evidence was rendered admiſſible by the late act of parliament, which enables the jury to decide upon the whole queſtion, including alſo the intention of the party accuſed of publiſhing a libel: but it ſeems to me that the defendant has had the full benefit of that ſtatute; for the queſtion left to the jury embraced every thing that could be left to their conſideration. And, they having found that the de-

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Mich. term, 2 Geo. 3. obtained on the 26th of January following (being the fourth day of Hilary term) a rule to ſhew cauſe why there ſhould not be a new trial, which was afterwards made abſolute.

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fendant publiſhed this paper with a ſeditious intention, there is nothing left for our deliberation. ASHHURST J. The rule with regard to the time of moving for new trials, ſeems now admitted to be the ſame in criminal as in civil caſes. But, though that be the general rule, when the Court ſee reaſon to ſuſpect that juſtice has not been done to any particular defendant, they will in their diſcretion direct a further enquiry into the merits of the cauſe. Then I am clearly of opinion, that the evidence tendered was not admiſſible. One of the conſequences of admitting that kind of evidence would be that the publiſher of a libel could not be indicted before the author, and that would be tantamount to ſaying, that in many inſtances there ſhould be no puniſhment at all. BULLER, J. The caſe of *R.* v. *Gough* was one of the firſt caſes, in which the Court granted a new trial after the expiration of the time allowed by the practice of the Court to move for a new trial. I read the report of the firſt trial; immediately on my reading it, the Court thought that the defendant ought not to have been convicted; and Lord *Mansfield* ſaid, We muſt either grant a new trial, or defer giving judgment for ever. But the Court did not interpoſe, without being appriſed that they were exceeding the rules of the Court; and nothing would have induced them to break through thoſe rules but the clear opinion which they entertained that injuſtice would otherwiſe have been done to the defendant. In the caſe of *R.* v. *Atkinſon* it is impoſſible to overlook the extreme caution expreſſed by Lord *Mansfield* to prevent the public ſeeing that what had been done in *R.* v. *Gough* was irregular. Lord *Mansfield* himſelf mentioned the caſe on the third day of the term, and ſaid if no motion for a new trial were made on the fourth day, it could not be made at all. The reſult of all the caſes which have been mentioned is, that if the defendant do not move for a new trial within the four days, he cannot be heard at all on the ſubject of a new trial: all that he can do afterwards is to move in arreſt of judgment, which may be done at any time before judgment is pronounced, or addreſs himſelf to the Court in mitigation of the puniſhment; and if in the courſe of that addreſs it incidentally appear that juſtice has not been done, the Court will interpoſe of themſelves. I do not differ in opinion with the Court on the point made reſpecting the information; but, for the ſake of the precedent, I will confine myſelf to this obſervation, that *as this objection does not appear on the judge's report, I think we ought not to take any notice of it after the expiration of the four days.* GROSE, J. The motion for a new trial ſeems to have been made on a miſapplication of the rule reſpecting motions in arreſt of judgment; for the objection by the proſecutor that it is now too late for the defendant to move for a new trial is perfectly well founded. But what paſſes every day in this court will leave the ſubjects of this country in no difficulty upon this point; for though the rule be ſettled

that, after the firſt four days, the defendant cannot move for a new trial: *wherever the Court have ſeen of themſelves, or on the ſuggeſtion of counſel, that the defendant has been improperly convicted, they always have interpoſed* (and I take it for granted always will interfere) to prevent judgment being paſſed on an innocent man. With regard to the other objection: it does not clearly appear to me what this ſuppoſed paper was, which the defendant wiſhed to give in evidence; and as it does not appear on the judge's report, it would be ſufficient to give that anſwer to the objection. But ſuppoſing a paper, preciſely ſimilar to that which is the ſubject of this indictment, had been offered in evidence, the vindication of this publication could not be made out by a prior publication of the ſame kind. It does not follow that, becauſe one libeller has not been puniſhed, another ſhould not even for the ſame publication at a future time. The admitting of ſuch evidence as that alluded to would lead to all thoſe miſchievous conſequences already pointed out; and therefore I am of opinion, that if the paper which the defendant tendered in evidence was exactly ſimilar to that for the publication of which he was proſecuted, the learned judge did right not to receive it. The Court on a ſubſequent day ſentenced the defendant to pay a fine of 50l. and to be committed to Newgate for two years, for each of theſe offences; and to find ſureties for his good behaviour for five years afterwards.

Pochin *v.* Pawley, Ea. Ter. 9 Geo. 3. B.R. 1 *Bl. Rep.* 670.

Where a plaintiff refuſes to be nonſuit, contrary to the opinion of the judge; a new trial (if granted) ſhall be without coſts; and if he ſubmits to an erroneous nonſuit; it ſhall be ſet aſide without coſts.—This was an action of aſſumpſit, againſt the ſurveyor of a turnpike road, by a farmer, employed by order of the commiſſioners, to repair the road. *Aſton*, J. was of opinion, that there was no evidence of any contract, with the ſurveyor perſonally and the plaintiff; but that the contract was made with the commiſſioners, and that the ſurveyor was only their ſervant, or meſſenger: and therefore, he would have nonſuited the plaintiff, but he refuſed to be nonſuited; and a jury of farmers gave a verdict for the plaintiff. And now, on a motion for a new trial, the Court was unanimouſly of opinion with Mr. Juſtice *Aſton*; and, though they held, that the commiſſioners could not be perſonally ſued, being too numerous; yet their treaſurer might. And, as the plaintiff had refuſed to be nonſuited, contrary to the opinion of the judge; they granted the new trial, without coſts. In like manner, as, where a plaintiff ſubmits to a nonſuit, in compliance with the erroneous opinion of a judge, the nonſuit ſhall be ſet aſide, without coſts.

Jackſon *v.* Duchaire, Hil. Ter. 30 Geo. 3. B.R 3 *Ter. Rep.* 553.

The caſe of a miſdirection at the trial is not the only caſe in which the Court will award a new trial *without* coſts. For if the verdict be manifeſtly againſt the juſtice of the caſe, and the judge's direction, it is fit that a new trial ſhould be granted without coſts.

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Notice to Quit.

A NOTICE to quit "or I shall insist on double rent," is good to support an ejectment.—In this case, the only question arose on the notice to quit, which was in writing, in the following words: "I desire you to quit the possession, at Lady-day next, "of, &c. or I shall insist upon double rent "for the same." And the Court held it sufficient to support the ejectment: that it was to be considered as having two points, 1st, The common notice to quit. 2dly, A warning to the tenant of the consequence, if he should disobey the notice, and put his landlord to the necessity of bringing an ejectment.

Doe, Lessee of Matthews, *et al.* v. Jackson *et al.* Ea. Ter. 16 Geo. 3. B.R. 1 *Doug.* 175.

But a month's notice is not sufficient, to quit a lease from year to year.—*A.* demises to *B.* from year to year, commencing the 10th of October. *B.* dies the 27th of August. *A.* the 9th of September, gives notice to the executor to quit, at the end of the term. Quæry, If the notice is sufficient? The Court held clearly, that, in a common case, it would not be sufficient notice; but in the case of an executor, they doubted. But Lord *Mansfield* inclined strongly, that the nature of the contract being to hold from year to year, unless reasonable notice was given on either side, and notice not having been given in reasonable time; the executor was bound to keep the farm, if required, another year: and therefore, is at liberty to keep it, if he chooses it.

Gulliver *ex dim.* Tasker *v.* Burr, Ea. Ter. 6 Geo. 3. B.R. 1 *Black.* 596.

See also title LANDLORD and TENANT.

Officers.

A JURAT of the corporation of Hastings may be elected town-clerk of that corporation. But the two offices are incompatible, and the acceptance of the latter (though an inferior office) will vacate the former.—On the trial of two issues directed by this Court, to try first, whether the defendant were duly elected town-clerk, or common clerk, of the corporation of Hastings for life. And secondly, whether the plaintiff were duly elected town-clerk, or common clerk, for the said corporation of Hastings. The first issue was put out of the question by the finding of the jury; and the points now to be considered arose upon the second issue, which respects the validity of the plaintiff's election; and upon this two questions arose: FIRST, Whether the offices of jurat and town-clerk of the borough of Hastings may be exercised by the same person? And if not, SECONDLY, Whether the objection goes to the plaintiff's ineligibility at the time of election, or to the incompatibility

Milward *v.* Thatcher, Mic. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 81.

compatibility of holding the two offices together? And it was contended for the defendant, that the plaintiff's election to the office of town-clerk was void; for it was inconsiſtent that two ſuch offices ſhould be exerciſed at once by the ſame perſon; one of theſe being a judicial and the other a miniſterial office in the ſame court. Ashhurst J. It is not neceſſary for us to decide in this caſe whether theſe two offices be or be not incompatible, becauſe if they be incompatible the acceptance of the latter vacates the former; though, if it were neceſſary to decide that queſtion, I ſhould be of opinion that they were incompatible, becauſe the one is a miniſterial and the other a judicial office. It has been ſaid that the plaintiff is not bound to ſit in his judicial capacity, becauſe there is a ſufficient number of jurats to conſtitute a court without him: but there may be caſes in which it would be abſolutely neceſſary for him to ſit in that character, as in caſe of the ſickneſs of the other members; and if there be one poſſible caſe in which he might be called upon to act, that is an anſwer to the argument. But, on the other part of the caſe, I think that the acceptance of the latter does abſolutely and *ipſo facto* avoid the former, although the ſuperior office, if they be incompatible. It is argued that, when two offices are incompatible, the acceptance of a ſuperior office vacates the inferior one, but that the converſe of that propoſition does not hold: but I ſee no reaſon for the diſtinction, and I know of no caſe to warrant it; for if a perſon chooſe to relinquiſh a ſuperior office on account of the profits of an inferior one, he is at liberty to do ſo. Now it is ſtated in this caſe that the plaintiff has acted as town-clerk ſince his election, and not as jurat; therefore he has accepted the latter office; and though the former were a ſuperior office, it is vacated by ſuch an acceptance. Buller J. Whether theſe offices be incompatible or not, there muſt be judgment for the plaintiff upon this caſe. This is an iſſue to try whether the plaintiff were duly elected to the office of town-clerk. Now if the offices be compatible, his being a jurat before is no objection to his election; and if they be incompatible, the election to the latter office is good, becauſe the acceptance of the ſecond vacates the firſt office; therefore he is entitled to this office. The argument in favour of the plaintiff's holding both offices is drawn from ſeveral caſes which do not bear the leaſt analogy to the preſent. The caſes cited from *Cro. Car.* 127. 138. *Cro. Eliz* 76. and Sir *W. Jones*, 193. are caſes of writs of error brought in civil actions, and the objection was taken to the competency of the judges below: but in ſuch caſes the queſtion whether they be properly judges or not, can never be determined; it is ſufficient if they be judges *de facto*. Suppoſe a perſon were even criminally convicted in a court of record, and the recorder of ſuch court were not duly elected, the conviction would ſtill be good in law, he being the judge

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de facto. With respect to the case put of replevin before the sheriff, that depends on an act of parliament. The case of *The King* v. Sir *W. Trelawney*, 3 *Burr.* 1615, as far as the question was entered into, is an authority. There the Court did not distinguish between a superior and an inferior office; but Lord *Mansfield* expressly said, that "if the two offices were incompatible, the acceptance of the latter would imply a surrender "of the former." That was an application for an information in the nature of a *quo warranto*, in which cases the Court exercise a discretion whether they will grant the application or not. There the persons who applied for the information had all been acting under an usage for 100 years before; and it is a decisive answer to such applications, that, where the parties have been acting under an usage, the Court will not suffer them to object to it. As to the case in *Dyer*, 332-6, the party was elected to the office of alderman against his consent; but it is not in the power of any man or description of men to turn any person out of his office by electing him to another against his consent. That case, as far as it goes, likewise shews that these two offices are not compatible. With regard to the distinction which was attempted to be made between being elected from an inferior to a superior office, and from a superior to an inferior office, there is no case to authorise it. Then as to any option which the party may be said to have, there cannot be a stronger instance of having made an option than the plaintiff's accepting the office of town-clerk, and acting under it. I have no doubt but that his intention was to keep both offices: but if he be mistaken in law, and choose to accept the last office, he must abide by the consequences; for it is his own act. It is no argument for the plaintiff to say, that he need not act in both capacities at the same time; for in questions of this sort it is material to consider what is the constitution of the borough, and whether by prescription or charter is the same thing; as if the king by his charter say, that there shall be a mayor, twenty-four jurats, and a town-clerk, the corporation cannot by their own act reduce the number by consolidating two of these offices. If the two offices be incompatible, the acceptance of the latter vacates the former; nor is this affected by the finding of the jury that the plaintiff was, and still is, a jurat; for they only state the fact, and the law is still left open. GROSE, J. agreed.—Postea to the plaintiff.

Ilderdale *v.* the Duke of Montrose and Lord Mulgrave, Paymasters General of the army, Ea. Ter. 31 Geo 3. B.R. 4 *Ter. Rep.* 248.

In this case, the Court held that the future half-pay of an officer is not assignable; and said that, on the best consideration which they had been able to give to this question, they saw no reason to retract the opinion which they had delivered in *Flarty* v. *Odlum*, *ante*, vol. III. p. 798. That on principles of public policy, as well as on account of the interest of the officers themselves, they were clearly of opinion that by law such assignments were void. That the half-pay of the officers was not only a chose in action, but that with respect to

ſuch payments as were not due it was alſo contingent whether or not they would ever be made. But they hinted that the aſſignee might maintain an action againſt the aſſignor on his covenant.

The King *v.* E. J. Hollond, eſq. Ea. Ter. 34 Geo. 3. B. R. 5 *Ter. Rep.* 607.

In an indictment againſt a public officer for a breach of duty, it is ſufficient to ſtate generally that he is ſuch officer, without ſhewing his appointment.

And where a duty is thrown on a body, conſiſting of ſeveral perſons, each is individually liable for a breach of duty; as well for acts of commiſſion as for omiſſion.

Alſo in an indictment againſt a ſervant of the Eaſt-India Company for offences in India, it is ſufficient to charge him with a wilful breach of duty, without adding that it was corrupt.

Likewiſe in an indictment againſt an officer for diſobedience of orders, it is not neceſſary to aver that the orders have not been revoked, or that they are in force.

And where a public officer is charged with a breach of duty, which duty ariſes from certain acts within the limits of his government, it is not neceſſary to aver in an indictment againſt him that he had notice of thoſe acts: he is preſumed from his ſituation to know them.

But time and place muſt be added to every material fact in an indictment. And a charge in an indictment againſt an officer with a breach of orders, in not proſecuting a war "with all poſſible vigour and "deciſion," is too uncertain, even though the charge be made in the very words of the order given to him.

This was an information filed by the Attorney-general againſt the defendant for malverſations in office during the time he was one of the counſel at Madras. To this information the defendant demurred generally; and it was very fully argued. THE COURT took time to conſider of the objections taken, and Lord KENYON, C. J. afterwards delivered the opinion of the Court. This is a cauſe of great importance to the public, and to the party accuſed. The great difficulties, which have been encountered in carrying on with effect enquiries into malverſations in India, have, I am afraid, had almoſt the effect of an indemnity for offences, which deſerved ſevere puniſhment. This called for the attention of the legiſlature, who enacted three different ſtatutes upon this ſubject; the 24 *Geo.* 3. c. 25, 26 *Geo.* 3. c. 16. and 26 *Geo.* 3. c. 57. Thoſe laws upon which this proſecution is founded are now, for the firſt time, as to this part of them, called into action; and the public, and particularly the ſervants of the Eaſt-India Company, cannot but look with ſome earneſtneſs towards the event of theſe proceedings. The trial, if the proſecution proceed to an iſſue in fact, may probably be in a court of novel inſtitution; compoſed of perſons of various deſcriptions, moſt likely, from their education, to bring to the deciſion of the cauſe a competent knowledge of the law, and the power of drawing fair concluſions in point of fact from the evidence which ſhall be laid before

before them. By the ſtat. 26 *Geo.* 3. c. 57. ſ. 24. if the party demur, the demurrer is to be decided in this court: under that clauſe the preſent demurrer was filed; and in the argument in laſt term ſeveral objections were made to the information, which we are now to diſpoſe of. Some of thoſe objections were general, and ſome applied only to particular counts. IT WAS ARGUED that three things ought to concur in every criminal proceeding; 1ſt, That the party accuſed ſhould be appriſed of the charge he is to defend; 2dly, That the Court might know what judgment was to be pronounced according to law; and 3dly, That poſterity might know what law is to be derived from the record. Theſe are general propoſitions, to which I aſſent. THE FIRST OBJECTION, which was ſuppoſed to affect the whole record, was that the defendant is charged with a breach of duty, where the diſcharge of the duty belonged to a body, whereof he was but one; and which duty could only be executed by the whole body. In the courſe of the argument the Court pretty ſtrongly intimated their opinion againſt this objection. They thought that each individual of the governor and council, who did not do what in him lay to diſcharge his public duty, contracted by his negligence individual guilt. And upon that intimation I think this objection was abandoned; and was not preſſed in the reply. THE SECOND GENERAL OBJECTION was, that it does not appear that the defendant was legally appointed one of the council. The information ſtates that he was a counſellor in the room and place of *Robert Maunſel* during the period in which theſe things happened, which are imputed to him as delinquencies. We are of opinion that there is neither authority or principle, which authorizes us to ſay that there is any defect in this point. In a criminal proſecution, or in an action againſt a juſtice of peace, or againſt a clergyman for any offences by either of them committed in their reſpective ſituations, every day's practice has ſettled that the exerciſe of their office is, as againſt them, proof that they are bound to diſcharge their reſpective functions. THE THIRD, and I think the laſt, general objection is, that the defendant's conduct is not charged to be corrupt. The ſtatutes reſpecting this point do not confine this mode of proſecution to corruption only, but "every wilful breach of the "truſt and duty of any office or employment under the united company by any of the officers or ſervants of the ſaid united "company in the Eaſt Indies ſhall be deemed and taken to be "a miſdemeanor at law, &c. (1)." The information ſtates this to have been wilful; therefore this objection has no more force than the two other general objections. Theſe general objections being diſpoſed of, and ſome of the counts to which particular objections have been made being liable to fatal ob-

(1) 24 *Geo.* 3. ſeſſ. 2. c. 25. ſ. 49.

jections,

jections, which I ſhall preſently ſtate, I ſhall not go through every one of them. I cannot, however, avoid ſaying a few words on the eleventh count, which charges that the defendant, and the other perſons in office, "did not commence and "proſecute the war againſt *Tippoo Sultaun* with all poſſible vigour and deciſion." I have before ſaid that we accede to Mr. *Adam*'s poſition, that every perſon accuſed ought to know what the offence is which he is to meet upon his trial. Now what intelligence does this charge communicate to the defendant? Moſt certainly none at all. It is impoſſible for any perſon on this count, taking it alone (and we muſt take it alone for this purpoſe), to divine what is meant to be proved. Therefore we are of opinion that this count is bad. The other counts have either ſtated the defendant to be in a ſituation in which it was his duty to have done the acts, which he neglected to do, and for the omiſſion of which he is now accuſed, or they ſtate expreſs orders which he was bound, but neglected to obey. The orders are ſtated to have been given by thoſe who were empowered by the ſtatutes to give them, and when the orders were given they muſt be taken to remain in force until they were revoked or contradicted. THE OBJECTION, that notice to the defendant was not ſufficiently averred upon this record, ſeemed to be pretty much abandoned by the defendant's counſel, in conſequence of what fell from the Bench in the argument. The rules ſtated by Mr. *Wood* in his argument ſeemed to ſhew the true grounds upon which notice is or is not required to be averred. In this caſe all the facts, to which this objection can be applied, aroſe within the preſidency, when the defendant was one of the council, and therefore he was bound to take notice of them. THE OBJECTION, which has the moſt extenſive effect, is that no time is alleged when the different facts happened which are eſſential to ſuſtain the charge againſt the defendant. That it is neceſſary to ſtate ſome time, when each fact happened that is material to conſtitute guilt, is ſo fully eſtabliſhed by the caſes of the proſecutions againſt the rebels in 1746, by the authorities quoted in 2 *Hawkins*, by the caſe of Lord *Wintoun* (1) and *Lowick*'s caſe (2), in the ſtate trials, that the queſtion muſt be conſidered at reſt. Therefore I ſhall only point out briefly what are the defects in this reſpect in the different counts. In the firſt count it is ſtated that *Tippoo* had made warlike preparations; and no other time is mentioned, except whilſt the defendant was one of the counſel, which appears upon the record to have been more than a year. It is likewiſe averred in that count that the defendant could have raiſed a ſufficient number of bullocks: but when or where that could have been done the record is ſilent. *The ſe-*

(1) 6 *St. Tr.* 17. (2) 4 *St. Tr.* 718.

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venth count ſtates that a rupture had taken place between *Tippoo* and the company: but it is not ſaid when that happened, nor whether or not it did happen whilſt the defendant was one of the counſel. *The eighth*, *ninth*, *tenth*, and *eleventh* counts are open to the ſame objection. *The eleventh* count is alſo ſubſtantially bad for the reaſons I have before mentioned. *And the ninth count* admits of this further objection, that it ſtates as the foundation of that charge that *Tippoo* committed hoſtilities againſt part of the territories of the Rajah of *Travancore*, without ſtating where, in what part, or in what manner. *The ſeventh count* is for not making proviſion for bills which had been drawn by the governor general and council; but when or where thoſe bills were drawn it is not averred. What I have pointed out as to theſe counts ſeems to be of the very eſſence of the offence imputed to the defendant, and therefore ſhould have been ſtated with the uſual and common averments of time and place, when and where they did happen; and why the common eſtabliſhed forms have not been adhered to in this inſtance, I am at a loſs to conjecture. For theſe reaſons, we think that judgment muſt be for the defendant on the firſt, ſeventh, eighth, ninth, tenth, eleventh, and ſeventeenth, counts. And on the other 12 counts, to which none of theſe objections apply, and which ſhew that the pleader thought that time and place were neceſſary to be added to all material facts, judgment muſt be for the crown. The Attorney-general will conſider how the judgment is to be entered; as by the 24th ſection of the ſtat. 26 *Geo.* 3. c. 57. the defendant may ſtill plead not guilty.

Outlawry.

AN outlawry cannot be reverſed, without giving ſuch bail as the law requires.—Cauſe was ſhewn on behalf of the ſheriff of Middleſex, why an attachment ſhould not iſſue againſt him, for diſcharging out of his cuſtody the defendant in this cauſe, who had been taken upon a *capias utlagatum*, on his attorney's engaging under his hand, "To appear for the defendant and "reverſe the outlawry;" without taking ſecurity by bond in double the ſum for which bail was required, purſuant to the act of 4, 5 *W. & M.* c. 18. § 5. which directs him to do ſo in all caſes where ſpecial bail is required by the Court. The cauſe ſhewn was, that the ſheriff neither did nor could know that it was a caſe where ſpecial bail was required; nor had he any reaſon to imagine it, as the *capias utlagatum* was not marked for bail: and they produced an affidavit of the under-ſheriff, "That

Cracraft v. Gledowe, Ea. Ter. 4 Geo. 3. B.R. 3 *Burr.* 1482.

" That he had no ill intention or thought of colluſion; but had " acted agreeably to his duty, to the beſt of his underſtanding " and judgment." And they urged the act of 12 *Geo.* 1. c. 29. " To prevent frivolous and vexatious arreſts;" which, in its 2d ſection, directs, " That if the debt exceeds the ſum " of ten pounds, there ſhall be an affidavit of it; and the ſum " for which bail is to be taken, ſhall be marked upon the pro- " ceſs." So that, unleſs there be ſuch an affidavit of the debt and marking of the proceſs, it is not, as they inſiſted, a caſe where ſpecial bail is required by the Court. The Court were then clear, that this was not a caſe within the 12 *Geo.* 1. c. 29. And Mr. Juſtice DENISON (who was then in court, though now abſent) thought the point in queſtion had been ſettled. It had been determined in *Hil.* term, 1742. 16 *Geo.* 2. in this court, between Sir *George Hampſon* and *Serocold*, he ſaid, " That a " defendant cannot reverſe an outlawry without giving ſuch " bail as the law requires." IT WAS THEN ADJOURNED. This matter being now mentioned again, Mr. Juſtice YATES obſerved, that by the 13 *Car.* 2. ſtat. 2. c. 2. § 4. No ſheriff can diſcharge any perſon taken upon a *capias utlagatum*, without a ſuperſedeas firſt had: (the words are " Without a law- " ful ſuperſedeas firſt had and received for the ſame.") And by 5 *Geo.* 2. c. 27. § 5. No ſpecial writ nor proceſs, ſpecially expreſſing the cauſe of action, ſhall be iſſued, where the cauſe of action (in a ſuperior court) ſhall not amount to 10l. But here the *capias utlagatum* recites a ſpecial original ſpecially expreſſing the cauſe of action. The Court were very ſtrongly inclined to be of opinion " That the ſheriff had acted impro- " perly;" and told his counſel, that the better way would be to put in bail: and in order to give opportunity for it, they enlarged the rule, and afterwards, the ſheriff undertook to pay the debt and coſts.

Rex v. John Wilkes, eſq. Hil. Ter. 10 Geo. 3. B.R. 4 *Burr.* 2527.

In Michaelmas term, 1764, an information was exhibited againſt Mr. *Wilkes*, for having publiſhed, and cauſed to be printed and publiſhed, *a ſeditious and ſcandalous* libel (the *North Briton*, No. 45). And ſoon after, another information was exhibited againſt him, for having printed and publiſhed, and cauſed to be printed and publiſhed, an *obſcene and impious* libel (an Eſſay on Woman, &c.) Mr. *Wilkes* (who was in France) having pleaded 'not guilty,' the trial came on at the appointed time, and proceeded in the uſual manner; verdicts were found againſt him, upon both informations: after which, judgment was duly ſigned againſt him, in each cauſe; and writs of capias were awarded and iſſued againſt him, as in ordinary caſes of convictions upon informations for miſdemeanors. Upon his non-appearance, the proceedings were carried on to proclamation and exigents: and upon his not appearing on the 5th time of being exacted, he was, by the judgment of the coroners of the county

county of Middleſex, according to the law and cuſtom of the realm, *outlawed*. On Wedneſday, the 20th of April, 1768 (being the firſt day of eaſter term, 1768), ſoon after the ſitting of the Court, and *before any proceſs* had iſſued on this outlawry, Mr. *Wilkes* voluntary made his perſonal appearance in it; accompanied by three or four friends, who probably meant to become his bail, in caſe of his being now admitted to bail; and the Attorney-general prayed, that he might ſtand committed: as he had been convicted of printing and publiſhing one of theſe libels, and of publiſhing the other; and had now avowed himſelf to be the perſon ſo convicted.—The counſel for Mr. *Wilkes* oppoſed this, and ſaid, that there were ſeveral objections to the *outlawry*; and which being pointed out, it was prayed, that Mr. *Wilkes* might be admitted to bail.—Lord MANSFIELD: Here are two motions made upon the defendant's appearing perſonally in court: one, for *committing* him; the other, for *bailing* him. I am of opinion againſt *both* theſe motions. He ought to be brought in *regularly*, upon a *return* of the *capias* by the ſheriff. I have no doubt but that we *might* take notice of him, upon his voluntary appearance as the perſon outlawed; and commit or bail him: but we are not abſolutely *bound* to do it, without *ſome reaſon* to excuſe the going out of the regular courſe. If the defendant could ſhew that the Attorney-general *refuſed* to take him up and bring him into court, *in order to prevent* his having this advantage; or, *if* the Attorney-general had in fact uſed all methods to take him up, and he had concealed himſelf and abſconded, and afterwards had come in thus voluntarily, *in order to ſurprize*; upon either of theſe, or any other *extraordinary* ground, we ſhould be bound to interpoſe, and overlook the impropriety of the defendant's *coming*, inſtead of being *brought*, into court. But the real cauſe of *this* irregularity is the ſtrongeſt argument why we ſhould *not* give way to a new mode, liable to miſconſtruction, and carrying a bad appearance. It is notorious, that the defendant has appeared very publicly: *why* was he not apprehended? *The outlawry* muſt certainly be diſpoſed of, *before* you can come at any thing *elſe*: the judgment upon the *conviction* can not, *at preſent*, be proceeded upon.—YATES, J. As to the two preſent oppoſite motions, one for committing, the other for bailing the defendant; the ſame anſwer ſerves for both: "the Court can take no notice "of any thing but what comes *judicially* before them." We cannot take cognizance of this matter, in the method in which it now comes before us: we cannot take *judicial* notice "that this is the *perſon* convicted or outlawed." Mr. *Browne*'s caſe, in *Dyer*, 192. is clear and ſtrong, as to the outlawry. And as to committing him upon the convictions, that cannot be done whilſt the *outlawry* is ſubſiſting: the outlawry

lawry muſt firſt be diſpoſed of, before we proceed upon the convictions. The judgment of outlawry *ſuſpends* all proceedings upon them. The judgment on the convictions would probably be fine and impriſonment. But it would be manifeſt oppreſſion to ſet a fine upon him, when all his effects ſtand forfeited to the king already: and he is already liable to impriſonment upon the outlawry; from which he can never be free whilſt that ſtands in force. There cannot be two different judgments for the ſame offence: there cannot be judgment of outlawry, and judgment for the miſdemeanor likewiſe. In the caſe of *the King and Queen* againſt *Tippen*, 1 *W.* and *M. Salk.* 494. the defendant was outlawed upon an information for a miſdemeanor, and fined 5000l. It was moved, on his behalf, that he could not be fined upon the outlawry; becauſe, in miſdemeanor, the outlawry does not enure as a conviction for the *offence* (as it does in caſes of treaſon and felony), but as a conviction of the *contempt* for not anſwering; which contempt is puniſhed by the forfeiture of his goods and chattels: and if he muſt be fined now, he muſt be fined again, upon the *principal* judgment. And the *firſt*(1) was held to be irregular: for, the outlawry in theſe caſes is not a conviction; as appears by *Fleta*, 42. "*Quamvis* "*quis pro contumacia et fuga utlagetur*, non *propter hoc con-* "*victus eſt de facto principali.*" And there is a caſe in *Bro. Abr.* title "Utlagary," *pl.* 26, where a man was outlawed of felony, and taken by a *capias utlagatum*, and detained in the King's-Bench; and divers bills were brought againſt him in cuſtody of the marſhal: and the Court would not ſuffer it. For, his body, lands, and goods, are *the King*'s; and, therefore, the plaintiff can not have the effect of his ſuit againſt him before the outlawry: but if he obtains a pardon, the plaintiff ſhall be anſwered. If the defendant, in the preſent caſe, had come in *by proceſs*, his identity would have appeared. If he had come in *by record*, he might have applied to be bailed, either upon the ſtatute of 4, 5 *W.* and *M.* c. 18. (if that ſtatute can be ſhewn to be applicable to an outlawry on a *miſdemeanor*), or under the plenary power of the Court upon the circumſtances of his caſe. But that ſtatute ſeems only applicable to *civil* caſes. I mention this, only for the conſideration of the counſel, when it ſhall come before the Court. By the 5th ſection, the ſheriff may "take ſecurity "of the defendant, taken upon a *capias utlagatum*, in caſes "where bail is required, in *double the ſum* for which bail is "required." But how can the ſheriff, under the directions of this ſtatute, take bail in *double the ſum*, in a *criminal* caſe?

(1) Sir *James Burrows* ſuſpects this word "*firſt*" to be an error of the preſs; and that it ſhould be "*fine*."

How can the ſheriff *know* what the fine *will be?* Or, why ſhould the ſum of the *fine* be doubled? The ſtatute ſeems to relate only to *civil* caſes, and to mean "double the *debt.*" The defendant ought, in my opinion, to have come hither in a *regular* way: but as the matter now ſtands, upon this voluntary appearance, without return of proceſs, or any matter of record whatſoever, the Court can neither commit him nor bail him.—ASTON, J. I think there is but one queſtion; and I ſhall keep to that: It is, "whether he ſhall be committed?" The Attorney-general prays us to commit a man *as an outlaw*, againſt whom he himſelf would not iſſue proceſs of outlawry; though there does not appear to be any particular circumſtances to prevent his iſſuing ſuch proceſs. The officers of the crown might have exerciſed their power by proper proceſs: and then he would have been in cuſtody. But they have not choſen to do ſo: and he remains as much at his liberty, as he was before he came into court. The motion to commit him ſeems unneceſſary: and I ſhall not, at preſent, take notice of any other queſtion; he not being at all in cuſtody.—WILLES, J. of the ſame opinion. —On Wedneſday, the 27th of April, 1768 (a week after the former tranſaction), Mr. *Wilkes* having this morning ſurrendered himſelf to the ſheriff of Middleſex, upon a *capias utlagatum*, which had been ſince the laſt motion iſſued againſt him, and being now in the ſheriff's cuſtody, was *brought* into court by the ſaid ſheriff, upon the return of a *habeas corpus* directed to him for that purpoſe. In the mean time Mr. Attorney-general had granted his fiat for a writ of error: which he did immediately upon receiving an aſſurance that Mr. *Wilkes* was in actual cuſtody upon the *capias utlagatum*. The return to the *habeas corpus* being read in court, it appeared, that the defendant was charged with two outlawries; viz. one on each conviction for the reſpective miſdemeanors before mentioned. A writ of error in each cauſe was delivered into court. The outlawries, and the writs of error and the aſſignment of errors, were exactly alike in both cauſes. —The material part of the outlawry, on which the queſtion turned, was this: The ſheriff returned the writ of exigent executed and indorſed as follows—"By virtue of this writ "to me directed, at *my* county court held at the houſe known "by the ſign of the Three Tuns, in Brook-ſtreet, near Hol- "born, in the county of Middleſex, the 12th day of July, in "the fourth year of the reign of our preſent Sovereign Lord "*George* the Third now king of Great-Britain, &c. the with- "in-named *John Wilkes* was the firſt time exacted, and did "not appear." It goes on in the ſame manner, till the *quinto exactus*, viz. "at my county court held *at the ſame place*, the "9th day of Auguſt, in the year aforeſaid, the ſaid *John* "*Wilkes* was a ſecond time exacted, and did not appear:"

and

and ſo, in the ſame words, only changing the days, to the 5th incluſive. Therefore, by the judgment of *Edward Umfreville*, eſq. and *Thomas Philips*, gent. his majeſty's coroners of the county of Middleſex, the ſaid *John Wilkes*, according to the laws and cuſtoms of this realm, is outlawed. The writ of error was allowed. Lord MANSFIELD then aſked the Attorney-general, "to *what priſon* he prayed that the defendant might be committed?" Mr. Attorney-general anſwered, "to the *marſhal*."—Lord MANSFIELD: Let him be committed to the marſhal. It was then moved, that he might be admitted to *bail*(1). But, the Court declining to bail him *without* the conſent of the Attorney-general as proſecuting for the crown, he was committed to the marſhal.

His counſel then moved for a rule to bring him up to-morrow, to aſſign errors; which was granted.—There were two rules. The former was this: "the defendant being "brought here into court, in cuſtody of the ſheriff of the "county of Middleſex, by virtue of a writ of *capius utlagatum*; "IT IS ORDERED, upon the motion of Mr. Attorney-ge-"neral, that the ſaid defendant be now *committed* to the cuſ-"tody of the marſhal of the marſhalſea of this court, to be "by him kept in ſafe cuſtody until he ſhall be from thence "diſcharged by due courſe of law. And the ſaid defendant "now here in court producing a writ of error, and praying "oyer of the record, IT IS ORDERED, by this Court, that the "ſaid writ of error be *allowed*. On the motion of Mr. At-"torney-general." The other rule, "That the marſhal or "his deputy bring the defendant up to-morrow, to aſſign er-"rors," was a diſtinct rule; and was taken upon the motion of one of the defendant's counſel. On Wedneſday the 4th of May, 1768 (a week after making the laſt mentioned rule), the defendant having aſſigned errors upon the record of the outlawry, and the crown having joined in error; (all which was, by conſent on both ſides, privately tranſacted between the agents, without actually bringing Mr. *Wilkes* into court); Mr. *Davenport* moved to make the joinder in error a *concilium*: and Saturday next was agreed upon as the day on which it was to be argued.

Accordingly, on Saturday the 7th of May, 1768, it was argued. The great and capital error that was inſiſted upon, was, *the inſufficiency of the return in not ſhewing that the defendant had been five times exacted from county-court to county-court, till he was out-lawed, as the law directs, and the writ requires.* It was argued, that this ought to appear certainly and preciſely upon the ſheriff's return; that outlawries are odious; and that the Court will intend nothing in ſupport of ſo cruel a proceeding, but, on the contrary, liſten to the leaſt objection of

(1) *Vide* vol. I. 740.

error

error in it. And here, the firſt exaction does not appear to have been made *in the county* of Middleſex; nor any of the ſubſequent ones, which are ſaid to have been at the ſame place with the firſt. The words, "*near* Holborn, in the county of Middleſex," do not import its being in the county. Beſides, the time and place of the 2d, 3d, 4th, and 5th exactions ought to have been particularly ſpecified and deſcribed; and not by *reference* only to the firſt. Moreover, the ſheriff ought to have ſtated the *proclamations* explicitly and particularly, and the particular manner and circumſtances of them. It was alſo made a queſtion, "Whether an "outlawry *lies* upon an *information?*"—THE COURT took time to conſider.—Afterwards it was moved for a rule to bring the defendant up in order to be *bailed*. And it was urged, that there were two grounds of impriſonment; one, for *ſecurity*; the other, for *puniſhment*. That the former failed in the preſent caſe; becauſe Mr. *Wilkes* had always voluntarily ſurrendered: the latter failed, becauſe it was premature; for, the caſe was not yet ripe for judgment upon the conviction; and the validity of the outlawry was at preſent doubtful.—Lord MANSFIELD aſked, "whether notice had been given to "the Attorney-general of this motion?" and being anſwered in the negative, Lord MANSFIELD—However, it can't prevail; becauſe the defendant is in cuſtody *after conviction:* which is a cuſtody *in execution*. It is not a cuſtody for ſecurity only; but goes in *part of the puniſhment*, and will be taken into conſideration, upon the final judgment: and ſo we told you before, *ante*, vol. I. p. 740. A defendant in execution upon an outlawry after conviction of a miſdemeanor, in crown proſecutions, cannot be admitted to bail *without the conſent* of the Attorney-general. If the Court had been of opinion, upon the laſt argument, to *reverſe the outlawry*, yet the defendant muſt have continued in cuſtody *upon the conviction*. Errors upon outlawries have ſeldom been ſolemnly argued. This writ of error has been ſolemnly and exceedingly well argued: and the matter deſerves to be ſeriouſly conſidered. What is determined upon ſolemn argument eſtabliſhes the law, and makes a precedent for future caſes: which is not the caſe of queſtions agreed by conſent of parties, or never litigated. *This* will be a precedent.—The Court, in all caſes (without regarding who is the particular defendant), leans to the reverſal of outlawries; becauſe the puniſhment of the outlawry is often greater than the puniſhment of the offence itſelf. Here, the defendant had the merit of coming in voluntary; not being brought in by proceſs and in cuſtody. But the Court cannot *make* errors; nor reverſe for errors which do *not exiſt*, or which they *cannot ſee*: they muſt be ſatisfied that there *are* errors. If the Court had been ſa-

tisfied on any one error aſſigned, they would have reverſed the outlawry for that error. We did, ſeveral of us, when we came into court, ſeem to think that the *want of proclamations* was a flaw: but my brother YATES, doubted "whether *pro-* "*clamations were at all neceſſary* in ſuch a proceeding as this." I wiſh that the precedents and acts of parliament may be looked into, to ſee "whether *proceſs of outlawry* will lie upon "*informations for miſdemeanors*;" as well as to ſee "whether "*proclamations* are neceſſary or not, upon proceſs of outlawry "*after convictions* for miſdemeanors." I deſire that the counſel will apply themſelves to ſearch into this point, "whether "proceſs of outlawry will *at all lie* upon informations for "miſdemeanors."—Mr. Juſtice YATES thought, that what was ſaid by the Court upon the former argument, *ante*, vol. I. p. 740, would have been ſufficient to have ſpared the preſent motion. To bail him upon the *mere aſſignment* of errors, would be *prejudging* upon the errors: it would *preſuppoſe* "that "they were *fatal*." He is at preſent *in execution*; and cannot be taken out of execution, without the conſent of the Attorney-general on behalf of the crown. But ſince this matter is again brought upon the tapis, it gives me an opportunity of ſuggeſting my own doubts. *If* proclamations are *neceſſary*, I ſhould think this return to be clearly bad: but if proclamations are not neceſſary, it is then immaterial when, or where, or how they were made. As to what has been ſaid about the expreſſion, "at *my* county-court," not being determinate, becauſe he might be ſheriff of *two* counties, there were two authorities which either were not mentioned at the bar, or (at leaſt) were not fully ſtated. One of them is 1 *Ventris*, 108, where an outlawry was reverſed, for that the proclamations were returned to be "*ad* "*comitatum meum tent. apud* ſuch a place in *comp. prædict*;" and not ſaid, "*pro comitatu*:" for, anciently one ſheriff had two or three counties, and might hold the court in one county for another. The other of theſe caſes is in 2 *Roll*'s Reports, 52, *Robert Alder*'s caſe; who was outlawed for murder: and it was moved for error, that the ſheriff returned "*ad* "*comitatum meum tentum apud D. in le county de Northumber-* "*land*;" and did not ſay, "*comitat. meum Northumbriæ ten-* "*tum*, &c." And this was holden to be error, by the Court; according to the caſe in 6 *H.* 4. where it is returned "*ad com.* "*meum Somerſett tentum.*" And therefore it was holden erroneous: for, one may be ſheriff of Surrey and Suſſex, and alſo of Huntingdonſhire and Cambridgeſhire. But this is not poſſible in the caſe of the ſheriff of Middleſex. The ſheriffs of London have been immemorially the ſheriff of Middleſex: therefore, he could not have two counties. But I ſhould always incline to favour errors aſſigned in outlawry; becauſe it is more juſt and right, that judgment ſhould be given

given upon the conviction for the *offence*. Therefore, my doubt being againſt the errors aſſigned, I ſhould be unwilling that more regard ſhould be paid to it, than it ſhall appear ſtrictly to deſerve: and I would not have propoſed it, if I had not thought it incumbent upon me to communicate it, ſince it has occurred to me, and ſeems to me to have more weight than, perhaps, it might appear to others to have. But my Lord's doubt is a very material one, "whether the "offence, charged in the information, is *ſuch* a crime as will "*warrant* an outlawry." The 18 *Ed.* 3. ſtat. 1. c. 1. *vid.* alſo, ſtat. 2. c. 5. has negative words in it, in the printed edition of the ſtatutes; though it is ſaid not to be ſo in the parliament-roll. At common-law, outlawry lies only for treaſon and felony, as I apprehend: therefore, the Court would be glad of hearing the arguments at the bar, to aſſiſt their enquiry in this doubt.—ASTON, J. The opinion of the world ought not to weigh at all with the Court in forming their opinion upon the validity of the errors aſſigned upon this outlawry. If one flat deciſive objection had clearly appeared, the Court would have immediately given their opinion, upon the firſt argument. I was not ſatisfied, myſelf, that the *minor* objections had ſufficient force in them: and as to the *greater* ones, the counſel for the defendant ſeemed to me to be too ſanguine, and too much attached to their own opinions, when they declined the offer of a further argument, when the Court wiſhed to be further informed by hearing it argued again. But this doubt, which my lord has mentioned, "whe-"ther proceſs of outlawry will lie for the crimes charged in "theſe informations," is a very material one, and ought to be well conſidered. It may be neceſſary to look into *Bracton* and other books; and the ſtatutes of 18 *E.* 3. ſt. 1. c. 1. and ſt. 2. c. 5. and 1 *E.* 1. c. 20. and a caſe in the year-book of 35 *H.* 6. fol. 6. pl. 9. "that proceſs of outlawry did not lie; "becauſe the action was not for a tort ſuppoſed to be done *vi et armis*." It may be a doubt "whether proceſs of out-"lawry lies on informations of this kind, for offences which "though expreſſed to be done *vi et armis*, and are *not really* "done with *actual* force." The 18 *Ed.* 3. ſtat. 2. c. 5. ſays, "that no exigent ſhall go, where a man is indicted of treſ-"paſs, if it be not againſt the peace, or of things contained "in 18 *Ed.* 3. ſtat. 1." And though the words "*nemy des* "*autres*," are not to be found in the parliament-roll, yet they are in ſeveral manuſcript copies. Theſe things deſerve to be maturely conſidered. It is proper alſo to enquire into the practice and precedents; and to ſee whether they have been uniform and concomitant. Treſpaſſes in parks may be effectually done, without actual force. The Court will not keep back their opinion, without having ſufficient ground for doubt-

ing, and a neceſſity of taking time to ſatisfy their doubts: on the other hand, they will not give their opinions over-haſtily and prematurely, merely to gratify the humours or paſſions of mankind. WILLES, J. concurred.—On Wedneſday the 8th of June, 1768 (being the ſixth day of Trinity term, 8 *Geo.* 3.) Mr. Attorney-general, and other counſel for the crown, were further heard. But the counſel for the defendant reſted their caſe upon the former argument. AND LORD MANSFIELD expreſſed himſelf as follows: I think I am now thoroughly maſter of a ſubject which I am not at all aſhamed to ſay I knew very little of before: and I never give a judicial opinion upon any point, until I think I am maſter of every material argument and authority relative to it. It is not only a juſtice due to the crown and the party, in every criminal cauſe where doubts ariſe, to weigh well the grounds and reaſons of the judgment; but it is of great conſequence to explain them with accuracy and preciſion, in open court; eſpecially if the queſtions be of a general tendency, and upon topics never before fully conſidered and ſettled; that the criminal law of the land may be certain and known.—OUTLAWRY is a very important part of that law. Yet it is no wonder, that the forms and method of proceeding are ſo little attended to, and ſo little underſtood: for, this is perhaps the firſt occaſion where any queſtion of law, upon a writ of error to reverſe an outlawry in a *criminal* caſe, ever underwent a ſerious litigation.—Outlawry, in *civil* actions, is conſidered as in the nature of civil proceſs, to compel an appearance to the ſuit; or, if after judgment, to procure ſatisfaction. The forfeiture, though nominally to the king, yet in truth goes to the plaintiff, towards payment of his demand. If the outlaw appears, pays all the coſts, puts in ſufficient bail, and does every thing he can to put the plaintiff in as good a condition as he would have been in originally; or if, after judgment, the outlaw pays the debt and coſts; the Court reverſes the outlawry upon motion, *without* any writ of error. The *form* of the reverſal always is, "For the errors "*aſſigned*, and other errors *appearing upon the record:*" although there is, in truth, *no* error at all. *Flight* in *criminal* caſes, is itſelf a crime. If an innocent man flies for treaſon or felony, he forfeits all his goods and chattels. Outlawry, in a *capital* caſe, is as a *conviction* for the crime: and many men, who never were tried, have been executed upon the outlawry. In *miſdemeanors*, outlawry is generally a more ſevere puniſhment than would be inflicted for the crime of which the outlaw ſtands accuſed or convicted. It is a forfeiture of his goods and chattels, and all the profits of his real eſtate; and perpetual imprisonment, with many incapacities. If it is erroneous, it cannot be reverſed without a writ of error. Till the 3d of Queen *Ann*, a writ of error in any *criminal* caſe was held to be

be merely *ex gratia*. Lord-keeper lays it down(1) "that a "writ of error, in a *criminal* matter, was *ex gratia regis*, in *all* "caſes;" and ſaid(2) "he had a collection of ſeveral caſes out "of the old books of the law, that were given him by Lord "Chief Juſtice *Hales*, which ſhew that writs of error, in cri- "minal caſes, are *not* grantable *ex debito juſtitiæ*, but *ex gratia* "*regis*: and in ſuch a caſe, a man ought to make application "to the king; and he will then refer it to his counſel; and if "they certify that there is error, the king will not deny a writ "of error." It never was granted, except when the king, from juſtice, where there really was error, or from favour, though there was no error, was *willing* the outlawry ſhould be reverſed. After a writ of error granted, the attorney-general never made any oppoſition: becauſe, either he had certified "there was error," and then he could not argue againſt his own certificate; or the crown meant to ſhew favour, and then he had orders "not to oppoſe." The king, who alone was concerned as the proſecutor, and who had the abſolute power of pardon, being *willing* that the outlawry ſhould be reverſed, this Court reverſed upon very *ſlight and trivial* objections, which could not have prevailed if any oppoſition had been made, or if the precedent had been of conſequence. The *form* of reverſal, "for the errors aſſigned *and other errors* ap- "pearing upon record," delivered the Court from the neceſſity of *ſpecifying* any; and they might think themſelves well warranted to reverſe, upon the *tacitè* or expreſs conſent of the king, where he alone was concerned to oppoſe; though there really was no error at all: and, as the king had the power to *refuſe* a writ of error, the precedent was of *no conſequence*. But in the *Aileſbury* caſe, the 3d of Queen *Ann*, ten of the judges were of opinion, "that in *all* caſes, *under* treaſon and felony, "a writ of error was *not merely of grace*, but *ought* to be "granted." *Price* and *Smith* were of a contrary opinion, "that a writ of error was of *grace only*, in ALL *criminal* caſes." The ten did not mean "that it was a writ *of courſe*;" but that, "where there was *probable error*, it *ought not to be denied*." It cannot iſſue *now*, without a *fiat* from the attorney-general; who always examines whether it be ſought merely for delay, or upon a probable error.—In the caſe of the *King* againſt *Earbury*, 9 Geo. 1. the opinion of the Court was taken, before the attorney-general granted his fiat for a writ of error. In the preſent caſe, the attorney-general refuſed his fiat, while the defendant was out of cuſtody. This opinion, in the 3d of Queen *Ann*, has made a great alteration as to outlawries in criminal caſes *under* treaſon and felony. In a miſdemeanor, if there be *probable cauſe*, it *ought not to be denied*: this Court

(1) 1 *Vernon*, 170. *Crawle* v. *Crawle*.
(2) Vid. 1 *Vern.* 175, in the rioters' caſe.

would *order* the attorney-general to grant his fiats. But be the error ever ſo manifeſt in *treaſon* or *felony*, the king's pleaſure to deny the writ is *concluſive*. Lord *Muſkerry*, the ſon and heir of the Earl of *Clancarty*, petitioned for a writ of error, to reverſe his father's outlawry, becauſe his father was a priſoner in the Tower of London during the whole time of the proceedings againſt him. The fact was verified beyond doubt, by entries from the books of the tower, and by the affidavit of the Ducheſs of *Marlborough*. The Lord Chief Juſtice *Willes*, then attorney-general, reported the writ to be *merely of grace*: and, upon political reaſons, it was abſolutely refuſed; and the outlawry ſtands. A writ of error being as a matter of right, where there is error in the outlawry; ſince the 3d of Queen *Ann*, in all crimes under treaſon and felony, "WHAT IS an "error" *became an important queſtion*: which was of *no* conſequence before. Since that time, this Court has not given way to *trivial* objections, though admitted by the attorney-general. In 1708, Lord *Griffin* was brought into this court upon an outlawry for high-treaſon: and upon the prayer of the ſolicitor-general (there being then no attorney-general), a rule was made for his execution. He was reprieved, from time to time, till his death. His grandſon and heir, from the grace and favour of King *George* the Firſt, obtained a writ of error. Sir *Philip Yorke*, then attorney-general, came into court, and ſaid he had a ſign manual "to *confeſs the errors*, and conſent to the "reverſal." The Court told him, "*his confeſſing* an error in "*law* would not do: THEY *muſt judge* it to be an error: and "*their judgment* would be a precedent. But the plaintiff in "error might aſſign an error in *fact*; which, by proper au-"thority, he might confeſs." Accordingly, the plaintiff aſſigned an error in fact, viz. "that the place of his grandfa-"ther's reſidence was in the county of Northampton; whereas "he had been outlawed in London." The attorney-general confeſſed the fact: whereupon, the outlawry was reverſed, Hil. 13 *Geo.* 1. SINCE the 3d of Queen *Ann*, no queſtion of law has been *litigated*, upon a writ of error to reverſe an outlawry; no criminal outlawry has been reverſed upon a *trivial* objection: no caſe, ſince that time, has been found, of *either* kind. OUTLAWRY is an eſſential part of the criminal law. The rules and method of proceeding are wiſely calculated, to prevent ignorance and ſurprize. The conſequences are made ſevere, becauſe the offence is heinous; and it imports the ſtate, that no man ſhould fly from the laws and juſtice of his country. This Court is bound to pronounce the law as they think it is; always leaning to the favourable ſide, where they doubt: for, ſo ſays the law. It is as much a breach of duty to reverſe a good, as it would be to affirm a bad outlawry. The miſchief goes farther than an unrighteous ſentence in the particular caſe. For, to reverſe without an error, is to aboliſh

that

that part of the law. And, therefore, criminal outlawries are not to be reverſed of courſe: an error muſt be found. From the materials with which I have been furniſhed, I think myſelf ſufficiently inſtructed, to form an opinion: and I will declare the grounds and reaſons of that opinion which I have formed. There are two ſorts of error which have been aſſigned and argued: 1ſt, The firſt ſort are errors which give riſe to *queſtions of law*, and to *real arguments*. 2dly, The ſecond are criticiſms, upon *words* and *ſyllables* in the return.—Of the firſt ſort, two are aſſigned: 1ſt, That there is *no ſufficient information* filed or exhibited againſt the defendant, whereon to *ground the proceſs of outlawry*. 2dly, That *no public proclamation* whatſoever is mentioned to have been made at any open court, or at any general quarter-ſeſſions of the peace whatſoever; or at the doors of any pariſh-church where the ſaid defendant was an inhabitant; according to the exigency of the ſaid writ of *capias cum proclamatione*. UNDER THE FIRST ERROR ASSIGNED, three objections were taken: 1ſt, THAT THE INFORMATION IS BY THE SOLICITOR-GENERAL, AND NOT THE ATTORNEY-GENERAL--*(but this was over-ruled vide*, vol. III. p. 787). 2dly, That an outlawry does *not lie* upon an *information*. 3dly, That though it may lie upon an information, yet it does not lie for *ſuch an offence* as is proſecuted in either of *theſe* caſes. AS TO THE SECOND OBJECTION, under the firſt error aſſigned, "*that an outlawry does not lie upon an information.*" The counſel for the defendant ſupported this objection, *two* ways: Firſt, they ſaid, the books were ſilent on this head: and the *ſtatute of additions* mentions only, that "in original writs "of perſonal actions, appeals, and *indictments*, in which the "exigent ſhall be rewarded, &c. &c." *vide* 1 *H.* 5. c. 5 ſ. 1. But an *information* is not therein mentioned. Secondly, they ſaid, that from the *nature of the proceſs* in an information, the *exigent was not awardable*. For, the proceeding by information in this court is ſimilar to the ſtar-chamber precedents: and in ſuch proceedings, they did not award a *capias*, but a *ſubpœna*. That here, the antecedent proceſs is by ſummons of *attachment*, not by *capias:* and conſequently, if there is no *capias* to introduce the proceſs of exigent, it can not lie in this caſe. Serjeant *Glynn* admitted, as a point beyond all doubt, "that informations of this kind were competent, in this court, "at the *common-law*." No lawyer ever doubted of it: no lawyer would ſeriouſly argue againſt it. So that Sir *Bartholomew Shower* had no opportunity to deliver the argument he has printed(1). Informations here, neither derive their being, nor the form of proceeding upon them, from the ſtar-chamber; but from the common-law of the land, and the uſage and prac-

(1) 1 *Shower*, 106. *Rex* v. *Berchet* et al. *Prynn's* caſe, 5 *Mod.* 459.

tice of this Court where they are exhibited. Although informations are not mentioned in the ſtatute of additions, yet the ſame requiſites of certainty and preciſion muſt be in an information, as in an indictment(1). *Preſentment* is not mentioned in this ſtatute. And yet, on a preſentment before the coroner, "that *French* was *felo de ſe*" (which was certified into the King's Bench), "and that certain of *French*'s goods were in the poſ-"ſeſſion of *J. S.*" proceſs was iſſued againſt *J. S.* until he was outlawed. And upon error brought, "for that there was "not any addition given to the ſaid *J. S.* in the preſentment "upon which he was outlawed," it was at firſt doubted, "whether upon that preſentment proceſs of outlawry did lie:" and *Ive*, clerk of the crown-office, ſaid to the Court, "that "ſuch proceſs, in ſuch caſe, did lie; and that he could ſhew "five hundred precedents of it." And, ſecondly, it was moved, "if this outlawry ought to be reverſed for default of "addition." But it was agreed by the whole Court, that, as to this purpoſe, the preſentment ſhould be accounted in law as an indictment(2). To an information, in nature of a *quo warranto*, to ſhew by what authority the defendant claimed to be a burgeſs of Grampound, the defendant pleaded in abatement, for want of proper addition; the information ſtyling him "la-"bourer," whereas he was clothier: and this plea was moved to be ſet aſide, on the ground "that an addition was not ne-"ceſſary." The Court refuſed to ſet it aſide on that ground: but they found another, the want of a proper affidavit to verify the plea(3). There ſeems as good ground to ſay, upon the foot of precedents and conſtruction of the ſtatute of additions, "that proceſs of outlawry *lies*, and addition is *requiſite* in an "*information*," as in the preſentment in *French*'s caſe. As to the other argument, from the *nature* of the proceſs, there was no authority or precedent cited or produced, to prove the aſſertion. On the contrary, there are many precedents where the proceſs was by *capias*, and the exigent followed: ſome, as in the preſent caſe; though moſt are before conviction. But, "that a *capias does lie*, in proceſs upon theſe informations," I take to be as old as their exiſtence. If not, how could there have been ſuch a number of outlawries upon informations; and ſome, of ancient date? All theſe records are ſo many authorities to ſupport this proceſs; which are not, after ſo great a length of unqueſtioned uſage, to be now impeached, 5 *Mod.* 463, 464. And it is obſervable, on the 18 *Edw.* 3. ſt. 1. that it not only clearly relates to a proceeding *before* judgment; but it gives the exigent, if the party is not brought in on an *attachment* or *diſtreſs*. However, there is no need to reſort to

(1) 1 *Hawkins*, P. C. 260, 261.
(2) *French*'s caſe, Mich. 26 *Eliz.* 2 *Leonard*, 200.
(3) The *King* v. *Pardew*, *H.* 15 *G.* 2. 1741.

that

that kind of reaſoning; when *uſage* ſupports the *capias*, in the preſent caſe, as the common proceſs upon theſe occaſions.—— As to the third objection, under the firſt error aſſigned, "*That outlawry does not lie, from the nature of the of-*"*fence.*" This objection was ſlightly touched by Mr. Serjeant *Glynn*; but ſtruck us, at firſt, as a point fit to be conſidered: and I mentioned to the bar, "that it might be proper to look "into it." The doubt was, "Whether the offence, charged "in either of theſe informations, was ſuch as rendered the "perſon accuſed of ſuch crime liable to the proceſs of outlaw-"ry, either at *common-law* or by any *ſtatute?*" In *Coke, Littleton*, 128. b it is ſaid, "that in the reign of King *Alfred*, and till "a good while after the conqueſt, no man could be outlawed "but for felony; the puniſhment whereof was death: but "after, in *Bracton*'s time, and ſomewhat before, proceſs of out-"lawry was *ordained* to lie in all actions that were *quare vi et* "*armis*, which *Bracton* calls *delicta*, for there the king ſhall "have a fine." The 18 *Edw.* 3. ſtat. 1. declares the caſes and offences for which the exigent ſhall be awarded, if the party can not be found or brought in by attachment or diſtreſs; and not againſt any other. Alſo the 18 *Edw.* 3. ſt. 2. c. 5. ſays, "no exigent ſhall from henceforth go out, where a man "is indicted of treſpaſs; unleſs it be againſt the peace, or of "things which be contained in the declaration made in that "caſe at the laſt parliament." But, upon full conſideration, I am very well ſatisfied that the counſel for the defendant judged right in laying no ſtreſs upon this objection. The offences laid in theſe informations, and the proceedings upon them, are at the *common*-law. The *ſtatutes* giving proceſs of outlawry in certain caſes, and reſtricting its iſſuing in others but under certain circumſtances, do not affect the preſent queſtion: the proceſs is warranted, in the preſent caſe, by the *common*-law, or not at all. *Actual* force or violence does not appear to be the criterion upon which the proceſs of outlawry was founded. The *greatneſs of the crime*, and the *ſeverity of the puniſhment*, ſeem to be the material circumſtances originally attended to, in founding this proceſs; according to the paſſage I have juſt cited from *Coke*, as to the earlieſt times: for, felony does not imply or convey the idea of actual outrage; grand larceny being in its definition, as well as practice, different. And *Hawkins* confirms this notion, by ſaying, "that this proceſs pro-"bably lay for a (2 *Hawkins*, P. C. l. 2. c. 27. p. 302.) higher nature than treſpaſs *vi et armis*." The extenſion of this proceſs is ſuppoſed by Lord *Coke*, in the paſſage I quoted (and what, he ſays, is repeated, without examination, by a variety of authors), to have been ſomewhat before *Bracton*'s time. The eſtabliſhing that period, for a ſuppoſed ordinance concerning outlawries, ſtrongly authenticates the teſtimony of that cotemporary writer, touching the caſes in which, and under what

what circumſtances this proceſs lay. Lord *Coke* ſaw, that it was impoſſible to ſay "that outlawry did not lie for any crime "under felony:" univerſal practice ſhewed the contrary. So he ſuppoſes a poſitive ſtatute made about *Bracton*'s time.—There does not appear any particular ordinance for extending this proceſs: and there is no authority for the ſuppoſition. But *Bracton* (who wrote in the reign of *Henry* the 3d.) ſays (lib. 3. p. 127.b) "that it lay *in omni tranſgreſſione quæ ſit contra* "*pacem;*" and afterwards, "*pro omni tranſgreſſione, licet mi-* "*nimâ, ubi quis ad pacem Domini Regis vocatus, venire re-* "*cuſaverit, et hoc propter contumaciam.*" That this neceſſary ingredient "*contra pacem,*" did not mean poſitive force in the committing of the offence, appears from the reaſon given why it lay for felony, 2 *Ro. Abr.* 805. "Outlawry lay for felony; "*becauſe* it was *contra pacem.*" For, that could not mean (as I have already ſaid) more than its being an offence in its nature againſt the laws of ſociety, and a diſturbance of that good order and government which keeps a ſtate in unity and peace. The crime of *larceny*, in its very nature, is ſecret and fraudulent, unleſs it be done with open violence; and then it is diſtinguiſhed by the aggravated name of robbery. Beſides, in the caſe of writs *quare vi et armis* (in which caſes this proceſs is given), it is acknowledged to be on account of the *ſuppoſed*, not the actual force. And ſo is the ſame place in 2 *Rol. Abr.* 805. and the 35 *H.* 6. 6. a and b, and many other books. In fact, therefore, it appears from *Bracton*, "*that every offence* "*committed againſt* the *peace* ſubjected the delinquent to the "proceſs of outlawry." And the caſes ſhew, that the peace of the king is broke by diſorders without force. And, indeed, ſome of the greateſt crimes are without force. If force was the criterion on which this proceſs of exigent was founded at common-law, why was that proceſs given by the 18 *Edw.* 3. ſt. 1. in the caſe of *riots*, *&c?* Or what occaſion had there been for the ſubſequent ſtatute of 18 *Edw.* 3. ſt. 2. c. 5, to ſay, "from henceforth, it ſhall not iſſue in treſpaſs, *unleſs it is* "*againſt the peace*," if the practice had not been, upon indictments, *though not ſo alleged*, for proceſs of exigent to iſſue? And that ſeems to be the true reaſon of the laſt reſtrictive ſtatute. I do not find it ever was denied, but that upon a preſentment or indictment for the king, proceſs of outlawry lay: and ſo it is expreſsly ſaid to be agreed, in *Brooke*, title "Exi-"gent;" which cites 8 *Hen.* 6. *vide Bro. Abr.* title Exigent and Capias, pl. 29, and title Proceſs, pl. 16. But a number of outlawries have been found, in crimes laid to be *contra pacem*, *without vi et armis*, and which could not be committed with force; and this error never aſſigned: which, alone, is deciſive. I think, Mr. Attorney-general produced one as far back as the 5th of *Edward* the 4th.—The SECOND error aſſigned is as to the PROCLAMATIONS. The return ſays: "I have "cauſed

" cauſed public proclamation to be made, *in manner and form* " *as I am within commanded.*" This is certainly *too looſe*: the proclamations are not ſufficiently ſet out, for the Court to judge whether they were properly made or not. I thought this error *fatal*: but Mr. *Thurlow* ſatisfied me " that it was *unneceſſary* " to make ANY *proclamation at all.*" The *ſtatutes* which require proclamations do not extend to this caſe: and they are not required by the *common* law. Indeed, this error was in a manner dropped and given up by Serjeant *Glynn*, upon his reply: he did not contend " that they were neceſſary." The preſent record, drawn in the crown-office, and ſettled by the king's counſel, ſhews under what obſcurity and perplexity this matter lies: the reſult of ignorance in the practiſers; and productive of a ſhameful confuſion in the precedents of the office. They have not diſtinguiſhed between *civil* and *criminal* outlawries: they have not diſtinguiſhed between the manner of proceeding to outlaw in *criminal* caſes, *before* and *after* conviction. All is jumbled together: whatever is required in *any* caſe, they have applied to *all*. Circumſtances are unneceſſarily required, and defectively returned; becauſe, former miſtakes are copied as precedents, without examination. But, as the proclamations, in *this* caſe, were nugatory and ſuperfluous, the imperfection of the return is of no conſequence: it is no error.——Of the SECOND SORT of errors, *critical* and *verbal*; two are aſſigned: 1ſt. For that it is not ſhewn, nor does it appear by the return of the ſheriff of Middleſex, " that the defendant was a firſt, ſecond, third, fourth, and " fifth time exacted *at the county-court of the county of Mid-* " *dleſex*; as, by the law of the land, he ought to have been, " before he was outlawed." UNDER this error thus aſſigned, two objections were made: as to the *firſt exaction*; and as to the *ſubſequent*. Firſt, As to the *firſt*—The return is by two men, ſheriff of Middleſex: " at *my* county court, " held, &c." So that two men, making one officer, that is, *ſheriff* of the county of Middleſex, ſay, " at *my* court, held in " the county of Middleſex." To raiſe a doubt, it is neceſſary to go out of the record, into hiſtory and law. We know from thence, that the ſame man might be ſheriff of *two* counties. Till the 13th of *Elizabeth*, one perſon was ſheriff of Somerſet and Dorſetſhire; and ſo of Suſſex and Surrey; of Oxford and Berks; of Nottingham and Leiceſterſhire: and to this day, the ſame perſon is ſheriff of Cambridge and Huntingdonſhire. Such a ſheriff might, by law, hold *in either* the county-court of the *other*. 6 *Hen.* 7. 15.[b] In the caſe of the ſheriff of Somerſet, who was then alſo ſheriff of Dorſetſhire, " *my court*, in the county of Somerſet," was adjudged uncertain. 11 *Hen.* 7. 10.[a] in a like caſe, *Rede*, *Fairfax*, and *Huſſey*, inclined to think it certain enough; and adjourned the conſideration. But *here* it is impoſſible to raiſe a doubt: *unleſs* the ſheriff

ſheriff of Middleſex may hold the court of *another* county in Middleſex, "at *my* county-court," *can* only be the county-court of Middleſex. *Two* men, ſheriff of Middleſex, never were nor could be *ſheriff* of any *other* county. The error is not aſſigned, for want of any technical form of words; but "that it is not ſhewn, nor does it appear by the return:" whereas, I am of opinion it *is* ſhewn, and *does* appear by the return, that the county-court was of Middleſex, and could not poſſibly be the court of any other county.—Secondly, As to the *ſubſequent exactions*, the objection is, "that it is not ſhewn, "nor does it appear, *where the court was held*, at which he "was exacted." The return, having ſpecified the place where the court was held, at which he was firſt exacted, ſtates ſeverally the ſubſequent exactions, "*at my court, held at the ſame* "*place.*" So that the whole doubt is, "whether the *ſame place* "includes the deſcription of the place referred to?" which can not be a doubt, in any language of the world. For, in truth, the doubt can be no other than, "whether the *ſame place* "means the *ſame place*, that is, the place before deſcribed."—SECOND *critical* error. The only other error aſſigned and argued, is, "It is no where expreſsly ſhewn, that the place "called Brook-ſtreet, where the ſeveral county-courts are ſup-"poſed to have been held, is *in* the county of Middleſex." The return ſays, "at the houſe known by the ſign of the "Three Tuns, in Brook-ſtreet, near Holborn, in the county "of Middleſex." The counſel for the defendant contend, that the true conſtruction ought to be, to apply "in the county "of Middleſex," to Holborn, and *not to* Brook-ſtreet; and ſo make a *ſtop*, at Brook-ſtreet. It is impoſſible for me to doubt whether "*near* Holborn," is not part of the deſcription of Brook-ſtreet. It could be added for no other reaſon: it could anſwer no end, to ſay, "near Holborn;" but as part of the name or deſcription of this Brook-ſtreet, in contradiſtinction to ſome other Brook-ſtreet. It is immaterial, what county Holborn is in: but the ſheriff was bound to ſhew that Brook-ſtreet was *in* Middleſex. There is no *law* in this: it is a queſtion of *conſtruction*. All men can judge of it; and would treat with contempt the judgment of this ſovereign court, if it could be founded upon ſo pitiful a prevarication. It is not permitted to me to *ſay*, "I doubt of the conſtruction," *unleſs* I *do* doubt; how much ſoever I may *wiſh* that this outlawry ſhould *not* ſtand. I am of opinion, that according to the letter, ſenſe, and grammatical conſtruction of the ſentence, the Court was held in "Brook-ſtreet, near Holborn;" and that "Brook-"ſtreet, near Holborn," lies in the county of Middleſex: and I am perſuaded, there is no man who can think otherwiſe.—*Theſe are the errors which have been objected: and* this *the manner and form in which they are aſſigned. For the reaſons I have given, I cannot allow* any *of them. It was our duty, as*

well

well as our inclination, ſedulouſly to conſider whether upon ANY OTHER GROUND, OR IN ANY OTHER LIGHT, *we could find an informality which we might allow with ſatisfaction to our own minds, and avow to the world.* From the PRECEDENTS we have ſeen, it appears, that a ſeries of judgments have required a *technical form of words*, in the *deſcription* of the COUNTY-COURT at which an outlaw is exacted: that after the words, "*at my county-court*," ſhould be added the NAME *of the county*; and after the word, "*held*," ſhould be added, "*for* "*the county of* ————" (naming it). Whereas here, the ſheriff ſays, "*at my county-court*," without adding, "of "Middleſex:" and he ſays, "*held at the houſe, &c.*" without adding the words, "*for the county of Middleſex*," after the word, "held." As to the firſt expreſſion, the caſes begin as far back as the 7th of *James* the 1ſt. As to the ſecond expreſſion, they begin about the 18th of *Charles* the 2d. If we are compelled by authority, to look upon *either* expreſſion as *technically neceſſary*, it is ſufficient upon *this* occaſion; becauſe, here, *both* are wanting. If an outlawry be returned in this manner, "*ad com. meum tent. apud Ciceſtriam in comitatu Suſſex*, "*&c.*" it is erroneous; becauſe it is not ſaid "*ad com. meum* "*Suſſex tentum, &c.*(1)" *Alder* was outlawed for murder; and it was moved for error, that the ſheriff returned, "*ad com.* "*meum tentum apud* D. in the county of Northumberland," and did not ſay, "*ad com. meum Northumbriæ, tentum*, &c." and this was holden to be error(2). Among the errors for which, the reporter ſays, the outlawry was reverſed; the ſecond is—not ſaid "*Suffolciæ*," after "*com meum:*" and this, he ſays, had been a *common exception*(3). Three copies have been left with us, from the records: and they are "*ad com. meum* (4) "*Middleſex tent.* &c." agreeable to the judgments I have mentioned. *Winnington* aſſigned error of outlawry: and one, ſaid to be allowed, was, that the court is ſaid to be held at the county of Hereford; and doth not ſay, "*for* the county(5)." An outlawry was reverſed, becauſe ſaid "*ad com. meum, &c.*" and not ſaid, "*pro comitatu*(6)." This term, ſeveral outlawries were reverſed, for want of "*pro com.*" or, "*nec eorum* "*aliquis*," or, "*per judicium coronatorum*(7)." One, who was outlawed for the murder of Sir *Edmonbury Godfrey*, now

(1) P. 7 *Jac.* 2. Ro. Abr. 802. *Whiting*'s caſe.
(2) Mich. 16 *Jac. Alder*'s caſe, 2 Roll's Reports, 52.
(3) Tr. 13 *C.* 2. 1. *Keble*, 50, 51. *Rex.* v. *Sicklemore.*
(4) *Rex* v. *Hallet, H.* 22, 23 *C.* 2. rotulo 16. *Rex.* v. *Preſton, H.* 22, 23. *C.* 2. rotulo 17. *Rex* v. *Vernatt, H.* 1. 2 *J.* 2. rotulo 9.
(5) *M.* 18 *C.* 2. *Rex* v. *Tuſton.* 2 *Keble*, 128.
(6) *H.* 22. 23 *C.* 2. 1 *Vent.* 108. anonymous.
(7) *E.* 31 *Car.* 2. 2 *Showzer*, 60.

brought

brought a writ of error in his hand to the bar; praying "that "it might be read and allowed." The outlawry was reverſed. Among the errors aſſigned, one was, "that it did not appear "the court was held *pro comitatu.*" The other was clearly a fatal objection(1). After ſtating the caſe, Sir *Bartholomew Shower* ſays, "She brings a writ of error, to reverſe the out-"lawry: and the error which I aſſigned *ore tenus*, was the "*uſual fault*, in not ſaying, the county-court was held *pro* "*comitatu.*" The outlawry was reverſed. (2) This is a very ſtrong authority, to ſhew, that in the third of *W.* and *M.* it was ſettled, "that the words *pro comitatu* were *technically ne-*"*ceſſary.*" A *record* of an outlawry has been found, agreeable to this form eſtabliſhed as neceſſary; and ſays, "*Ad com.* "*meum tent. pro com. Middleſex, apud le Cheſhire Cheeſe in* "*Gray's-Inn-Lane, in com. prædict*(3)." No caſe, report, or record, has been found, ſince the third of Queen *Ann*, which can be of any uſe, either way, upon this point, or any of the errors aſſigned. The authorities, I have ſtated, ſtand, to this day, uncontradicted. They are many; and have prevailed above a century. I think, they *begun* againſt law and reaſon. The former authorities were otherwiſe: the precedent in *Dalton* is otherwiſe. There is no reaſon for requiring theſe words: there is ſufficient certainty, without them. It is impoſſible to doubt, upon this record, but that the county-court, at which the defendant was exacted, was the court *of*, and held *for*, the county of Middleſex. But, this is a criminal caſe, highly penal. Outlaws have had the benefit of this exception, for a great length of time. *Can* we refuſe it to the defendant? We *can not:* though I am clearly of opinion, "*there was not a* "*colour*, ORIGINALLY, *to hold theſe words to be neceſſary.*" The objection to the blunder between the peace "*of the now*," and "*the late king*" (*vide Lookup*'s caſe, vol. III. *ante*, p. 749), after conviction, has not much more ſolidity in it: yet the houſe of lords thought themſelves bound by precedents. And ſo muſt we, had the flaw been diſcovered before judgment. I *can not* ſay, "that it does *not appear* upon this record, that the court "was *of*, and held *for*, the county of Middleſex:" becauſe, I am clearly of opinion "that, moſt manifeſtly, it *does*." But I *can* ſay, that a ſeries of authorities, unimpeached and uncontradicted, from the 7th of *James* the Firſt, as to one expreſſion; and from the 18th of *Charles* the Second, as to the other, have ſaid "ſuch words *are formally neceſſary:* I *can* ſay, that *ſuch* "*authority*, though begun without law, reaſon, or common

(1) *H.* 1 *Ja.* 2. 3 *Mod.* 89. anonymous: (*S. C.* as *Rex* v. *Vernatt*, left with us from the Record).

(2) *M.* 3 *W.* and *M.* 1 *Show.* 309. *Rex* v. Lady *Oneby* alias *Truder.*

(3) Tr. 9 *W.* 3. 1697. rotulo 1. *Rex* v. *Bell.*

"ſenſe,

"ſenſe, *ought to avail* the defendant." It would be dangerous to ſay, that any exception *allowed ſo long*, ſhould not be over-ruled. The exception certainly would not have prevailed, had it been oppoſed at firſt: but, before the 3d of Queen *Ann*, there being no oppoſition after a writ of error was granted, the Court conſidered the Crown as conſenting to the reverſal upon *any* pretence, how ſlight ſoever. Though that is *not* the caſe *now*, the *neceſſity of the form of words* muſt not be canvaſſed; ſince it has been *ſo often adjudged* neceſſary. The officers of the crown are in fault, for not attending to the form preſcribed, and copying the precedent of the *King* v. *Bell*.—There can no miſchief or uncertainty ariſe from this determination: becauſe, it being once known "*what* form of words "is neceſſary," it is eaſy to follow it. But great ſuſpicion and uncertainty muſt follow, from this Court's *allowing* a formal exception one day, and *diſallowing* it another. I beg to be underſtood, that I ground my opinion *ſingly upon the authority of the caſes adjudged*; which, as they are on the *favourable* ſide, in a *criminal* caſe *highly penal*, I think ought not to be departed from: and, therefore, I am bound to ſay that, *for want of theſe technical words*, the outlawry ought to be *reverſed*. The other THREE JUDGES concurred. A RULE was accordingly made (in each cauſe) "that, the outlawry be REVERSED." And at the ſame time rules were made, for the proſecutor to ſhew cauſe why the judgment ſhould not be arreſted; and why the verdict ſhould not be ſet aſide: and the two following points were argued very ſtrenuouſly and very copiouſly on both ſides; namely, "Whether the informations could be exhibited by "the *ſolicitor*-general?" and, "Whether the amendment could "be made by a *ſingle judge out of court*, in the manner before "ſpecified?" The former was objected to, as a ground for arreſting the judgment: the latter, as a ground for a new trial. But both points were over-ruled(1).—The defendant was then remanded, and ſentenced, for printing and publiſhing "*The* "*North Briton*, No. 45." to pay a fine of five hundred pounds, and be impriſoned for ten calendar months: and for printing and publiſhing "The Eſſay on Woman," to pay a further fine of five hundred pounds, and be further impriſoned for the ſpace of twelve calendar months, *to be computed from and after the determination of his afor ſaid impriſonment, for printing and publiſhing* "*The North Briton*, No. 45:" and to give ſecurity for his good behaviour for the ſpace of ſeven years, to be computed from and after the end and expiration of the ſaid twelve calendar months, himſelf in one thouſand pounds, with two ſufficient ſureties in five hundred pounds each. Afterwards he brought a writ of error in the Houſe of Lords, and

(1) See vol. I. p. 582, 740, and vol. III. p. 786.

counſel

counſel having been fully heard to argue the errors aſſigned, the following queſtion was put to the judges: "Whether a judg-"ment of impriſonment againſt a defendant, *to commence from* "*and after the determination of an impriſonment* to which he "was before ſentenced for another offence, is good in law?" Whereupon, the lord chief juſtice of the court of common-pleas, having conferred with the reſt of the judges preſent, delivered their unanimous opinion upon the ſaid queſtions, with their reaſons. That a judgment of impriſonment, &c. is good in law. And it was then ORDERED and ADJUDGED, that the judgments of the Court of King's-Bench be affirmed. Afterwards it was moved, that the defendant might be brought up, either into court within this term, or before a judge at chambers after the end of it; to enter into the recognizance required, as his impriſonment would end upon a day which did not fall within any term; namely, upon Eaſter Tueſday next. AND THE COURT ſaid, they had thought of this already; and they conceived the beſt method would be, to make a rule for his entering into the recognizance before the marſhal, or ſome other juſtice of the peace for the county of Surrey. And accordingly, they ordered the recognizance to be taken by and before any juſtice of the peace of and for the county of Surrey.

G. Barrington *v.* the King, in error, Mic. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 499.

An outlawry in felony was reverſed becauſe it appeared on the writ of proclamation and return to it, that the perſon indicted had a day in court after he was outlawed.—This came before the Court by a writ of error to reverſe an outlawry in felony. And it was objected on the behalf of the priſoner, 1ſt, that it was not ſtated in the ſheriff's return to the *capias cum proclamatione* that the priſoner was exacted at the county court of Middleſex; it is only "in *my* county "court," without adding the name of the county: and that the county court was not ſtated to have been holden in Took's-court, Curſitor-ſtreet, *and* in and for the county of Middleſex, but only "in and for the county of Middleſex." This objection prevailed in *R. v. Wilkes* (1), becauſe it had been allowed in a variety of inſtances; though Lord *Mansfield*, in giving judgment, obſerved that originally there was no colour for requiring this technical form of words, and that there was no foundation either in reaſon or common ſenſe for ſuch an objection. 2dly, That the *capias cum proclamatione*, commands *the priſoner to appear before the juſtices* at the return of the writ, whereas it ſhould have commanded him *to render himſelf to the ſheriff* on or before the day when he was exacted, *ſo that the ſheriff might have his body before the juſtices* on the return. So that this abſurdity appears on the record, that the priſoner had a day in court given to him by the *capias cum proclamatione*, *ſſ. the 25th of February*,

(1) 4 *Burr.* 2563. *Ante*, 573.

and

and yet he was outlawed for not appearing on the 21ſt of February. Lord KENYON, Ch. J. The proceedings in this caſe impute to the priſoner that he has been guilty of diſobedience of the law: they require that he ſhould render himſelf to the juſtices at the general ſeſſions of the peace next after the 1ſt of February then next enſuing, and that time is aſcertained by another part of the record to be on the 25th of February; but before that day arrived, namely, on the 21ſt of February, the ſentence of outlawry is pronounced on him. It is clear that the diſobedience of the law, for which he was to be puniſhed, never happened; for the day was not arrived, on which he was required to render himſelf. Therefore on the plaineſt principles of common ſenſe, without looking after critical objections, this outlawry muſt be reverſed (1). ASHHURST, J. of the ſame opinion. BULLER, J. I am glad that we are not called upon to give any opinion on the firſt objection; though I confeſs I have a ſtrong opinion upon it. I do not know that it has ever been determined that in any return made by a ſheriff any technical form of words is neceſſary: certain requiſites muſt be obſerved; but if obſerved in ſubſtance, and the return be not in equivocal terms, a great deal of argument is neceſſary to convince me that ſuch a return is bad. But the ſecond objection is perfectly clear. The ſtatute 8 *Hen.* 6. c. 10. which has been referred to, has no relation to this caſe: that act only applies to indictments in one county againſt offenders reſiding in another, and only to caſes where it appears on the face of the indictment that he does reſide out of the county. There the legiſlature have required that a proclamation ſhall iſſue with a ſecond *capias*, and go into the county where the perſon indicted lives; and, it is true, in ſuch a caſe the writ muſt require the perſon indicted to appear before the juſtices at the return of the writ: but that return is before the time of the outlawry; for there muſt be a *pluries capias* before the outlawry can iſſue; all thoſe are preparatory ſteps to the outlawry, and the priſoner's appearance is required in order to prevent the outlawry. But this is a very different caſe; for here the writ is returnable after the outlawry is complete. In looking into the precedents on this ſubject, there is one of *the King* v. *Cranſtaun* for the murder of Mr. *Blandy* (2) which deſerves attention, becauſe ſome of the moſt eminent gentlemen of the profeſſion were employed in it; and therefore it is natural to ſuppoſe that great care was taken in ſettling that outlawry; and in that I obſerve that the writ of *capias cum*

(1) The outlawry againſt *Richard England*, on an indictment for murder, was reverſed for the ſame reaſon, in *Hil.* 36. *Geo.* 3. B.R.

(2) Vid. 10 *St. Tr.* 1.

proclamatione required *Cranſtaun to render himſelf to the ſheriff, ſo that the ſheriff might have his body before the juſtices at the return, &c.* The form of outlawry in civil caſes is alſo material to be conſidered. The ſtat. 31 *El.* c. 3. ſettles the form in *civil* proceedings; and the 4 and 5 *W. & M.* c. 22. ſ. 4. extends the proviſions of the former act to *criminal* caſes *before judgment.* For there is a difference in that reſpect whether the outlawry be *after* or *before* judgment; for, if after judgment, no proclamation is neceſſary. And unleſs that diſtinction be attended to in *Wilkes*'s caſe, that caſe, as reported in *Burrow*, may miſlead; for the arguments are not ſtated. In fact that was an outlawry *after* conviction, and therefore it did not come within the ſtatute of *W. & M.* But that ſtatute extends the proviſions of the 31 *El.* c. 3. to criminal caſes before judgment; and, therefore, that which has prevailed in civil caſes, is a fair rule in this caſe. Now in civil caſes the writ of *capias cum proclamatione* univerſally requires the perſon indicted *to render himſelf to the ſheriff, ſo that the ſheriff may have his body before the juſtices at the return, &c.* Therefore the outlawry muſt be reverſed.—GROSE, J. agreed.—ASHHURST, J. then pronounced the judgment of the Court, that the outlawry ſhould be reverſed; that the priſoner ſhould be reſtored to his former rights; and that he ſhould be remanded. And the Court awarded a *procedendo* to carry back the record to the Court from whence it came.

The King *v.* John, James, and Joſeph Vandell, Hil. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 521.

This was a writ of error to reverſe a judgment of outlawry. On an indictment found againſt the priſoners *John* and *James Vandell*, as principals for ſheep-ſtealing, and the priſoner *Joſeph* as an acceſſory after the fact. This writ of error was twice argued; AND THE COURT took time to conſider of the ſeveral objections; afterwards Lord KENYON, Ch. J. delivered the unanimous opinion of the Court, as follows: The objections made to this outlawry on the firſt argument were divided and ſubdivided into 17 (1) in number; many of them were ſo fully anſwered at the bar, that the counſel for the priſoners upon the ſecond argument rightly confined himſelf to the ſeven following objections,

(1) Though the objections branched out into 17, many of them were ſubdiviſions of ſome general ones; and the only objections not included in thoſe now anſwered by the Court were three; 1ſt, That it was not alleged that "the indictees did not come in" before the exigent awarded. 25 *Ed.* 3. ſt. 5. c. 14. 2d, That it did not appear that the *capias* and *exigent* were *under ſeal*, but only *ſigned* by the juſtices of oyer and terminer, &c. 2 *Hale*'s *P. C.* 199. 3d, That the *exigent* was returnable before the juſtices of our lord the king aſſigned by letters patent under *his ſeal* of Great Britain, not ſaying *great* ſeal. In anſwer to the laſt, 2 *Inſt.* 555. was cited, where it is ſaid "*ſigillum regis*" generally ſpoken is the "great ſeal."

of

of which I ſhall take notice in the order in which they were made. FIRST, *That the priſoners have a day given to them upon the record to appear after the outlawry was pronounced.* SECONDLY, *That the writ of exigent is contrary to the ſtatute of* Weſtm. 1. *c.* 14. THIRDLY, *That the ſecond writ of* capias *is bad, becauſe it does not contain a command to ſeize the goods of the priſoners.* FOURTHLY, *That it is not alleged that each writ of proclamation was delivered to the ſheriffs three months before the return of it.* FIFTHLY, *That the writs of proclamation were neither iſſued or executed, according to the ſtatute.* SIXTHLY, *That it is not alleged after each proclamation that the priſoners did not appear and render themſelves*; AND SEVENTHLY, *That the names of the coroners, by whom the outlawry was pronounced, are not ſubſcribed to this record.* AS TO THE FIRST OBJECTION (1); If it were well founded in fact, we think it would have been fatal, according to the judgment of this Court in the caſe of *The King* v. *Barrington.* But the two caſes are not alike; and it will be ſufficient to ſtate the record only, to ſhew the material diſtinction between them, and to prove it to be as clear that theſe priſoners had not a day given to them to appear after the outlawry, as it was that *Barrington* had ſuch a day given to him. In *Barrington*'s caſe the priſoner was outlawed on the 21ſt of February; and the writ of proclamation required the ſheriffs to proclaim him, ſo that he ſhould be *before the juſtices* of the peace at the general ſeſſions of the peace to be holden for the county aforeſaid next after

(1) In this caſe it was argued that the objection in *Barrington*'s caſe was of a two-fold nature. 1ſt, That he was required by the writ of proclamation to be *before the juſtices, &c.*; and 2dly, That he was required to render himſelf on a day ſubſequent to that on which he was outlawed. That though the firſt of thoſe did not hold in this caſe, the latter did. That the time was the material point to be attended to. That the priſoners would have anſwered the exigency of the writ of proclamation, and the proclamations made thereon, by appearing at the aſſizes on the 9th of Auguſt, which was ſubſequent to the time when the judgment of outlawry was pronounced, according to the legal as well as general acceptation of the words "to render themſelves to the ſheriff, *ſo that he might have their bodies at the next aſſizes* to be held on the 9th of Auguſt." That in the common caſe of a *capias* or *latitat*, where a ſheriff is commanded to take a defendant, *ſo that* he have his body at the return of the writ, the ſheriff complies with the requiſitions of the writ by having the defendant on the day of the return. That the terms of theſe proclamations, which were required in aid of the *exigent*, and for the purpoſe of greater notoriety, were calculated to miſlead the priſoners: and that the ſheriff ſhould either have proclaimed the priſoners to ſurrender themſelves *generally*, leaving it to them to enquire when the fifth county court would be held, or he ſhould have ſpecified in his proclamations the day when that court would be held, requiring them to ſurrender before they were a fifth time exacted, as was done in *R.* v. *Ruſſell*, 30 *Geo.* 3.

the firſt day of February next enſuing; and the return by the ſheriffs to that writ was that he had proclaimed the ſaid *George Barrington*, that he ſhould be before his majeſty's juſtices of the general ſeſſions of the peace laſt within mentioned. The next ſeſſions of the peace were holden on the 25th of February; ſo that by the terms of the writ, and by the proclamation too, the priſoner had a day given to him to appear till the 25th of February; and if he had appeared on that day, he would have complied with the requiſition of the writ, and have ſaved his default. But he was outlawed before that day came, *viz.* on the 21ſt of February; and upon that ground the Court held the outlawry bad. In the preſent caſe the writs of proclamation were iſſued by the courts of oyer and terminer, requiring proclamations to be made that the priſoners render themſelves *to the ſheriff*, ſo that he might have their bodies before the juſtices, *&c.* at the next ſeſſions of oyer and terminer, to be holden for the ſaid county; and the priſoners were proclaimed at the proper times and places before the return of thoſe writs to ſurrender *themſelves to the ſheriff*. Under theſe writs it was the duty of the priſoners to render themſelves to the ſheriff before the 5th county court; or in default of doing ſo, they ſtood liable to the outlawry. It is impoſſible to allow this objection, without ſaying in broad terms that an outlawry (which is a legal proceſs, ſanctioned by all the authorities in the law both ancient and modern, and interwoven in the conſtitution itſelf) never can legally exiſt in this country. By law the outlawry muſt be completed before the return of the writ of *exigent*. That writ requires the ſheriff to call the party from county court to county court till he is outlawed; and if the ſheriff neither bring in the party on a caption, or render before the outlawry, or return a complete outlawry at the time that the writ of exigent is returnable, he has not complied with the writ, or done his duty. In this caſe, therefore, no day was given to the priſoners to ſurrender themſelves *to the juſtices on the return of the exigent* and proclamation, but they were required to ſurrender themſelves *to the ſheriff*; which is the accurate and correct mode of proceeding. THE SECOND OBJECTION is, that the writ of *exigent* is contrary to the ſtatute of *Weſtm.* 1. c. 14. The ſtatute of 3 *Ed.* 1. c. 14. enacts, that no acceſſory be outlawed until he that is appealed of the deed be attainted (1). But that ſtatute relates ſolely to the caſe

(1) It proceeds to enact that "their exigent *ſhall remain* until ſuch as be appealed of the deed be attainted by outlawry, or otherwiſe." This, it was contended, was equivalent to ſaying, that the exigent *ſhould not iſſue*. That it was therefore void not only as to the acceſſory, but as to the principals alſo, it being an entire writ. That there was a diſtinction in civil actions between thoſe cauſes for which a writ abated as to one

caſe of the acceſſory, and in no wiſe applies to a proceeding againſt the principal. The ſtatute mentions the caſe of an appeal only; but it has been determined that it extends to indictments as well as to appeals. And in *Bro.* tit. *Exigent*, pl. 44. it is ſaid that if it appear in the writ of appeal that one is principal and others acceſſories in an appeal againſt three, there the exigent ſhall not iſſue againſt the acceſſories, until the principal be outlawed. But if it do not appear by the writ (1), then it is not error, though the exigent iſſue againſt all together. This authority relates to the caſe of the acceſſory only, and by no means proves, that if the proceſs be erroneous as to the acceſſory, it ſhall be ſo in reſpect of the principal alſo. Another caſe quoted in behalf of the priſoners was 1 *Bulſt.* 74; where in an appeal againſt ſeveral, ſome as principals, and one as acceſſory, the acceſſory pleaded that there was no ſuch perſon in *rerum naturâ* as one of the principals; and that was holden to be a good plea. This caſe proves only that in an appeal an acceſſory may plead the miſnomer of the principal; and if by any means an end be put to the indictment or appeal againſt the principal, moſt unqueſtionably it muſt fail as againſt the acceſſories alſo. In this point there ſeems to be a diſtinction between an appeal and an indictment; for 2 *H. H. P. C.* 201. ſays, if an appeal be brought againſt a man as acceſſory to two, he muſt be

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one defendant, and thoſe which made it void as to all; that if there were any extrinſic fact, as a miſnomer or a wrong addition, or if any thing happened pending the writ, as the death of one party, to abate the writ as againſt one defendant, it would ſtill be good as againſt the reſt; but if the writ were bad upon the face of it, or it iſſued when in law it ought not, as in the inſtance of one defendant being dead before the writ was purchaſed *, it is void as to all the defendants. 8 *Rep.* 159. b; 27 *Hen.* 8. fo. 26. b. pl. 9; 21 *Hen.* 7. fo. 34. pl. 39; & 7 *Hen.* 4. fo. 27. pl. 4. And that the ſame objection alſo applied to the *judgment* which was given upon this writ; for no judgment can be given on a bad writ, 1 *Rol. Rep.* 2. 1 *Rol. Abr.* 175. pl. 1. Treſpaſs againſt three; one died pending the writ, and judgment againſt all three; the whole judgment was reverſed on a writ of error. *Scudamore* v. *Scriven*, 1 *Ro. Abr.* 775, pl 2. So in caſe of infancy; 1 *Rol. Abr.* 776. pl. 9. So in the caſe of the coverture of one defendant, *Ib.* pl. 10. The counſel for the proſecutor, after admitting the objection as to the acceſſory †, anſwered (in addition to what is ſaid by the Court in their anſwer to this objection) that the caſes of civil actions did not apply to the preſent; becauſe the proceſs, as well as the crime, is in its nature ſeveral; 2 *Hale*, *P. C.* 177; that therefore the exigent might be good as againſt the principals, though it was bad as againſt the acceſſory; and that the judgment of outlawry upon this record was alſo ſeveral, "they are and each of them is, *ſeverally* outlawed, &c."

(1) The original writ of appeal; ſee 44 *Aſſ.* p. 16. See alſo 45 *Aſſ.* pl. 9. and 3 *Inſt.* 233.

* Sed. vid. *Plowd.* 98. marg.

† The outlawry was accordingly reverſed as to *Joſeph Yandell*; and he was afterwards bailed.

proved acceſſory to both: but if he be indicted as acceſſory to two, he may be convicted on evidence which proves him acceſſory to one only. And in 2 *H. H. P. C.* 177. it is expreſsly laid down, that if ſeveral perſons be indicted for one offence, miſnomer or want of addition of one quaſhes the indictment only againſt him; and the others ſhall be put to anſwer; for they are in law as ſeveral indictments; and ſo in treſpaſs. If the indictment be conſidered as ſeveral againſt each defendant, which we think it muſt be, this objection, though it is material and has already been allowed in the caſe of the acceſſory, cannot avail the principals. And ſo it is laid down by Serjt. *Hawkins* in b. 2. c. 27. ſ. 130; who ſays "that it ſeems to be agreed that wherever ſome of the de-"fendants are expreſsly charged as principals, and others as "acceſſories, before the award of the exigent, the outlawry "of thoſe *charged as acceſſories cannot be but reverſible.*" I lay out of the caſe all the authorities, quoted relative to civil actions, becauſe they proceed on a very different ground. There the judgment given for damages is entire; and if it cannot be ſupported againſt all, it muſt be reverſed *in toto*; becauſe the Court cannot ſever the damages, and ſay that each defendant ſhall be ſeverally liable for his proportion of them. But even in thoſe caſes, if different parts of a judgment can be ſevered, the Court will reverſe it in part, and affirm it for the reſidue; as appears by the caſe quoted from 2 *Rol. Rep* 136. and many more modern determinations (1). THE THIRD OBJECTION is, that the 2d writ of *capias* is bad, becauſe it does not contain a command to the ſheriffs to ſeize the goods of the priſoners, which it was argued was required by the ſtatute, for the purpoſe of giving the party notice. This objection is founded on the ſtat. 25 *Ed.* 3. ſt. 5. c. 14. which enacts "that after any man is indicted of felony before the juſtices in their ſeſſions to hear and determine, it ſhall be commanded to the ſheriff to attach his body by writ, or by precept, which is called a *capias*: and if the ſheriff return that the body is not found, another *capias* ſhall be incontinently made returnable at three weeks after; and in the ſame writ it ſhall be compriſed that the ſheriff ſhall cauſe to be ſeized his chattels, and ſafely to keep them till the day of the writ returned. And if the ſheriff return that the body is not found, and the indictee cometh not, the exigent ſhall be awarded, and the chattels ſhall be forfeit, as the law of the crown ordaineth; but if he come and yield himſelf, or be taken by the ſheriff before the return of the ſecond *capias*, then the goods and chattels ſhall be ſaved." If this ſtatute

(1) Vide 5 *Rep.* 58. 2 *Ld. Raym.* 1384. 1 *Str.* 188. 2 *Str.* 803. and 4 *Burr.* 2022. *ante.*

were

were ever intended to apply to a court of aſſizes and over and terminer, to be ſure the language of it is very incorrect: for when an act mentions juſtices in their ſeſſions, the natural and moſt obvious meaning of thoſe words is the juſtices of the peace in their general or quarter ſeſſions. But the proviſion made by it is totally incompatible with a court of aſſizes, and over and terminer; for there never was a period in the annals of this country, when that Court ſat from three weeks to three weeks. Lord Ch. J. *Hale*, in 2 *Pl. Cor.* 195, conſiders the ſtatute as inapplicable to this court, or to any court where the juſtices ſit by commiſſion; for (ſays he) the ſecond *capias* is to be returnable at three weeks after, which may be out of term, or after the ſeſſions of the juſtices are ended. We concur in this opinion; and we think it is ſtrongly fortified by the ſtat. of 8 *H.* 6. c. 10, and the conſtruction which Lord Ch. J. *Hale* has put upon it. That act conſiſts of two parts; 1ſt, That a ſecond *capias* ſhall iſſue where the party is in a foreign county; 2dly, If the party be converſant in the county where he was indicted at the time of the felony, the proceſs ſhall be *as hath been uſed before this time*; which words Lord Ch. J. *Hale* renders thus, the proceſs ſhall be *as it was at common law*. In the ſame page, Lord Ch. J. *Hale* ſtates it as clear and unqueſtionable, that at that day the proceſs in caſe of an indictment of any felony was only one *capias*, and then an exigent. If ſo, undoubtedly the ſtat. of 25 *Ed.* 3. which requires two *capiases*, could not extend to all courts of oyer and terminer; and if it do not, it muſt neceſſarily be confined to the ſeſſions of the juſtices of the peace. *Hawkins* makes a diſtinction as to the proceſs upon indictments and appeals for offences which are or are not capital: but I ſhall not purſue that enquiry farther, becauſe we do not feel ourſelves called upon to ſay in this caſe, whether two *capiases* were neceſſary, or whether one only was ſufficient. Lord Ch. J. *Hale* makes a *quære* as to the uſage on the ſtat. of 25 *Ed.* 3. If that uſage has been conſiſtent with what we conſider as the true and plain conſtruction of the words of the ſtatute, it will greatly fortify that opinion: if, on the contrary, the uſage has been the other way, it will be incumbent on the Court, notwithſtanding what is ſaid by *Hale*, to ſee if the ſtatute can be made conſiſtent with it. All the precedents which we have been able to find on this ſubject, are one way. In the *King* v. *Morley*, *Trem. Ent.* 280; in the *King* v. *Cranſtoun*, and in the *King* v. *Barrington*, there was a ſecond *capias*; and in neither of them is there any command to ſeize the goods. The *King* v. *Morley* was a caſe of ſome authority beyond the mere precedent; for it appears in 3 *Keb.* 125. that a writ of error was brought; and though objections were taken to the indictment, yet none were made againſt the proceſs. The words of

the ſtatute themſelves, the precedents, and the authorities upon it, all concur that there is no weight in this objection. THE 4TH OBJECTION is, that it is not alleged that the writ of proclamation was delivered to the ſheriff three months before the return of it. This objection was over-ruled by the Court upon the argument; and it is not warranted in point of fact; for it appears upon the record that the writ was delivered to the ſheriff on the 28th of December, and was not returnable until the 25th of March, which allowed an interval of more than three lunar months, and is all that is required. It can only appear by the return of the ſheriff when the writ was delivered to him. THE 5TH OBJECTION is, that the writs of proclamation were neither iſſued or executed according to the ſtatute. The writ of proclamation requires "one proclamation to be made in open court in the ſaid "ſheriff's county; another at the general quarter ſeſſions of "the peace to be holden for the ſaid ſheriff's county; and an-"other at or near the moſt uſual door of the pariſh church "of *Brompton Ralph* aforeſaid, where they are inhabiting." The return of the ſheriff to that writ is as follows; that "*at* "*my county* court of Somerſet holden at Ivelcheſter in and "for the county of Somerſet within written on Wedneſday, "27th January, 30th *Geo.* 3. I cauſed the firſt proclamation "to be made in open court in the ſaid county, &c." And afterwards to the ſecond writ of proclamation, the ſheriff returned that "at the general quarter ſeſſions of the peace of our "lord the king, holden for the county of Somerſet, at the city of "Wells, in the ſaid county, on Wedneſday the 14th of April, "30th *Geo.* 3. I cauſed the ſecond proclamation to be made in "open court, &c.; and that afterwards at the moſt uſual "door of the church of the pariſh of Brompton Ralph "within mentioned, upon Sunday the 18th of April, 30th "*Geo.* 3. immediately after divine ſervice and ſermon (one "month at leaſt before the withinnamed priſoners (men-"tioning them by name) were a fifth time called by virtue of "a ſecond writ of exigent of our ſaid lord the king), I cauſed "the third proclamation to be made, &c." The expreſſions in the writ, which have been objected to, are 1ſt, That it requires one proclamation to be made *in open court* (1) *in the ſheriff's*

(1) In ſupport of this objection it was ſaid that the "*open court* in the ſheriff's county" did not neceſſarily mean the *county court*, but might be underſtood to mean any public court of juſtice held within the county. That it was not even deſcribed as *his* (the ſheriff's) open court; but that, if it had been, that might have referred to his *torn*, as well as his county court*. And that if the writ of proclamation itſelf were bad, the defect could not be ſupplied by a good return to it. The proſecutor's counſel anſwered this by obſerving, that ſome of the old entries were more general than

* *Vide* 6. *Hen.* 7. 15. *B. pl.* 7; & 11 *Hen.* 7. 10. *pl.* 33.

this

ſheriff's county; and the ſtatute 31 *Eliz.* c. 3. requires it to be made in *the open county court.* 2dly, That it requires another proclamation to be made *at the general quarter ſeſſions of the peace to be holden for the ſaid ſheriff's county;* and the words of the ſtatute are, that *one or other of the ſaid proclamations ſhall be made at the general quarter ſeſſions of the peace in thoſe parts where the party defendant at the time of the exigent awarded ſhall be dwelling.* 3dly, That it does not appear that the priſoners were dwelling in the town or place, at the church door of which the third proclamation was made. Theſe objections are very nice and critical: and the anſwers to them lie within a very narrow compaſs. 1ſt, *The open court* in the ſheriff's county is the *open county court;* the ſheriff has no court but the county court: and the caſe cited from 1 *Vent.* 108. makes againſt the objection rather than for it; for the return of the proclamation was "*ad comitat. meum. tent apud* (ſuch a "place) *in com. prædict;*" and no objection was made to the words "*ad comitat. meum:*" but the outlawry was reverſed for want of the words "*pro comitatu,*" which objection does not hold good in the preſent caſe. It was admitted at the bar on the ſecond argument that this writ was agreeable to the precedents; and I will mention ſome which tend to ſhew that, if the writ had been more general than it is, yet it would have been good. In the *King* v. *Morley* the writ of exigent was to demand him from *county to county*; and the return was "at "*our county* of the ſame city." In *Lilly*'s *Ent.* 460. the writ of proclamation is to be proclaimed on three ſeveral days according to the ſtatute, whereof let one proclamation be at or near the moſt uſual door of the church of the pariſh of A. where the ſaid defendant is dwelling, &c. without mentioning any place where the other two ſhould be. In *Theſ. Brev.* 173. the exigent is to demand him from *county to county*: and there are two precedents of writs of proclamation the ſame as that in *Lilly*'s *Entries.* So in *Clift*'s *Entries,* 384. *Dalt. Sher.* and *Raſt. Entr.* all the precedents are "*ad. com.*" In *Dalt. Sher.* 229. there are three precedents of the returns of the election of members of parliament; and in p. 230. one of

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this writ, requiring the ſheriff to proclaim the party three ſeveral times *according to the form of the ſtatute*; that others were *ad comitatum*; and that in *Cranſtoun*'s caſe the writ was like the preſent "in open court in the ſheriffs' county." To this it was replied that "*comitatus* *" ſignified either "county†" or "county court," according to the manner in which it was applied; and that *Cranſtoun*'s caſe could not be relied on as any authority, it never having been argued.

* *Vid. ſtat.* 13 *Ed.* 1. *ſt.* 1. *c.* 2. *f.* 1. "*ad comitatum vel ad aliam curiam.*"

† *Vid.* 2. *Hen.* 7. *fo.* 34. *pl.* 36. where the word "counties" is uſed to expreſs "county courts."

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the election of a coroner; all of which are *in pleno comitatu meo.* And in *Cranſtoun's* caſe, the writ was exactly in the ſame words as the preſent. As to the ſecond objection; the words "thoſe parts where the party defendant ſhall be dwelling" can mean nothing but county, riding, or diviſion; and no other conſtruction was attempted to be put upon them at the bar. The third objection is not applicable to the writ; becauſe that expreſsly ſtates that the priſoners are inhabiting in the pariſh of Brompton Ralph: but the return only ſtates that the ſheriff proclaimed them at the church door of the pariſh of Brompton Ralph, without adding the words *where they are inhabiting.* But we are of opinion that this return is ſufficient; for the ſheriff has done every thing which he was required by the writ to do, and has made a full return of that. If it appear on the record that the priſoners were inhabiting in the pariſh, that is ſufficient; and here it is expreſsly ſo alleged in the writ. It was obſerved on the firſt argument that the indictment does not deſcribe the priſoners as being *then* of that pariſh, but only as *late* of that pariſh. After the expreſs averment in the writ which I have mentioned, the caſe is not open to that objection: but if the caſe were otherwiſe, there is no foundation for it. The conſtant form of indictments is to deſcribe the priſoner *late* of ſuch a place; and both *Hawkins* and *Hale* ſay the writ of proclamation ſhall go according to the place of which he is ſo deſcribed.—THE SIXTH OBJECTION is that the ſheriff has not added to his return to each proclamation that the priſoners did not appear. It is not neceſſary that he ſhould do ſo. The paſſage cited from 2 *Hale's P. C.* 204. ſpeaks of the exigent only; and in the return to that writ it is neceſſary to ſtate that they did not appear. The exigent is the writ, which commands the ſheriff to take the priſoners; and the proclamation is merely a public notice of what is doing in another place. The precedents are againſt this objection alſo; and there is no authority in ſupport of it. In truth, theſe laſt four objections were rather hinted at, than relied upon, in the ſecond argument; and is as much as they deſerved.—THE LAST OBJECTION is, that the names of the coroners, by whom the outlawry was pronounced, are not ſubſcribed to this record; and 2 *Hale's P. C.* 204. and 2 *Rol. Abr.* 802. were quoted upon this point, where it is ſaid to have been determined that the names of the coroners muſt be ſubſcribed to the judgment of outlawry, or, in the words of *Rolle*, *be put upon the record*; or elſe it is error. By law it is neceſſary that it ſhould appear by whom the outlawry was pronounced, and that they had authority to pronounce that judgment, with the exception perhaps of an outlawry in the city of London; in which caſe it was determined in *King* v. *Garrard*, *Cro. Jac.* 531. that an outlawry returned in the general words, "*ideo utlagatus eſt*,"

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was good; the Court taking notice that there was not any coroner, but the mayor for the time being was perpetual coroner; and that the courſe was not to return there "*per judicium coro-*" *natorum*" but generally "*ideo utlagatus eſt.*" From that caſe it is manifeſt that the law requires no more than what I have already ſtated, namely, that the names of the perſons by whom the outlawry was pronounced, and that they had authority ſo to do, or in other words that they were coroners, ſhould appear upon the record. But the point does not reſt merely on inference from that caſe; for there are two other caſes in the ſame book, which ſhew clearly what is required. The firſt is Sir *Edmund Button* v. *Awdley*, *Cro. Jac.* 521; where the outlawry was reverſed becauſe it was not ſaid to be *per judicium coronatorum*; the other is *Patrick*'s caſe, *Cro. Jac.* 528. where it was ſtated that the defendant was outlawed *per judicium coronatorum*, but the record did not ſhew *the name* of any of the coroners; and for that cauſe it was reverſed. It never was contended that the coroners muſt *ſign* the judgment with their own hands. In ancient times it was hardly poſſible; and there is no caſe in the law in which it is eſſential that the judge of a court ſhould ſign the judgment with their own hand. Beſides, if that had been neceſſary, it could not have been done on this record, which is not the record of the coroners, but of the court of over and terminer, made up from the returns of the ſheriff, ſtating what had in fact been done under the mandates of the Court. The record in the preſent caſe ſtates that "by the judgment of *Daniel Follett Scadding*, "gentleman, and *Peter Layng*, gentleman, coroners of our "ſaid lord the king of the ſaid county of Somerſet, and ac-"cording to the laws and cuſtoms of England, the priſoners "are each of them ſeverally outlawed." Therefore it does appear on the record by whom the outlawry was pronounced, and that they were coroners, and conſequently had authority to pronounce that judgment. For theſe reaſons we are all of opinion that judgment muſt paſs on the priſoner at the bar.

In the courſe of this enquiry another queſtion aroſe, whether the priſoners were entitled to their clergy? and that depends on the true conſtruction of the ſtatute 14 *Geo.* 2. c. 6. ſ. 1. which takes away clergy from thoſe who are *convicted* of ſheep-ſtealing. As that is a general queſtion, we took the opinion of all the judges of England, who took time to conſider it thoroughly; and I am authoriſed to deliver it as their unanimous opinion that "outlawry" is a conviction" (1) within the meaning of

(1) Vide Stat. 26 *Hen.* 8. c. 13. ſ. 5. 1 *Ed.* 6 c. 12. ſ 10; 2 & 3 *Ed.* 6. c. 33; 5 & 6 *Ed.* 6. c. 11. ſ. 9; 29 *El.* c. 15. ſ. 2; 1 *Jac* 1. c. 8; 3 & 4 *W.* & *M.* c. 9. ſ. 2; *Co. Lit.* 390. *b*; 391. *a*; *Pordage's Caſe*; 11 *Rep.* 29; *Dr. Foſter's Caſe* 11 *Rep.* 56. *b*; 1 *Rol. Rep.* 89. 2 *Hawk.* c. 35. ſ. 62. 2 *Hale P. C.* 205; 345; 350; 352; 353; *Crompt. Off. Juſt.* 9; & *Foſter* 358.

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that act of parliament.—ASHHURST, J. then pronounced ſentence of death on the priſoner *James Yandell*; *John Yandell* having died ſince this caſe was argued the ſecond time.

The King *v.* J. Alnſon. In Error. Ea. Ter. 33 Geo. 3. 5 *Ter. Rep.* 202.

The ſheriff muſt ſtate in his return to the writ of exigent, the day and year of each exaction: ſtating that on ſuch a day *in the 30th year* of the reign he exacted the defendant a third time; that *afterwards* on ſuch a day (omitting the year) he exacted him a fourth time; and that *afterwards* on ſuch a day *in the 30th year aforeſaid* he exacted him a fifth time, is inſufficient, and a good ground for reverſing the outlawry.—On a writ of error to reverſe a judgment of outlawry againſt the defendant on an information for a libel of which the defendant had been found guilty. It was, on the behalf of the defendant, objected, 1ſt, that the firſt writ of *capias* was not returned, and therefore that there was no foundation for the other writs. And that therefore it did not appear there was any foundation for the *alias capias*; for that ſhould only have iſſued on the return of *non eſt inventus* to the firſt. 2dly, For the ſame reaſon the third writ ſhould have appeared to be a *pluries*. 3dly, That it did not appear in what year the *quarto exactus* was; and the Court cannot intend it. And that it ſhould have been expreſsly alleged in words. See 2 *Rol. Abr.* 802. *pl.* 8. which caſe is as follows; "If the return of the exigent be at my "county court, &c. at Oxford, 22 June, 6 *Ja. Angliæ*, &c. and "*Scotiæ* 42, the defendant was exacted and did not appear; at "my county court, &c. held 19 July in the year aforeſaid; at "my county court, &c. 16 Auguſt, 6 *Jac. Angliæ* and *Scotiæ* "43; the return of the ſecond county court is not good, be- "cauſe it does not ſay '*Angliæ*;' for though the firſt and "third are good, and *pur ceo* the ſecond may be intended to "be ſo too, yet becauſe this cannot be taken by intendment, "it is not good."—Lord KENYON, Ch. J. In caſes of outlawry the rule is, that the moſt ſcrupulous exactneſs is required. This rule has been adopted in a ſeries of determinations. It is now too late to enter into the reaſons on which particular objections have been held to be fatal; we have only to examine whether or not the authorities have been followed. And I confeſs, I cannot diſtinguiſh this caſe from that in 2 *Rol. Abr.* in ſubſtance: the introduction of the word "af- "terwards" makes no difference. The ſheriff's return then ſtated the ſeveral proceedings diſtinctly, as it ſhould now. Any reaſonable perſon reading the return to the exigent might ſuppoſe that the fourth exaction was in the 30th year: but in the caſe in *Rol. Abr.* the Court ſaid they could not make ſuch an intendment; and that book of abridgment was publiſhed by Lord *Hale*, who approved of the caſe cited, and gave his reaſons why it ſhould be adopted.—BULLER, J. There is neither ſenſe nor reaſon in the objection; but, according to the authorities, it muſt prevail. In a record of

outlawry

outlawry it is neceſſary to ſtate the year of the king's reign (*Craſe*'s caſe, *Hard.* 6, 7.) in which every tranſaction happened; though that is not required in other records. For example, when continuances are entered for the purpoſe of excluding the ſtatute of limitations, the year of the reign is never mentioned. But in the caſe of outlawry a different rule has been eſtabliſhed, and therefore it muſt be adhered to in the preſent inſtance.—Judgment reverſed.

The King *v.* S. Perry, Hil. Ter. 36 Geo. 3. B R. 6 *Ter. Rep.* 573.

It need not be ſtated in expreſs terms on a record of a judgment of outlawry that a *writ of capias* iſſued againſt the defendant; it is ſufficient if it appear "that the ſheriff was "commanded *to take* the defendant, &c." Neither is it neceſſary in ſtating every writ to repeat the day and year when each was iſſued; it will ſuffice if it appear by referring to the preceding parts of the record; as if, after ſtating that the capias was returned on ſuch a day, it proceed thus, *Whereupon* the exigent was awarded; the word *Whereupon* referring to the day when the capias was returned.—On a writ of error to reverſe a judgment of outlawry, for a libel on the Houſe of Commons, the objections relied on were three: 1ST, *That no writ of capias has been awarded.* 2DLY, *That it did not appear on what day or year the exigent was awarded.* 3DLY, *That it did not appear that the ſheriff who returned the exigent was the ſucceſſor of him who executed it.*—Lord KENYON, Ch. J. As to the firſt, the writ of capias is awarded in the common and uſual form. In *Co. Entr.* 358, *b.* which is an outlawry for robbery, the exigent (1) is awarded thus; Ideo preceptum fuit vicecomiti quod exegi faciat eundem *T. G.* de comitatu in comitatum, &c. The return is in this form; "ad quem diem *G. H.* armiger adtunc vicecomes, &c. retor-"navit quod virtute brevis dictæ dominæ reginæ *T. G.* "primo exactus fuit, &c." In *Trem.* 282, *Rex* v. *Morley*, for murder, the exigent is awarded thus: ſuper quod preceptum eſt eidem vicecomiti quod non omittat, &c. quin exegi faciat, &c. In like manner writs of venire and diſtringas may be found awarded in *Co. Entr.* 358, 360, 366; and it is the moſt common way ſo to award the various writs required in the courſe of any judicial proceeding. Therefore we think that the manner in which the capias is awarded on this record is warranted by all the precedents. AS TO THE SECOND OBJECTION, that it does not appear on what day or year the exigent was awarded; it appears by this record that the writ of capias was returned on *Wedneſday next after* 15 *days from the day of Eaſter;* WHEREUPON by another writ the ſheriff is commanded that he cauſe to be exacted the ſaid *S. Perry* from county court to county court, &c. In

(1) There too the *capias* only appeared on the record as in this caſe; "Per quod *preceptum fuit* H. S. armigero adtunc vicecomiti Rut. quod caperet predictum *T. S.* &c."

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this award the word *whereupon* refers to the day on which the capias was returned, and ſufficiently ſtates the day and year when it was awarded. The entry referred to as an authority in ſupport of the objection in *Brown*'s *Entr.* 363, is merely an aſſignment of an error, and not an entry of any judgment of outlawry being reverſed for ſuch cauſe; and the error aſſigned there was, that it did not appear *by the writ* in what term and year it iſſued; which might be an objection in that caſe if the writ was ſet out in the record: but that is not the caſe here. In the *King* v. *Morley*, at the gaol delivery held at York, 12th March, 1650, the ſheriff returned non eſt inventus; and the exigent is there awarded in this manner, ſuper quod preceptum eſt eidem vicecomiti quod non omittat, &c. quin exigat, &c. and no teſtè is ſtated. In *Co. Entr.* 358. *b.* the return of the capias is thus ſtated, ad quem diem (ſi) ad ſeſſionem pacis tent. apud *U.* die Jovis, &c. cor m, &c. idem vicecomes retornavit quod prædictus *T. S.* non fuit inventus in ballivâ ſuâ; *ideo preceptum* fuit eidem vicecomiti quod exegi faciat, &c.; and the day and year did not appear in any other way. In *Co. Ent.* 356. *b.* writs of diſtringas in the caſe of an indictment for murder are awarded to prevent a diſcontinuance exactly in the ſame manner. Therefore all the authorities ſhew that this objection is not better founded than the firſt. As to the third objection, That it does not appear that the ſheriff who returned the exigent was the ſucceſſor of him who executed it; the authority cited in ſupport of it was an entry in the ſame page of *Brown*, and like the other is a mere aſſignment of errors, and no entry of a judgment; neither is it an aſſignment of the error now inſiſted on, which is that it does not appear that the ſheriff returning the writ was *the ſucceſſor of him who executed it.* In *Brown*, the error aſſigned is, that it did not appear that the exigent was delivered to the ſucceſſor by the predeceſſor *in exitu ab officio ſuo*; whereas here it is expreſsly ſtated to have been delivered to the preſent ſheriff by the late ſheriff at the time of his going out of the office of ſheriff. The return of the exigent is in the form here uſed in *Lilly*'s *Entr.* 459. and in *The King* v. *Yandell*, and appears to be the uſual form; of which thirteen inſtances have been furniſhed from the Crown Office. And by looking at the record it appears, that the quinto exactus by the late ſheriff was on the 29th of Auguſt, and the return by the preſent ſheriff on the *Morrow of all Souls*, within which time the Court cannot intend that there was any intervening ſheriff, but that the writ muſt have been returned by the immediate ſucceſſor. There being, therefore, no fair ground of objection to the outlawry, the judgment of outlawry muſt be affirmed.

Campbell *v.* Daley, Tr Ter. 6 Geo 3. B.R. 3 *Burr.* 1920.

Special bail muſt be put in, upon appearing to an outlawry, where ſpecial bail was originally required.—The queſtion was, "Whether,

" Whether, in a caſe *originally* requiring ſpecial bail, and the " defendant ſtanding out to an *outlawry*, he can come in and " appear to the outlawry *without* putting in SPECIAL *bail*(1)." PER CUR. There ought to be *ſpecial* bail: it would be very unreaſonable, that the defendant ſhould gain an *advantage*, by ſtanding out till proceſs of outlawry. He certainly ought not to be in a *better* caſe then, than if he had appeared at firſt. And accordingly, the direction given was " That the filacer " ſhould not iſſue a *ſuperſedeas*, *till* the defendant had put in " *ſpecial* bail." And a week was given him for that purpoſe.

The writ of *capius utlagatum*, and the ſheriff's return to it, ought to be filed with the clerk of the exigents.—A rule was obtained, calling on the plaintiff in outlawry to ſhew cauſe why the writ of *capius utlagatam*, and the ſheriff's return to it, which had been filed by the plaintiff in the treaſury chamber, ſhould not be taken off the file there, and carried to the office of the clerk of the exigents and outlawries, in order that a tranſcript might be ſent to the court of Exchequer, upon which to apply for an *amoveas manus*. Cauſe was ſhewn: AND THE COURT ordered it to be referred to the maſter to enquire in which of the offices this writ ought to have been filed; *who reported, on a ſubſequent day, that it ought to have been filed with the clerk of the exigents.* BUT LORD KENYON deſired it might be underſtood, that it was afterwards to be carried to the office of the *cuſtos brevium*.

Reynolds, gent. *v.* Adams, Hil. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 578.

If an indictment for felony has been removed here from an inferior court, in order to iſſue proceſs of outlawry upon it, and the party accuſed come in upon the exigent, and be committed for trial, this Court will award a *procedendo*, on the ſtat. 6 *Hen.* 8. c. 6. (2) to carry the record back.

The King *v.* Perry, Hil. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 478.

Palatine.

UPON a ſuggeſtion entered by leave of the Court upon the roll, that a fair and impartial trial cannot be had in the county-court of the city of Cheſter, the Court will award the trial to be had in the adjoining county palatine. This was an indictment for the non-repair of a road lying within the county of the city

The King *v.* the Inhabitants of St Mary-on-the-Hill, Cheſter, Tr. Ter. 38 Geo. 3. B.R. 7 *Ter. Rep.* 735.

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(1) See the ſtatute of 31 *Eliz.* c. 3. § 3; and 4, 5 *William* and *Mary*, c. 18. § 4.

(2) Which enables " this Court to remand and ſend down, as well the bodies of all felons and murderers brought or removed before the King, in his bench, as their indictments, into the counties where the ſame murders or felonies have been committed or done.

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of Cheſter(1), returned by *certiorari* into this court; and a rule was obtained for leave to enter a ſuggeſtion on the record that a fair and impartial trial could not be had in that county; and praying the Court to award a trial in the county of Salop, that being the next Engliſh county where the king's writ of *venire* runs; it having been decided in the caſe of the *King* v. *Amery*(2), that this Court could not ſend down ſuch a record by mittimus to the chief juſtice of the county palatine of Cheſter, which was, in fact, the next county to the county of the city of Cheſter. But Lord KENYON, Ch. J. ſaid, that he had ſince taken the matter into conſideration, and was ſatisfied that the opinion delivered in the caſe of the *King* and *Amery* had proceeded upon a miſtake, in ſuppoſing that becauſe the king's writ of *venire facias* could not run into the county palatine of Cheſter, therefore this Court could not award the trial to be had there, and that the practice had been accordingly; but upon examination it appeared, that in the caſe of the *King* v. *Ellames* (3), where the matter originated in the county of the city of Cheſter, the record was ſent down to be tried in a county palatine; and there were other inſtances (4) ſtated in the caſe of the *King* v. *Amery*; therefore, PER CUR. Let the ſuggeſtion prayed for be entered on the roll, and let the record be ſent down by mittimus to be tried in the county palatine of Cheſter.

Rex v. Lambe, Eſq. Hil. Ter. 3 Geo. 3. B.R. 4 *Burr.* 2171.

A warrant for a tales, on a trial in a county palatine, muſt come from the king's attorney-general.—On a motion for a new trial, it appeared that the cauſe was tried in the county palatine of Durham; and related to the rights of a corporator of Durham: and the *principal* objection taken on behalf of the defendant was, "that the *warrant for a tales de circumſtanti-* "*bus*" (for there were not enough of the *ſpecial* jury) "*ought* "to have been a warrant from the attorney-general of the "*county palatine:* whereas the proſecutors had only procured a warrant from his majeſty's *attorney-general.*—Lord MANSFIELD, Ch. J. As to the *tales*, at preſent I think that, as this is an *iſſue joined at* Weſtminſter, and the *king's officer proſecutes* it, the warrant for the *tales* muſt follow that; and the king's attorney is to ſign it.—YATES, J. concurred: and

(1) Cheſter is one of the places excepted out of the late act of the 38 *Geo.* 3. c. 52.

(2) 1 *Ter. Rep.* 363. vide title VENUE.

(3) This is the ſame caſe as is reported 2 *Stra.* 976. and *Rep. Temp. Hardw.* 42. for another point. But in the report in 2 *Barnard*, 402. it appears to have been much conſidered whether there could be a ſpecial jury, in that caſe, out of the county palatine of Cheſter, the matter originating in the county of the city; and the Court ultimately decided that there might.

(4) One of them is *R.* v. *Johnſon. H.* 7. *Geo.* 2.

that

that there was no need of the aid of the ſtatute of 5 *Eliz.* c. 25.(1) to impower the granting a *tales de circumſtantibus* in the counties palatine. The judges of the counties palatine have the ſame authority as the King's judges of *niſi prius:* and the *poſtea* is to be returned in the ſame manner as from other judges of *niſi prius*. As to trials at bar, the reaſon is very different: there, there is a proper method of proceeding to try it by a *tales*; namely, a writ of *decem tales*; which can not be on trials at *niſi prius*. As to the *Biſhop*'s attorney-general, he ſhall not have power to contradict the *king*'s attorney-general, and to ſay "it ſhall not be tried:" which might be the caſe, if he was to grant the warrant, inſtead of the *King*'s attorney-general.—ASTON, J. and WILLES, J. were of the ſame opinion. PER CUR. Rule diſcharged.

Pardon.

THE king's ſign manual may be given in evidence by the priſoner, on an indictment for returning from tranſportation; and if not revoked, and the condition be literally, though not ſubſtantially, complied with, it ſhall diſcharge the priſoner from that indictment.—*Miller* was convicted, at the Old Bailey, in January ſeſſions, 1771, and ordered for tranſportation for ſeven years. *He afterwards obtained a ſign manual from his majeſty, declaring his intention to pardon the ſaid ſentence, and inſert the priſoner's name in the next general pardon*; on condition of his *giving ſecurity*, to the ſatisfaction of the recorder, to tranſport himſelf for ſeven years; which he accordingly gave, and was admitted to bail, but did not go abroad. And he was now indicted capitally, at December ſeſſions, 1771, for being at large in this kingdom, after having been ordered for tranſportation. He would have pleaded this ſign manual; but the recorder who tried him, thought it inadmiſſible. Whereupon the jury found him guilty; ſubject to the opinion of the judges, whether this ſign manual ought to have been received in evidence? and alſo, if it had been admitted, whether it could have availed the priſoner; as he had not ſubſtantially performed the condition of this intended pardon, by tranſporting himſelf for ſeven years? THE JUDGES were unanimouſly of opinion, 1. That this ſign manual ought to have been received in evidence; for, though no pardon, but revocable by the King; it was an authority, for the judge to bail him; and therefore, a good cauſe for him to appear at large. 2. That the ſign manual was improperly worded, by miſtake of the officer; for the condition

The King *v.* Max. Miller, Hil. Ter. 12 Geo. 3. 2 *Black. Rep.* 799.

(1) 5 *Eliz.* c. 25. ſ. 2. enacts, "that in Wales, and in the counties "palatine of Cheſter, Durham, and Lancaſter, where a full jury ſhall "not appear, the juſtices may, upon requeſt by the plaintiff or demandant, command the ſheriff to name ſo many other perſons preſent, as "ſhall make up a full jury: which ſhall be added to the former pannel."

of it ſhould have been, to tranſport himſelf, and give ſecurity ſo to do; and not merely to give ſecurity: which condition the priſoner has literally complied with. And therefore, though the King might revoke his intended grace, on account of this apparent fraud; yet, as he has not actually revoked it, the priſoner ought not to have been convicted on this indictment.

The King *v.* Beaton, Tr. Ter. 4 Geo. 3. B.R. 1 *Black Rep.* 479.

Pardon by ſign manual, how to be recorded and made uſe of. —The defendant having been convicted on an indictment for a violent aſſault, had judgment to pay a fine, to be impriſoned for two years, and give ſecurity for five years longer. Afterwards, the King, by letters under his ſign manual, directed to the judges of this court, ſignified, that it was his royal pleaſure, to remit the fine and impriſonment; and willed them to give the neceſſary directions accordingly. And it being moved to bring the defendant up, to take the benefit of this ſign manual, Lord MANSFIELD, Ch. J. ſaid, that the defendant had been ill adviſed. He ſhould have procured a privy-ſeal to bail him, in order to plead his pardon, which, it ſhould be ſuggeſted, the King intends to grant, in the nature of a circuit pardon. We can do nothing upon this ſign manual; which imports to be a pardon in itſelf, and ſhould therefore have been under the great-ſeal. Afterwards, a new ſign manual was procured in theſe terms: "Whereas, &c. (ſtating "the inducements aforeſaid) we do hereby ſignify our intention "of granting to the ſaid —— *Beaton*, our moſt gracious par- "don, ſo far as relates to the ſaid fine and impriſonment; upon "his giving ſecurity for the good behaviour for five years, ac- "cording to the judgment of our ſaid court, and entering into "ſufficient recognizance, for his appearance in the ſaid court "of King's-Bench, and pleading our ſaid pardon for his ſaid "offence, when thereto required. Our will and pleaſure there- "fore is, that you take due notice thereof, and give the neceſ- "ſary directions accordingly." This was allowed by the Court, and a rule granted to bring up the defendant; who, on a ſubſequent day, was brought up and diſcharged, upon giving bail for the purpoſes aforeſaid.

Bull *v.* Tilt, Hil. Ter. 38 Geo. 3. C.B. 2 *Pul. et Boſ.* 199.

A pardon, if pleaded, muſt be averred to be under the great-ſeal.—This was aſſumpſit for wages. Pleas: 1ſt, *non-aſſumpſit*; 2dly, That the plaintiff, before the time of the action commenced, was convicted of felony, and ſentence of tranſportation paſſed upon him. Replication joining iſſue on the 1ſt plea. As to the 2d plea, "that after the ſaid conviction of the plaintiff, &c. at, &c. our ſovereign lord the now king, in conſideration of the opinion of the judges, &c. was graciouſly pleaſed to extend his gracious mercy unto the plaintiff, and did then and there grant the plaintiff his ſaid majeſty's *free pardon* for the ſaid crime, &c. And this, &c. Wherefore, &c." To this there was a ſpecial demurrer, "for that the ſaid plaintiff hath not, in or by his ſaid replication, alleged or ſhewn in what manner the ſuppoſed pardon therein mentioned

was

was granted, &c. &c." Joinder in demurrer. PER CURIAM. Every thing under the great ſeal muſt be pleaded *ſub pede ſigilli*, and that a pardon muſt be under the great ſeal is clear. However, that this may not be taken too generally, it is right to mention, that under ſome ſtatutes the king's ſign manual actually carried into execution, and the conditions performed, may amount to a ſtatute pardon. But thoſe are exceptions not at all affecting this caſe.—PER CURIAM. Judgment for the defendant.—See alſo the title APPROVER, in vol. I.

Parliament.

IF a member of parliament be held to ſpecial bail, and it be moved to diſcharge him on a common appearance. The Court can take no evidence of his being a member, but the return of the writ.—The defendant, who was knight of the ſhire for Weſtmoreland, was bound in a bond of 18,000l. to the plaintiff, the widow of his elder brother, to pay her 3000l. in money, and an annuity for life of 400l. per annum. On default of payment, ſhe brought debt on this bond in the King's-Bench, and recovered judgment; and ſued out an *elegit* thereon, which was not executed. For, finding he had caſh in the hands of *Child* and *Company*, bankers, in London, ſhe brought a plaint upon this judgment, in the Mayor's-Court, and ſued a foreign attachment againſt the money in *Child*'s hands: to which, the defendant put in ſpecial bail, and thereby diſcharged the attachment [See *Cro. Eliz.* 593, 713.] The defendant then removed the plaint, by *habeas corpus cum cauſâ*, into this court; and, upon a rule given by the plaintiff for that purpoſe, put in ſpecial bail upon the *habeas corpus*. And now *Wilſon* moved, that the defendant, being a member of parliament, might be diſcharged on common bail. But, this being only proved by affidavit; the Court, on conſideration of precedents, would not grant a rule to ſhew cauſe: but the next day, the deputy-clerk of the crown attended with the ſheriff's return; when they ordered the rule to go.

Anne Fenwick, widow, *v.* T. Fenwick, Eſq. Mic. Ter. 11 Geo. 3. C.B. 2 *Black. Rep.* 788.

The coſts of iſſuing writs of diſtringas, under ſtat. 10 *Geo.* 3. c. 50. are to be paid before appearance, though no iſſues be levied.—By 10 *Geo.* 3. c. 50. "For the further preventing delays of juſtice by reaſon of privilege of parliament," it is recited "That the proceſs by *diſtringas* is dilatory and expenſive." For remedy whereof, ſect. 3. enacts, "That the court, out of which the writ proceeds, may order "the iſſues levied from time to time to be *ſold*, and the money "ariſing thereby to be applied to pay ſuch coſts to the plaintiff, "as the ſaid Court ſhall think juſt, under all the circumſtances, "to order; and the ſurplus to be retained until the defendant "ſhall have appeared, or other purpoſe of the writ be anſwered." With a proviſo, ſect. 4. that "When the purpoſe of "the writ is anſwered, then the ſaid iſſues ſhall be *returned*;

Martin *v.* Townſhend and Sawbridge, Ea. Ter. 11 Geo. 3. B.R. 5 *Burr.* 2725.

"or if ſold, what ſhall remain of the money ariſing by ſuch "ſale ſhall be repaid to the party diſtrained upon." The plaintiff, in the preſent action (which was againſt a member of parliament), had proceeded agreeably to this act of parliament, and had obtained rules for ſelling the iſſues levied upon a *diſtringas*, an *alias diſtringas*, and a *pluries diſtringas*; and alſo a rule for an attachment againſt the ſheriffs: but no iſſues had been actually levied. However, the defendant did, at length, appear. It was thereupon moved, that theſe rules ſhould be all diſcharged: but the plaintiff inſiſted upon the *coſts* of iſſuing theſe writs, before the rules ſhould be diſcharged. AND THE COURT thought that to be juſt and reaſonable; and directed that, *on payment* of ſuch coſts, the rules ſhould be diſcharged. They were of opinion, that theſe coſts were not to attend the event of the ſuit; but were to be paid to the plaintiff immediately and at all events, whether he ſhould finally ſucceed in the ſuit or not.

Raban v. Plaiſtowe, Ea. Ter. 11 Geo. 3. B.R. 5 Burr. 2726.

And the ſtat. 10 *Geo.* 3. chap. 50. extends to all writs of *diſtringas*, as well thoſe iſſued againſt members of parliament as others.—This was the caſe of a ſheriff who did not bring in the body, after a return of a "*cepi corpus*" made by his predeceſſor: for which neglect or refuſal, ſeveral writs of *diſtringas* had iſſued againſt this ſucceeding ſheriff. For, the practice is, that if a ſheriff in office returns a *cepi corpus*, and will not bring in the body, though he remains in office, an *attachment* ſhall go againſt him: but if he is gone out of office, an attachment ſhall not iſſue againſt his *ſucceſſor*, the new ſheriff, who did not make the return of *cepi corpus*; but a *diſtringas* is the method of enforcing him to bring in the body. And this latter was the preſent caſe, viz. that theſe writs of *diſtringas* had iſſued againſt the ſucceeding ſheriff, for not bringing in the body upon a *cepi corpus* returned by a former ſheriff ſince gone out of office. And the Court was applied to, on behalf of the plaintiff, that they would direct the iſſues to be ſold; and that the plaintiff ſhould be paid his coſts, out of the money ariſing thereby.—The counſel for the ſheriff, againſt whom theſe writs of *diſtringas* had iſſued, endeavoured to ſhew that this act of parliament of 10 *Geo.* 3. c. 50. does not extend to writs of *diſtringas in general*; *but only to ſuch writs of diſtringas as are iſſued againſt members of parliament, or relate to privilege of parliament.* But Lord MANSFIELD held, that this act of parliament relates to *all* writs of *diſtringas* in general; and is not confined to ſuch as concern privilege of parliament only(1). THE COURT ordered the iſſues to be ſold; and the coſts hitherto incurred by the fault of the ſheriff to be taxed, and paid to the plaintiff out of the money ariſing thereby; and the reſidue to be retained, in order to anſwer the event of the ſuit.

(1) The third clauſe begins thus: "And whereas the proceſs by *di-* "*ſtringas* is dilatory and expenſive; for remedy thereof, be it enacted."

It ſeems that peers may be ſued in *B. R.* by original bill.—In debt upon bond, by bill, the defendant pleaded to the juriſdiction of the Court, becauſe a peer of the realm can only be ſued by original writ, and not by bill.—Demurrer and joinder in demurrer.—In ſupport of the demurrer, it was inſiſted, that by the ſtat. 12 and 13 *W.* 3. c. 3. in caſe of diſſolution or prorogation of parliament, or in caſe of adjournment for more than *fourteen* days, the ſame proceſs was given againſt peers as againſt other perſons; and *Say* v. *Lord Byron*, *Sayer*'s Reports, 63. was cited as in point.—LORD *Mansfield*, CH. J. The note I have of the caſe of *Say* v. *Lord Byron* is as follows: "*Mich.* 26 *Geo.* 2. *B. R.* it was moved (upon an affidavit that the plaintiff had ſued out two writs of *diſtringas*, whereupon the ſheriff had levied 40s. and 4l. and that no bill was filed) for a rule to ſhew cauſe, why the ſaid two writs ſhould not be quaſhed, and the money levied thereon be reſtored. The objection was, that a peer ought not to be ſued by bill, but by original writ: and that the ſtat. 12 and 13 *W.* 3. c. 3. does not make any variation in the proceedings againſts *peers*, but reſpects, in this particular, *commoners only*. After cauſe ſhewn, the Court declared, that there were many precedents of actions againſt peers of parliament for many years before the ſtatute of *W.* 3. as certified by the maſter, and Mr. *Day* the clerk of the rules: and ſaid, why could not the Court ſupport its ancient juriſdiction; as well as the Court of Exchequer hold plea as *debitor domini regis?* And the Court, in that caſe, diſcharged the rule." This is an authority in point. The original bill was the common law proceſs.—*Per Cur.* Judgment *quod defendens reſpondeat ouſter.*

Gosling *v.* Lord Weymouth, Tr. Ter. 18 Geo. 3. B R. *Cowp.* 844.

And if a peer of parliament plead in chief to a bill filed againſt him in the court of King's-Bench, he cannot afterwards aſſign for error, that he ought to have been ſued by original writ, and not by bill. The defendant in error, *filed a bill* in the court of King's-Bench, againſt the plaintiff, and recovered a verdict; the cauſe of action being the following: "Be it remembered, that in Eaſter Term laſt paſt, before our lord the king, at Weſtminſter, came *Henry Littledale*, by *Anthony Adamſon*, his attorney, and brought in the court of our ſaid lord the king, then there, HIS BILL againſt the Right Honorable *James*, *Earl of Lonſdale*, having privilege of parliament, of a plea of treſpaſs on the caſe, and there are pledges for the proſecution, to wit, *John Doe* and *Richard Roe*; which ſaid bill follows in theſe words, to wit, Cumberland to wit, *Henry Littledale* complains of the Right Honourable *James*, *Earl of Lonſdale*, having privilege of parliament, in a plea of treſpaſs on the caſe, &c. for that whereas, &c. [charging the earl with undermining and deſtroying the defendant in error's houſe and premiſes, by the improper working of a coal-mine."] A writ of error being brought; after aſſignment of the uſual errors, it

The Earl of Lonſdale *v.* Littledale, in the Ex Ch in error, Mic Ter. 34 Geo 3 2 *Hen. Black.* 267.

was firſt aſſigned, "that the ſaid earl, being a peer of this realm, "ought to have been ſued by *original writ*, and *not by bill*." And now, on behalf of the plaintiff in error, *Williams*, in ſupport of that aſſignment, made two queſtions: the firſt, Whether a peer or lord of parliament could be ſued in the court of King's-Bench by bill prior to the paſſing the ſtatute 12 and 13 *W.* 3. c. 3? the ſecond, Whether that ſtatute had made any alteration in this reſpect? After the argument by *Williams*; *Holroyd*, who was going to argue on the other ſide, was ſtopped by the Court, and the judgment was affirmed (1).

The Earl of Lonſdale *v.* Littledale in the Houſe of Lords, in error, 2 *Hen. Black.* 299.

THE PLAINTIFF IN ERROR thereupon brought a writ of error in the Houſe of Lords; and having aſſigned the ſame error as in the court of Exchequer Chamber, hoped the judgment would be reverſed for the following, among other reaſons:

1ſt. Becauſe the juriſdiction aſſumed by the court of King's-Bench, of proceeding againſt a peer *by original bill*, is not warranted either by the common or ſtatute law of this realm.

By the common law, that Court has power to hold plea by bill againſt two deſcriptions of perſons only, viz. againſt the attornies, officers, miniſters, or clerks of the court who are ſuppoſed to be preſent in court (and the courſe always has been, to exhibit original bills againſt them, as being preſent in court in their proper perſons), and againſt perſons in cuſtody of the marſhal of the marſhalſea of the court; and in ſuch bills, it is neceſſary to allege, that the defendant is in the cuſtody of the marſhal of the marſhalſea of that court. This laſt mentioned branch of its juriſdiction, in proceſs of time, has been extended to all perſons againſt whom the proceſs of *capias* could iſſue, by the following fiction, viz. the court having an original juriſdiction in treſpaſſes *vi et armis*, iſſues a writ called a bill of Middleſex, or latitat, commanding the ſheriff *to take the body of a defendant*, as for a ſuppoſed treſpaſs *vi et armis*, which the defendant never has in reality committed; and the defendant *being taken and brought into the cuſtody of the marſhal* of the court upon this writ, the plaintiff may exhibit a bill againſt him, as *in the cuſtody of the marſhal*, for any cauſe of action whatſoever, upon which fiction reſts this branch of its juriſdiction at this day. This writ, except in caſes where an *ac etiam* for bail is inſerted, is not executed upon the defendant's perſon, but he is ſerved with a copy of it, and appears, and files common bail,

(1) As other errors were aſſigned, beſides that which was made the ſubject of argument, there was enough on the record to entitle the Court of Exchequer Chamber to give judgment; but that Court could not mean to decide the queſtion that was argued, the ſtatute 27 *Eliz.* c. 8. ſ. 2. having expreſsly excepted "errors to be aſſigned or found, *for or concerning the juriſdiction of the ſaid Court of King's Bench.*" 2 *Hen. Bl.* 274 (*n. b.*).

which

which is a proceeding by which a defendant, inſtead of being committed to the cuſtody of the marſhal, is ſuppoſed to be delivered on bail, upon a *capi corpus*, to *John Doe* and *Richard Roe*, which is the ſame as a commitment to the cuſtody of the marſhal. *It is evident this mode of proceeding never could apply to a peer, becauſe his perſon could never be arreſted and brought into the cuſtody of the marſhal by a capias in treſpaſs, as no ſuch capias lies againſt a peer:* and, therefore, *Lilly*, in his Entries, page 21, obſerves, in a note, that a peer cannot be ſued in the King's-Bench by bill, by reaſon he is therein alleged to be in the cuſtody of the marſhal. The next, and only other juriſdiction which the King's-Bench has in civil actions, is by an authority delegated to the court by an original writ, iſſued from the court of Chancery, returnable in the King's-Bench, and this applies to peers, as well as other perſons, with this difference as to the proceſs, by which the defendant is brought into court to anſwer as againſt all perſons (except peers, or privileged perſons, during the time of privilege), the proceſs is *ſummons*, *attachment*, and *capias*, againſt peers, ſummons and diſtringas in infinitum only, *as no capias lies*; the common law having given no juriſdiction to the King's-Bench of proceeding againſt peers, except by original writ only. The next queſtion is, Whether the ſtatute of 12th and 13th *W.* 3. has given that court a juriſdiction of proceeding againſt them by original bill? that ſtatute enacts, "that from and after the "four-and-twentieth day of June, one thouſand ſeven hundred "and one, any perſon or perſons ſhall and may commence, "and proſecute, any action or ſuit, in any of his majeſty's "courts of record at Weſtminſter, or high court of Chancery, "or court of Exchequer, or the duchy court of Lancaſter, or "in the court of Admiralty; and in all cauſes matrimonial and "teſtamentary, in the court of the Arches, the Prerogative "courts of Canterbury and York, and the Delegates, and all "courts of appeal, againſt any peer of this realm, or lord of "parliament, or againſt any of the knights, citizens, and bur-"geſſes of the Houſe of Commons for the time being, or "againſt their or any of their menial or other ſervants, or "any other perſon entitled to the privilege of parliament, at "any time from and immediately after the diſſolution or pro-"rogation of any parliament, until a new parliament ſhall "meet, or the ſame be re-aſſembled, and from and immediately "after any adjournment of both houſes of parliament for above "the ſpace of fourteen days, until both houſes ſhall meet or "re-aſſemble; and that the ſaid reſpective courts ſhall and may "after ſuch diſſolution, prorogation, or adjournment as afore-"ſaid, proceed to give judgment, and to make final orders, "decrees, and ſentences, and award execution thereupon, any "privilege of parliament to the contrary notwithſtanding; "provided, nevertheleſs, that this act ſhall not extend to ſub-

" ject the perſon of any of the knights, citizens, and burgeſſes " of the Houſe of Commons, or any other perſon entitled to " the privilege of parliament, to be arreſted during the time " of privilege; nevertheleſs, if any perſon or perſons having " cauſe of action or complaint *againſt any peer of this realm,* " *or lord of parliament*, ſuch perſon or perſons, after any diſſo- " lution, prorogation, or adjournment as aforeſaid, or before " any ſeſſions of parliament, or meeting of both houſes as " aforeſaid, ſhall and may have *ſuch proceſs* out of his majeſty's " courts of King's-Bench, Common Pleas, and Exchequer, " againſt ſuch peer or lord of parliament, *as he or they might* " *have had againſt him out of the time of privilege*; and if any " perſon or perſons having cauſe of action *againſt any of the* " *ſaid knights, citizens, or burgeſſes, or any other perſon entitled* " *to privilege of parliament*, after any diſſolution, prorogation, " or ſuch adjournment as aforeſaid, or before any ſeſſions of " parliament, or meeting of both houſes as aforeſaid, ſuch per- " ſon or perſons ſhall and may proſecute ſuch knight, citizen, " or burgeſs, or other perſon entitled to the privilege of parlia- " ment, in his majeſty's court of King's-Bench, Common " Pleas, or Exchequer, by ſummons and diſtreſs infinite, *or by* " *original bill*, and ſummons, attachment, and diſtreſs infinite " thereupon, to be iſſued out of any of the ſaid courts of re- " cord."

It is ſufficient only to read the act above mentioned, to ſee that the form of proceeding againſt a peer is not thereby varied; *and that the original bill is not given againſt peers, but only againſt knights, citizens, or burgeſſes, or other perſons entitled to privilege of parliament*, which words, *other perſons*, can by no rule of conſtruction be contended to apply to peers, but only to inferior degrees of perſons, as officers, miniſters, and clerks, of the houſes of parliament, &c. And what is the moſt convincing proof that the peers did not mean to give a juriſdiction, by original bill againſt them, is, that the bill originally ſent up to the lords by the commons, at the parts above marked, had the words " peer of this realm, or lord of parliament;" and the lords ſtruck out thoſe words.—*Vide* Journals of the Houſe of Commons, vol. xiii. 567. Notwithſtanding the above, the court of King's-Bench, in the caſe of *Goſling* v. Lord *Weymouth*, determined, that the original bill was the common law mode of proceeding againſt peers of parliament before the ſtatute of 12 *W.* 3. on the authority of a caſe of *Say* v. Lord *Byron*.

It is a ſingular thing, that if the proceeding by original bill, as againſt peers, was the common law proceeding before the ſtatute of *W.* 3. *that it ſhould not have been alſo the mode of proceeding againſt members of the Houſe of Commons*; and yet that has not been pretended; if it were ſo, it is alſo ſingular it ſhould not have been known to ſome writer upon

upon the law, or that it ſhould not be found in ſome caſe, or book of reports or practice; and yet it may with confidence be aſſerted, that no ſuch thing is ever noticed in any book of law or practice, neither is it conſiſtent with any principle of law; therefore, the plaintiff in error truſts, that neither a ſuppoſed certificate of a maſter and clerk of the rules in the King's-Bench, in a matter in which they were materially intereſted, in point of emolument, to eſtabliſh the proceeding they certified, nor any erroneous practice which may have followed from the precedent of *Goſling* v. Lord *Weymouth*, will be ſufficient to eſtabliſh this juriſdiction.

2dly, In the next place, it is contended, that the plaintiff in error, by not having pleaded his peerage in abatement, has precluded himſelf from taking any objection, in a court of error, to the mode of proceeding by bill. In anſwer to which, the plaintiff in error ſubmits, that the want of juriſdiction is a matter of error; and that if a court has no juriſdiction, even the defendant's conſent could not give it juriſdiction: *that the want of juriſdiction in this caſe appears on the record*; and, therefore, as the Court ſees it, there is no occaſion for a plea to diſcloſe it, as there is of a matter *dehors* the record. The proceeding by original bill inverts the whole courſe of proceeding againſt peers, from the beginning to the end of the ſuit. The returns of writs, in every ſtage of the ſuit, are totally different, where the proceeding is by original writ, and where by bill; and not only ſo, but a new juriſdiction in error is created by proceeding by bill, inſtead of original; for where the proceeding is by original bill in the King's-Bench, a writ of error is given to the court of Exchequer Chamber, which is not the caſe where the proceeding is by original writ in the King's Bench, as there the writ of error is returnable in parliament only.

REASONS FOR THE DEFENDANT IN ERROR.

1ſt. The Court of King's-Bench has juriſdiction to proceed againſt a peer of the realm by bill. This appears by the ſtat. 12th and 13th *Will.* 3. c. 3. which authorizes againſt a peer ſuch proceſs, during the times there limited (which limitations are ſince removed, and extended to all times, by ſtat. 10 *Geo.* 3. c. 50.) as might have been had againſt him out of the time of privilege. Before that ſtatute, peers were, by the practice of the court, ſued there out of the time of privilege, by this form of proceeding, namely, by bill and by ſummons, and diſtreſs thereupon; and may now, therefore, by virtue of the above ſtatutes, be ſo ſued at any time. 2d. That the caſes of *Say* v. Lord *Byron*, and *Goſling* v. Lord *Weymouth*, are not only determinations in point, but are even ſtronger than the preſent caſe; as in both thoſe caſes this objection to the mode of proceeding was taken as it ought to be (if a valid objection) in the firſt inſtance: in the one caſe, by motion before defence

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to the action; and in the other, by plea in abatement. 3d. But even if theſe caſes could be over-ruled, and allowing that the plaintiff in error, being a peer, might in the preſent action have objected to this mode of proceeding againſt him by bill; yet the objection cannot now be taken as matter of error: it is merely an objection of form. The objection cannot be extended to every caſe of proceeding by bill againſt a peer; for if a peer were in the cuſtody of the marſhal of the king's marſhelſea (as he may by law be upon a criminal charge), whilſt he remains in ſuch cuſtody, a bill may be exhibited againſt him in the court of King's-Bench, as againſt any other perſon. In that caſe, the objection could not hold. In other caſes, if it could avail, it ſhould be taken by plea in abatement, as a reaſon for not anſwering to the bill. If not ſo taken, but the party makes defence, and anſwers to the bill, the juriſdiction of the Court is admitted, and the objection waived; and it cannot afterwards be received.

AFTER ARGUMENT at the bar of the houſe, the following queſtions were propoſed to the judges: 1ſt. WHETHER the court of King's Bench has any juriſdiction to hold plea in a perſonal action againſt a peer of the realm, and lord of parliament, who is neither in the cuſtody of the marſhal, nor is an officer or miniſter of that court, without the king's original writ iſſuing out of his Chancery, to warrant ſuch action? 2dly, If the Court has no ſuch juriſdiction, can it derive ſuch juriſdiction from the acquieſcence of the defendant by pleading to iſſue, and proceeding to trial, in an action commenced without the king's original writ? IN ANSWER, Lord Chief Juſtice *Eyre* ſtated the unanimous opinion of the judges, that the firſt queſtion would have admitted conſiderable doubt, if the objection had been made in an earlier ſtage of the cauſe; and that the caſes of *Say* v. Lord *Byron*, and *Goſling* v. Lord *Weymouth*, were not to be conſidered as deciſive authorities on the ſubject. But that, after pleading in chief, it was too late for the defendant to object to the juriſdiction of the Court. Judgment affirmed.

The King *v.* J. Wright, Trs. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 293.

The Court refuſed to grant a criminal information againſt a bookſeller for printing, on his own account, a report of the Houſe of Commons, though it reflected on the character of an individual.—A rule having been obtained, calling on the defendant (a bookſeller) to ſhew cauſe why a criminal information ſhould not be granted againſt him, for printing and publiſhing a libel on *J. Horne Tooke*.—It appeared, that the charge on Mr. *H. Tooke* was a paragraph contained in the report of the committee of ſecrecy of the Houſe of Commons, *a literal copy of which he had publiſhed*. The paragraph complained of, and which was contained under the title "Attempts to aſſemble a Convention of the People in England," was as follows: "Some of the perſons ſo arreſted were proſecuted for high treaſon. A grand jury

jury for the county of Middleſex found a bill againſt *Thomas Hardy*, the ſecretary of the London Correſponding Society, and eleven others; three of the perſons ſo indicted, viz. *Thomas Hardy*, *John Horne Tooke*, and *John Thelwall*, were tried, and on their trials were acquitted of the charge in the indictment. But the evidence given on thoſe trials eſtabliſhed, in the cleareſt manner, the grounds on which the committees of the two houſes of parliament had formed their reports in 1794; and ſhewed, beyond a poſſibility of doubt, that the views of theſe perſons and their confederates, were in their nature completly hoſtile to the exiſting government and conſtitution of this kingdom, and went directly to the ſubverſion of every eſtabliſhed and legitimate authority." PER CURIAM: When the motion was firſt made, it was ſuggeſted to the counſel for the proſecutor, that if the publication in queſtion really were, what it profeſſed to be, a copy of the report of the Houſe of Commons, it would be wrong to grant a rule to ſhew cauſe: but it not being then admitted to be a true copy, and it being ſurmiſed that the publication aſſumed a title that did not belong to it, we granted a rule *niſi*; but as it now proves to be a true copy of the report, there was not the leaſt pretence for the motion. This is an application for leave to file a criminal information againſt the defendant for publiſhing a libel; ſo that the application ſuppoſes that this publication is a libel. But the enquiry made by the Houſe of Commons was an inquiſition taken by one branch of the legiſlature, to enable them to proceed further, and adopt ſome regulations for the better government of the country: this report was firſt made by a committee of the Houſe of Commons, then approved by the Houſe at large, and then communicated to the other Houſe, and it is now *ſub judice*; and yet, it is ſaid, that this is a libel on the proſecutor. It is impoſſible for us to admit, that the proceeding of either of the Houſes of parliament is a libel; and yet that is to be taken as the foundation of this application. Caſes might, perhaps, be put, in which we would enquire whether or not the Houſe of Commons were juſtified in any particular meaſure; if, for inſtance, they were to ſend their ſerjeant at arms to arreſt a counſel here, who was arguing a caſe between two individuals, or to grant an injunction to ſtay the proceedings here in a common action, undoubtedly we ſhould pay no attention to it. But the report in queſtion, being adopted by the Houſe at large, is a proceeding of thoſe who, by the conſtitution, are the guardians of the liberties of the ſubject; and we cannot ſay, that any part of that proceeding is a libel.—The rule muſt be diſcharged.

The Houſe of Lords having voted the defendant guilty of a breach of privilege, in publiſhing a libel upon the Biſhop of *Landaff*, and having ſentenced him to pay a fine of 100l. and to be impriſoned ſix months, and until ſuch fine was paid, which commitment was returned into this court upon an *habeas corpus*

The King *v.* Flower, Tr. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 314.

corpus ſued out by the defendant, the Court refuſed to diſcharge him out of cuſtody.—The defendant was this day brought before the Court by virtue of a writ of *habeas corpus*, directed to the keeper of Newgate, who returned the following warrant of commitment by the Houſe of Lords, as the cauſe of the defendant's impriſonment. "*Die Veneris* 3° *Maij*. 1799. The ſerjeant at arms acquainted the houſe, that *Benjamin Flower* had ſurrendered himſelf, and was in his cuſtody; whereupon, he was ordered to be brought to the bar, and being brought to the bar accordingly, he was informed of the complaint made againſt him, of his having printed and publiſhed a libel upon the Right Reverend *Richard*, Lord Biſhop of *Landaff*, a member of this Houſe, in the paper entitled '*The Cambridge Intelligencer*,' Saturday, April 20th, 1799; and the ſaid paper was ſhewn to him, and the ſaid *Benjamin Flower* having been heard as to what he had to ſay in anſwer to the ſaid complaint, and having acknowledged himſelf to be the printer and publiſher of the ſaid paper ſo complained of, and alſo that he was the ſole proprietor of the ſame, he was directed to withdraw: then the ſaid paper was again read; moved to reſolve, by the lords ſpiritual and temporal in parliament aſſembled, that *Benjamin Flower*, of Cambridge, printer, having preſumed to publiſh a libel on the Right Reverend *Richard*, Lord Biſhop of *Landaff*, a member of this houſe, in the paper entitled '*The Cambridge Intelligencer*,' Saturday, April 20, 1799, is guilty of a high breach of the privileges of this Houſe; which being objected to, after debate, the queſtion was put thereon, it was reſolved in the affirmative; moved to reſolve, by the lords ſpiritual and temporal, in parliament aſſembled, that *Benjamin Flower*, of Cambridge, printer, do, for his ſaid offence, pay a fine to his majeſty of 100l. and that he be committed priſoner to Newgate for the ſpace of ſix months, and until he pay the ſaid fine; the queſtion was put thereupon; it was reſolved in the affirmative. Ordered, that the ſerjeant at arms attending this houſe, his deputy or deputies, do forthwith convey the body of the ſaid *Benjamin Flower* to the priſon of Newgate, to be kept in ſafe cuſtody for the ſpace of ſix months, and until he pay the ſaid fine. *Geo. Roſe*, cler. parl." And it was moved, that the defendant might be diſcharged, on the ground of the illegality of the warrant of commitment in ſeveral reſpects. FIRST, The Houſe of Lords have no juriſdiction to impriſon any one beyond the term of their ſeſſion: whereas this commitment is for ſix months abſolutely, which may extend beyond that term. SECONDLY, They have no power to fine. THIRDLY, They have no power to puniſh either by fine or impriſonment, any commoner, not an officer of their houſe, for any contempt committed out of the houſe, ſuch offence being triable by the courts of common law.—Lord KENYON, Ch. J. This is one of the plaineſt queſtions that ever was diſcuſſed in a court of law. Some things, however, have dropped

dropped from the counſel that require an anſwer: Firſt, it is ſaid, that the Houſe of Lords, when exerciſing a legiſlative capacity, is not a court of record, which is undoubtedly true; but when ſitting in a judicial capacity, as in the preſent caſe, it is a court of record. Then it was objected, that the defendant was condemned without being heard in his defence: but the warrant of commitment furniſhes an anſwer to that; by, that it appears that "he was informed of the complaint made againſt him, &c." and *having been heard* as to what he had to ſay in anſwer to the ſaid complaint, &c. he was adjudged "guilty of a high breach of the privileges of the houſe," &c. So that it clearly appears, that he was heard in his defence, and had the ſame opportunity of calling witneſſes that every other defendant has in a court of juſtice. Then inſinuations are thrown out againſt the encroachments, by the Houſe of Lords, on the liberties of the ſubject: but the good ſubjects of this country feel themſelves protected in their liberties by both houſes of parliament. Government reſts, in a great degree, on public opinion; and if ever the time ſhall come when factious men will overturn the government of the country, they will begin their work, by calumniating the courts of juſtice and both houſes of parliament. The ground of this proceeding is, that the defendant has been guilty of a breach of privileges of the houſe, and a contempt of the houſe. This claim of right to puniſh by fine and impriſonment, for ſuch an offence, is not peculiar to the Houſe of Lords; it is frequently exerciſed by this and other courts of record, and that not merely for contempts committed in the preſence of the Court; one inſtance of which was, that of Mr. *Beardmore*(1), under-ſheriff of Middleſex, for a contempt of the Court in not executing part of the ſentence pronounced on Dr. *Shebbeare*. And that caſe anſwers another objection, ſtrongly inſiſted upon by the defendant's counſel here, that if the party accuſed can be puniſhed in any other manner, this mode of trial and puniſhment cannot be reſorted to; for there Mr. *Beardmore* might have been indicted, but yet he was attached, examined upon interrogatories, and fined and impriſoned. Again, it is objected, that the Houſe of Lords cannot impoſe a fine for ſuch an offence: but this, and other courts of record, have the power of fining in this ſummary manner; and why ſhould not the Houſe of Lords have the ſame power of impoſing a fine for a contempt of their privileges? Then ſeveral inſtances were alluded to, where the Houſe did not chooſe to exerciſe this privilege, but directed proſecutions to be inſtituted in the courts of law: the ſame obſervation might equally be made on the proceedings of this court, who have ſometimes directed indictments to be preferred: we are not, therefore, to conclude, that the Houſe of Lords has not the power of inflicting this puniſhment from

(1) Vid. 2 *Burr.* 792.

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the circumſtance of its not exerciſing it on all occaſions.—When Lord *Shaftesbury*'s caſe came on, there were ſome perſons who wiſhed to abridge the privileges of the Houſe of Lords: but Mr. Serjt. *Maynard* was one of thoſe who argued in ſupport of their privileges; and he, ſurely, was not capable of concurring in any attempt to infringe the liberties of the people.* It has been ſaid, however, that though many inſtances are to be found in which the Houſe of Lords has, in point of fact, exerciſed this power; whenever that power has been reſiſted, it has been reſiſted with effect; from whence it is inferred, that the Houſe of Lords has not the authority which it aſſumes: but in this caſe, I may avail myſelf of the ſame argument in favour of its juriſdiction, for no caſe has been found where it has been holden to be illegal in the Houſe of Lords to fine and impriſon a perſon guilty of a breach of privilege. We are bound to grant this *habeas corpus:* but having ſeen the return to it, we are bound to remand the defendant to priſon, becauſe the ſubject belongs *ad aliud examen.* There is nothing unconſtitutional in the Houſe of Lords proceeding in this mode for a breach of privilege; and unleſs we with to aſſiſt in the attempt that is made to overſet the law of parliament and the conſtitution, we muſt remand the defendant. GROSE, J. This queſtion is not new; it has frequently been conſidered in courts of law, and the principles diſcuſſed to-day and the caſes cited were examined not many years ago (*vide* vol. III. *ante*, p. 669): and the reſult is very ably ſtated by Lord Ch Juſt. *De Grey* in 3 *Wilſ.* 199. "When the Houſe of Commons (and the ſame may be ſaid of the Houſe of Lords) adjudge any thing to be a contempt or a breach of privilege, their adjudication is a conviction, and their commitment in conſequence is execution; and no Court can diſcharge or bail a perſon that is in execution by the judgment of any other Court;" in another paſſage he ſaid "Every Court muſt be ſole judge of it's own contempts:" and again, "The council at the bar have not cited one caſe where any Court of this Hall ever determined a matter of privilege which did not come incidentally before them." Having ſtated this, I think I need not add more in the preſent caſe. *Per Curiam:* Let the defendant be remanded.

The King *v.* Davie and ſeven others, Hil. Ter. 21 *Geo.* 3. B.R. 2 *Doug.* 587.

The Court will not grant an information againſt the magiſtrates of a borough for having diſfranchiſed perſons entitled to their freedom, although ſworn to have been done *to ſerve election purpoſes*, if the defendants deny that motive, and ſwear that they thought there was a legal ground for the diſfranchiſement, and the ground on which the diſfranchiſement went has not been decided.—On an application for an information againſt the defendants, for a conſpiracy to elect *Davie* mayor of the borough of Lyme Regis, in an illegal manner, for the purpoſe of making certain perſons without title, corporators, and, thereby, to procure a colourable majority in the corporation, and by means of this majority, to diſfranchiſe others,

others, well entitled to be corporators, *in order to obtain an undue influence in the election of members to ſerve in parliament for the borough.*—It was ſtated, from *affidavits*, that the perſons disfranchiſed by the defendant had been twice before removed, and reſtored by *mandamus*; that the laſt disfranchiſements were on the ſame grounds of objection which had been over-ruled, on argument, upon the returns made to the *mandamuſes* to reſtore; that the ſame objections applied equally to the titles of ſome of the defendants themſelves; and *that* (as the perſons making the *affidavits* believed) the defendants had acted in this illegal manner with a view to procure *a colourable majority of votes in the election of the members for the borough.*—On ſhewing cauſe againſt the rule, *affidavits* of the defendants were produced, expreſsly denying the corrupt motives imputed to them, and ſwearing that they thought they had a legal ground for the acts complained of, and that the laſt disfranchiſements were expreſsly with a view to have the queſtion decided whether non-reſidence is a good cauſe for amoving a capital burgeſs. Lord MANSFIELD:—There are undoubtedly caſes where the exerciſe of a diſcretionary authority, by a magiſtrate, with a corrupt motive, in order to ſerve election purpoſes, will be a ground for granting an information. If, for inſtance, licences are refuſed to publicans, as in the caſe from *Corfe-Caſtle* (1); if a rate is partially made, and perſons corruptly left out or put on; if freemen without title are admitted; if electors are arreſted coming to vote, *&c.* But, what is this charge? That perſons have been admitted who the defendants ſwear they thought had a title, and others removed who they ſwear they thought had none. To grant an information in this caſe would imply an opinion that ſuch a proceeding is puniſhable as a crime. Now, there is no inſtance even of an indictment for it. There is great tenderneſs in granting informations in matters of election. How many inſtances do we recollect of mayors acting as returning officers after there has been judgment of *ouſter* againſt the mayor under whom they derived their title, as at Wigan, Marlow, Carmarthen, &c.? Yet no information has ever been granted in ſuch a caſe. For the civil injury, when a corporator has been improperly removed, there is a ſpecific remedy by a *mandamus*, and an action for a falſe return. Where a perſon, not entitled, intrudes, he may be removed by an information in the nature of *quo warranto*, and fined for his uſurpation. If you would proceed criminally, prefer an indictment. *That* is more proper for a precedent. But how is corruption proved? For the application, the *belief* of corrupt motives is ſworn to, but the defendants poſitively deny

(1) *Rex* v. *Hann*, T. 5 *Geo.* 3. 3. *E.* 2 *Geo.* 3. 3. *Ante*, vol. III. p. 776. S. P. *Rex.* v. *Williams*. *Ante*, vol. III. p. 777.

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the motives ſo imputed to them. The former reſtorations did not go upon the merits. The queſtion, whether non-reſidence is a cauſe of diſfranchiſing a capital burgeſs (which was the ground of the amotions complained of), has never yet been tried. It is now clear that all the capital burgeſſes are of the council, yet, on the returns of the different *mandamuſes*, *that* was diſputed, and the contrary maintained on the part of the proſecutors; though they, being poſſeſſed of the charter, knew it to be ſo. I think the rule muſt be diſcharged. WILLES, and ASHHURST, and BULLER, *Juſtices*, of the ſame opinion.

Partition.

Halton *v.* the Earl of Thanet, Ea. Ter. 17 *Geo.* 3. C.B. 2 *Black. Rep.* 1134.

IN *Partition*. Rule to ſhew cauſe was granted, and afterwards made abſolute on affidavit of ſervice, for the Court to proceed to examine the title of the demandant; proceſs having been duly returned, the declaration entered, and no appearance entered by the tenant within fifteen days. See the ſtatute 8 and 9 *Will.* c. 31. The Court, on making the rule abſolute, appointed to proceed on the examination in open court on the morrow. *Qu.* If the better way would not have been to have referred it to the prothonotary to have ſtated the title of the defendant; and, if his report had been excepted to, to have conſidered ſuch report; otherwiſe to have made it abſolute? Elſe, if this practice ſhould become frequent, ſuch examination of titles in public would perhaps be found inconvenient. On the morrow, *Walker* for the demandant opened his title, of which abſtracts had been previouſly left with the judges. It luckily proved not to be very intricate. The ſeveral ſeiſins, deſcents, deviſes, and conveyances, were proved by affidavits. The deeds and wills were produced and read. And no counſel appearing for the tenant, the Earl of *Thanet*, judgment on his default was given for the demandant, to hold in ſeveralty the premiſſes demanded in his count, in ſome of which he was ſeiſed of two undivided third-parts, and in others of a moiety only, in common with the ſaid Earl of *Thanet*. And a writ of partition was awarded accordingly.

Halton *v.* the Earl of Thanet, Mic. Ter. 18 Geo. 3. C.P. 2 *Black. Rep.* 1159.

Judgment in partition having been given as above, that the plaintiff ſhould hold in ſeveralty the undivided moieties and third-parts mentioned in his declaration, and that partition be made accordingly; a writ of partition thereupon iſſued to the ſheriff of Derbyſhire; who now returned, that he had executed the ſame in the preſence of perſons, who attended for the plaintiff and defendant reſpectively, and he ſpecified in his return the ſeveral parcels with their

their metes and boundaries. And hereupon *Walker* for the plaintiff moved for final judgment, *quod partitio sit ſtabilis*. The rule for which was made abſolute the laſt day of the term, on affidavit of notice to the defendant and the tenants in poſſeſſion.

The 8 and 9 *W.* 3. c. 34. §. 1. which directs notice of the writ, with a copy thereof, to be ſerved forty days before the return, in a writ of partition; applies only to caſes of ſigning judgment by default for want of appearance; and here the tenants having appeared, the Court diſcharged a rule which had been obtained on the ground of want of notice.

Dyer *v.* Bullock *et. al.* Mich. Ter. 39 Geo. 3. C B. 1 *Pul. et Boſ.* 344.

Partners.

TO make a man liable as a partner, there muſt either be a contract between him and the oſtenſible perſon to ſhare jointly in the profits and loſs, or he muſt have permitted the other to make uſe of his credit, and to hold him out as one jointly anſwerable with himſelf.—On the trial of an action for money lent and advanced, a verdict was found for the defendants; and on a motion for a new trial the facts appeared to be as follow:—The plaintiffs, who were bankers, had advanced a ſum of money on certain tea-warrants of the Eaſt-India Company to *Contencin*, a broker, who depoſited the tea-warrants with the plaintiffs as a ſecurity, and alſo gave them his note of hand for the ſum advanced. He had been employed by a number of perſons, of whom the defendants were two, to purchaſe a lot of tea at the Eaſt-India Company's ſale, of which they (together with himſelf) were to have ſeparate ſhares, the lots being, in general, too large for any one dealer. The practice at ſuch ſales is, for the Company to give a warrant or warrants to the broker or purchaſer, for the delivery of the quantity of tea purchaſed, on payment being made. At the time of the ſale, 25 l. per cent. is advanced, and is forfeited, unleſs the whole is paid on the *third*, which is the *laſt*, day of payment. If paid ſooner, allowance is made for prompt payment. The warrants are often pledged, and money raiſed upon them; generally conſiderably leſs than the ſuppoſed value of the tea. It happened, however, in this inſtance, between the time of the depoſit of the warrants with the plaintiffs, and the time when the payment was to be made at the India-houſe, that the value of the tea ſunk ſo much as to be conſiderably under the amount of the ſum advanced. The broker, in the mean time, had become a bankrupt, and had informed the plaintiffs who his employers were, all of whom, except the defendants, were ſince either dead, or become bankrupts. The ſhares of the defendants were to be two ſixteenths of the whole lot. The ground of the action

Hoare *et. al.* *v.* Dawes *et. al.* Ea. Ter. 20 Geo. 3. B. R. 1 *Doug.* 371.

was, that all the employers of the broker were to be conſidered as partners, and jointly and ſeverally liable for the whole. The defendants owed nothing upon their own two ſixteenths. There was not any joint concern in the re-diſpoſal of the tea. The defendant produced ſeveral bankers and brokers (of whom *Contencin* was one), who ſaid, they had had frequent tranſactions of this ſort (it being a very uſual ſpeculation), and they always underſtood, that the only ſecurity was the pledge, and the perſonal ſecurity of the broker, unleſs where the principals were enquired after, and declared, which was very rarely done. That, as the practice was to advance conſiderably under the ſuppoſed value of the tea, and it was alſo uſual to ſtipulate, that, if the money was not repaid within a certain time, the lender might ſell, the warrant was of itſelf a general and ſufficient ſecurity. *Contencin* ſaid, that tea-warrants were conſidered as caſh, and paſſed by delivery. On the other ſide, *in anſwer to this evidence* (the plaintiffs having, *at firſt*, reſted their caſe on the fact, that there were perſons behind the curtain, for whom the broker acted), two witneſſes were called. One of them, one *Cartony*, a tea-dealer, ſwore, that a broker had once borrowed ſome money *for him* on tea-warrants, from the plaintiffs, and that the value of the tea having fallen under the ſum advanced, and the broker having failed, he had paid the difference, conſidering himſelf as liable. The other was a perſon who had alſo dealt in tea, and in loans of this ſort, and he ſwore, that his idea had always been, that the perſons behind the curtain were liable; but, upon croſs-examination, he ſaid, he never knew any loſs happen, nor any demand actually made, on the broker's employers. Lord MANSFIELD:—I conſidered this, at firſt, as a caſe of dormant partners. The law with reſpect to them is not diſputed, viz. that *they are liable when diſcovered*, becauſe they would otherwiſe receive uſurious intereſt without any riſk; but, towards the end of the cauſe, the nature of the tranſaction, and of theſe loans, was more clearly explained, and I was ſatisfied with the verdict, and am now confirmed in my opinion. The evidence of *Cartony* is irrelevant, becauſe he ſaid the broker borrowed the money *for him*; and, beſides, he did not diſpute the demand. Is this a partnerſhip between the buyers? I think it is not; but merely an undertaking with the broker by each, for a particular quantity. There is no undertaking by one to advance the money for another, nor any agreement to ſhare with one another in the profit or loſs. The broker undertakes to buy and ſell, but makes no advance without the ſecurity of the tea-warrants, which are conſidered as caſh, and paſs by delivery, like Eaſt-India bonds. Theſe warrants are pawned with the lender, but the broker has no power to pledge the perſonal ſecurity of the principals. He cannot ſell the warrants,

warrants, and borrow more money on such personal security. It makes no difference, whether specific tea, or the warrants, are delivered at the sale. It would be most dangerous, if the credit of a person, who engages for a fortieth part, for instance, should be considered as bound for all the other thirty-nine parts. *Non hac in fœdera veni.* The witnesses did not merely speak to opinion, but to matter of fact, and their own dealings. They said, the money was lent to the broker alone. Sometimes, indeed, lenders have required to know the principals; *they* did not trust the broker alone; but all others who do not ask after the principals do. The note is given as a collateral security personally by the holder of the warrant, not in the character of a partner with other persons, nor as a broker for them.—WILLES, J. and ASHHURST, J. of the same opinion. BULLER, J. This is a very plain case. The plaintiffs had no reason to consider the broker as a partner with the other persons, for though he had a share, he did not act or appear as a partner, nor were they partners as among themselves. They had never met or contracted together as partners. If this transaction were sufficient to constitute a partnership, a broker would have it in his power to make 500 persons partners, who had never seen nor heard of one another, or might, at his pleasure, convert his principals into partners, or not, without any authority from them, by taking joint or separate warrants. Rule discharged (1).

Money lent to a trader by a partner who retires from business, at legal interest, with an additional annuity for a certain term of years, is not a continuance of the partnership.—On the trial of an action of assumpsit for goods sold and delivered: a verdict was found for the defendant. A new trial was moved for, on the ground that the verdict was contrary to law and evidence. "This was an action brought against *Smith* alone, as a secret partner with one *Robinson* [vide *Abbot* and *Smith*, *ante*, vol. I. p. 3], to whom the goods were delivered, and who became bankrupt in 1770. On the 30th of *March*, 1767, *Smith* and *Robinson* entered into partnership for seven years, but in the *November* afterwards, some disputes arising, they agreed to dissolve the partnership. The articles were not cancelled; but the dissolution was open and notorious, and was notified to the public on the 17th of *November*, 1767. The terms of the dissolution were, that all the stock in trade and debts due to the partnership should be car-

Grace v. Smith, Ea. Ter. 15 Geo. 3 C. B. 2 *Black Rep.* 998.

(1) *Vide Coope* v. *Eyre*, *C. B. T.* 28 *Geo.* 3: *H. Bl.* 37. *ante*, vol. I. p. 551. In the case of *Hoare* v. *Dawes*, the plaintiff had first filed a bill in equity, which was dismissed with costs, the Lord Chancellor being of opinion, that it was merely a question of law. *Hoare* v. *Contencin*, *Cant. H.* 19 *Geo.* 3. 1 *Br. Ca.* in *Ch.* 27.

ried to the account of *Robinſon* only. That *Smith* was to have back 4200l. which he brought into the trade, and 1000l. for the profits then accrued, ſince the commencement of the partnerſhip: *That* Smith *was to lend* Robinſon 4000*l. part of this* 5200*l. or let it remain in his hands for ſeven years, at five* per cent. *intereſt, and an annuity of* 300*l.* per annum, *for the ſame ſeven years.* For all which *Robinſon* gave a bond to *Smith.* In *June*, 1768, *Robinſon* advanced to *Smith* 600l. for two years' payment of the annuity and other ſums by way of intereſt, and gratuities, and other large ſums at different times to enable him to pay the partnerſhip debts, *Smith* having agreed to receive all that was due to the partnerſhip, and to pay its debts, but at the hazard of *Robinſon.* On the 1ſt of *Auguſt*, 1768, the demands of *Smith* were all liquidated and conſolidated into one —— viz. 5200l. due to him on the diſſolution of the partnerſhip; 1500l. for the remaining five years of the annuity; and 300l. for *Smith*'s ſhare of a ſhip: in all 7000l. for which *Robinſon* gave a bond to *Smith.* On the 22d of *Auguſt*, 1769, an aſſignment was made of all *Robinſon*'s effects to ſecure the balance then due to *Smith*, which was ſtated to be 10,000l. Soon after the commiſſion was awarded." For the plaintiff, it was inſiſted, that the agreement between *Robinſon* and *Smith* was either a ſecret continuance of the old partnerſhip, or a ſecret commencement of a new one; being for the retiring partner to leave his money in the viſible partner's hands, in order to carry on his trade; and to receive for it twelve and an half per cent. profit, which could not be fairly done, unleſs it be underſtood to ariſe from the profits of the trade. And that he ought therefore to be conſidered as a ſecret partner. *De Grey*, C. J.—The only queſtion is, What conſtitutes a ſecret partner? Every man who has a ſhare of the profits of a trade, ought alſo to bear his ſhare of the loſs. And if any one takes part of the profit, he takes a part of that fund on which the creditor of the trader relies for his payment. If any one advances or lends money to a trader, it is only lent on his general perſonal ſecurity. It is no ſpecific lien upon the profits of the trade; and yet the lender is generally intereſted in thoſe profits; he relies on them for repayment. And there is no difference whether that money be *lent de novo*, or *left behind* in trade by one of the partners who retires. And whether the terms of that loan be kind or harſh, makes alſo no manner of difference. I think the true criterion is, to enquire whether *Smith* agreed to ſhare the profits of the trade with *Robinſon*, or whether he only relied on thoſe profits, as a fund of payment: a diſtinction, not more nice than uſually occurs in queſtions of trade or uſury. The jury have ſaid this is not payable out of the profits; and I think there is no foundation for granting a new trial. *Gould*, J. ſame opinion. *Blackſtone*, J. ſame opinion. I think the true criterion (when money

money is advanced to a trader) is to conſider whether the profit or premium is certain and defined, or caſual, indefinite, and depending on the accidents of trade. In the former caſe, it is a *loan* (whether uſurious or not, is not material to the preſent queſtion(1); in the latter, a *partnerſhip*. The hazard of loſs and profit is not equal and reciprocal, if the lender can receive only a limited ſum for the profits of his loan, and yet is made liable to all the loſſes, all the debts contracted in the trade, to any amount. *Nares*, J. ſame opinion.—Rule diſcharged.

A. and *B.* ſhip-agents at different ports, entered into an agreement to ſhare, in certain proportions, the profits of their reſpective commiſſions, and the diſcount on tradeſmen's bills employed by them in repairing the ſhips conſigned to them, &c. It was held, that by this agreement they became *liable*, as partners, to all perſons with whom either contracted as ſuch agent, though the agreement provided that neither ſhould be anſwerable for the acts or loſſes of the other, but each for his own.—This was an action of *aſſumpſit*, for goods ſold and delivered, work and labour done, &c. and on the trial a verdict was found for the plaintiff, ſubject to the opinion of the Court, on a caſe which ſtated, that on the 24th of February, 1790, the defendant duly executed articles of agreement as follows: "Articles of agree- "ment, &c. between *Eraſmus Carver* and *William Carver*, of "Goſport, in the county of Southampton, merchants, of the "one part, and *Archibald Gieſler*, of Plymouth, in the county "of Devon, merchant, of the other part. Whereas the ſaid "*Archibald Gieſler*, ſome time ſince, received appointments "from ſeveral of the principal ſhip-owners, merchants, and "inſurers, in Holland, and other places, to act as their agent "in the ſeveral counties of Hampſhire, Devonſhire, Dorſet- "ſhire, and Cornwall; and whereas the ſaid *Eraſmus Carver* "and *William Carver* have, for a great number of years, been "eſtabliſhed at Goſport aforeſaid, in the agency line, under "the firm of *Eraſmus Carver* and ſon, and hold ſundry ap- "pointments, as conſuls and agents for the Daniſh and other "foreign nations, and alſo have very extenſive connections in "Holland, and other parts of Europe; and whereas it is deem- "ed, for their mutual intereſt, and the advantage of their "friends, that the ſaid *Archibald Gieſler* ſhould remove from "Plymouth, and eſtabliſh himſelf at Cowes, in the Iſle of "Wight; and the ſaid *Eraſmus Carver*, and *William Carver*, "and the ſaid *Archibald Gieſler*, have agreed, that *each ſhould* "*allow to the other certain portions of each other's commiſſions* "*and profits*, in manner hereafter more particular mentioned "and expreſſed: *now, therefore, this agreement witneſſeth*, and "the ſaid *Archibald Gieſler* doth hereby, for himſelf, his exe-

Waugh *v.* Carver, Carver, and Gieſler, Mic. Ter. 34 Geo. 3. C.B. 2 *Hen. Black.* 235.

(1) It is uſurious, *vide* title USURY, *infra*.

" cutors and adminiſtrators, covenant, promiſe, and agree, to " and with the ſaid *Eraſmus Carver* and *William Carver*, their " executors and aſſigns, in manner following (that is to ſay), " that the ſaid *Archibald Gieſler* ſhall and will, when required " ſo to do, by the ſaid *Eraſmus Carver* and *William Carver*, " remove from Plymouth, and eſtabliſh himſelf at Cowes afore- " ſaid, for the purpoſe of carrying on a houſe there in the " agency line, on his account; but in conſequence of the aſ- " ſiſtance and recommendations which the ſaid *Eraſmus Carver* " and *William Carver* have agreed to render in ſupport of the " ſaid houſe at Cowes, the ſaid *Archibald Gieſler* doth cove- " nant, promiſe, and agree, to and with the ſaid *Eraſmus Carver* " and *William Carver*, that the ſaid *Archibald Gieſler*, his ex- " ecutors, adminiſtrators, and aſſigns, ſhall and will well and " truly pay or allow, or cauſe to be paid or allowed, to the ſaid " *Eraſmus Carver* and *William Carver*, their executors, ad- " miniſtrators, and aſſigns, *one full moiety, or half part, of the* " *commiſſion agency*, to be received on all ſuch ſhips or veſſels " as may arrive or put into the port of Cowes, or remain in " the road to the weſtward thereof, within the Needles, of " which the ſaid *Archibald Gieſler* may procure the addreſs, " and likewiſe *one full moiety, or half part, of the diſcount* on the " bills of the ſeveral tradeſmen, employed in the repairs of ſuch " ſhips or veſſels: and as there have been, for a conſiderable " time paſt, very general complaints made abroad, of the mal- " practices and impoſitions that have prevailed at Cowes afore- " ſaid, and it being a principal object of the ſaid *Eraſmus* " *Carver* and *William Carver* to counteract and prevent ſuch, " the ſaid *Archibald Gieſler* doth further covenant, promiſe, " and agree, to and with the ſaid *Eraſmus Carver* and *William* " *Carver*, that the ſaid *Archibald Gieſler* ſhall and will uſe " his utmoſt diligence and endeavours, to prevent ſhips or veſ- " ſels arriving at the eaſt end of the Iſle of Wight from being " carried paſt the port of Portſmouth to that of Cowes, and " alſo to induce the mariners or commanders of ſuch ſhips or " veſſels, as may come in at the weſt end of the iſland, through " the Needles, whenever it is practicable and adviſeable, to " proceed to Portſmouth, and there put themſelves under the " direction of the ſaid *Eraſmus Carver* and *William Carver*; " and that he will conſult and adviſe with the ſaid *Eraſmus* " *Carver* and *William Carver*, on and reſpecting the affairs of " ſuch ſhips or veſſels as may put into and remain at the port " of Cowes, under the care of the ſaid *Archibald Gieſler*, and " purſue ſuch meaſures as may appear to the ſaid *Eraſmus* " *Carver* and *William Carver* for the intereſt of the concerned. " And whereas one of the cauſes of complaint before men- " tioned, is the very heavy charge made at Cowes for the uſe " of warehouſes, for depoſiting the cargoes of ſhips or veſſels, " the ſaid *Archibald Gieſler* doth alſo covenant, promiſe, and

" agree,

" agree, to and with the ſaid *Eraſmus Carver* and *William* " *Carver*, that they, the ſaid *Eraſmus Carver* and *William* " *Carver*, ſhall be at full liberty to engage warehouſes at " Cowes aforeſaid, on ſuch terms and in ſuch manner as they " may think proper, in which the ſaid *Archibald Gieſler* ſhall " not, upon any grounds or pretence whatſoever, either directly " or indirectly interfere. And the ſaid *Eraſmus Carver* and " *William Carver*, for the conſiderations herein before men- " tioned, do hereby covenant, promiſe, and agree, to and with " the ſaid *Archibald Gieſler*, his executors and adminiſtrators, " that they the ſaid *Eraſmus Carver* and *William Carver*, *ſhall* " *and will well and truly pay or allow, or cauſe to be paid or* " *allowed to the ſaid* Archibald Gieſler, *his executors, adminiſ-* " *trators, or aſſigns, three-fifth parts or ſhares of the commiſſion* " *or agency, to be received by the ſaid* Eraſmus Carver *and* " William, *on account of all ſuch ſhips or veſſels, the commanders* " *whereof may, in conſequence of the endeavours, interference, or* " *influence of the ſaid* Archibald Gieſler, *proceed from Cowes to* " *Portſmouth, and there put themſelves under the direction of* " *the ſaid* Eraſmus Carver *and* William Carver, *in manner* " *herein before mentioned, and likewiſe one and one half per* " *cent on the amount of the bills of the ſeveral tradeſmen em-* " *ployed in the repairs of ſuch ſhips or veſſels, together with one* " *fourth part of ſuch ſum or ſums, as may be charged or brought* " *into account for warehouſe rent, on the cargoes of ſuch ſhips* " *or veſſels reſpectively; and alſo one ſixth part of ſuch ſum or* " *ſums as may be charged or brought into account, for warehouſe* " *rent on the cargoes of ſuch ſhips or veſſels as may be landed at* " *Cowes aforeſaid:* And alſo that they, the ſaid Eraſmus Carver " *and* William Carver, *their executors, adminiſtrators, and* " *aſſigns, ſhall and will, well and truly pay or allow, or cauſe to* " *be paid or allowed unto the ſaid* Archibald Gieſler, *his exe-* " *cutors, adminiſtrators, or aſſigns, one fourth part or ſhare of* " *the commiſſion or agency to be received by the ſaid* Eraſmus " Carver *and* William Carver, *on account of all ſuch ſhips or* " *veſſels that may arrive or put into the port of Portſmouth, or* " *remain in the limits thereof, under the care and direction of* " *the ſaid* Eraſmus Carver *and* William Carver; *and likewiſe* " *one half per cent on the amount of the bills of the ſeveral* " *tradeſmen employed in the repairs of ſuch ſhips or veſſels*; and " in order to prevent any miſunderſtanding or diſputes, with " reſpect to the commiſſion and diſcount to be paid and divided, " between the ſaid *Eraſmus Carver* and *William Carver*, and " the ſaid *Archibald Gieſler*, and for the better aſcertaining " thereof, it is hereby mutually covenanted, declared, and " agreed upon, between the ſaid *Eraſmus Carver* and *William* " *Carver*, and the ſaid *Archibald Gieſler*, that one-fifth part of " the commiſſion or agency on each ſhip ſhall and may be " firſt retained by the party, under whoſe care ſuch ſhip or

" veſſel ſhall be, as a full compenſation of clerks, boat hire, and " all other incidental charges and expences in regard of ſuch " ſhips or veſſels reſpectively; after which deduction, *the then* " *remaining balance of ſuch commiſſions or agency, ſhall be di-* " *vided between the ſaid* Eraſmus Carver *and* William Carver, " *and the ſaid* Archibald Gieſler, *in the proportion herein be-* " *fore mentioned*; and that ſuch commiſſion or agency ſhall be " aſcertained, by one party's producing to the other, true and " authentic copies of the general accounts of each ſhip or " veſſel, under their reſpective care and direction, ſigned by " the ſeveral maſters of ſuch ſhips or veſſels reſpectively, and " notarily authenticated. And it is hereby further covenanted, " declared, and agreed upon, by and between the ſaid *Eraſmus* " *Carver* and *William Carver*, and the ſaid *Archibald Gieſler*, " that this preſent contract and agreement ſhall commence and " take effect from the date hereof, and ſhall continue in full " force and virtue for the term of ſeven years, during the whole " of which ſaid term, the ſaid parties, or either of them, ſhall " not upon any grounds or pretence whatſoever, directly or " indirectly, enter into, or form any connection, contract, or " agreement, with any other houſe or houſes, or with any per- " ſon or perſons whatſoever, concerning the commiſſion or " agency of ſhips or veſſels, that may, during the ſaid term, " put into or arrive at either of the beforementioned ports of " Portſmouth or Cowes; nor ſhall the ſaid *Archibald Gieſler*, " at the expiration of the ſaid term of ſeven years, directly or " indirectly, eſtabliſh himſelf at Goſport or Portſmouth; nor, " on any grounds or pretences whatſoever, enter into or " form any connection, contract, or agreement with any houſe " or houſes, perſon or perſons whomſoever, at Goſport or " Portſmouth aforeſaid. And alſo, that they, the ſaid *Eraſmus* " *Carver* and *William Carver*, and the ſaid *Archibald Gieſler*, " ſhall and will meet at Goſport, on or about the firſt day of " September yearly, for the purpoſe of examining and ſettling " their accounts, concerning the ſaid commiſſion buſineſs; and " that ſuch party from whom the balance ſhall then appear to " be due, ſhall and will, well and truly pay or ſecure the ſame " unto the other party, his executors, adminiſtrators, or aſ- " ſigns, on or before the 29th day of the ſaid month of Sep- " tember yearly. And it is hereby, likewiſe, covenanted, de- " clared, and agreed, by and between the ſaid *Eraſmus Carver* " and *William Carver*, and the ſaid *Archibald Gieſler*, that each " party ſhall *ſeparately run the riſque of, and ſuſtain all ſuch* " *loſs and loſſes as may happen on the advance of monies*, in re- " ſpect of any ſhips or veſſels, under the immediate care " of either of the ſaid parties reſpectively; it being the true " intent and meaning of theſe preſents, and of the parties " hereunto, that *neither of them, the ſaid* Eraſmus Carver *and* " William Carver, *and* Archibald Gieſler, *ſhall, at any time or*

" *times*

" *times during the continuance of this agreement, be in anywiſe*
" *injured, prejudiced, or affected, by any loſs or loſſes that may*
" *happen to the other of them; or that either of them ſhall, in*
" *any degree, be anſwerable or accountable for the acts, deeds, or*
" *receipts of the other of them, but that each of them, the ſaid*
" Eraſmus Carver *and* William Carver, *and* Archibald Gieſler,
" *ſhall, in his own perſon, and with his own goods and effects,*
" *reſpectively be anſwerable and accountable for his own loſſes,*
" *acts, deeds, and receipts.* Provided always, nevertheleſs, and
" it is hereby declared and agreed to be the true intent and
" meaning of theſe preſents, and the parties hereunto, that in
" caſe the houſes of either of them, the ſaid *Eraſmus Carver*
" and *William Carver*, and *Archibald Gieſler*, ſhall diſſolve or
" ceaſe to exiſt, from any circumſtance whatſoever, before the
" expiration of the ſaid term of ſeven years; that then, this
" preſent agreement, and every clauſe, ſentence, and thing
" herein contained, ſhall from thence ceaſe, determine, and be
" abſolutely void, to all intents and purpoſes whatſoever; but
" without prejudice, nevertheleſs, to the ſettlement of any ac-
" counts that may then remain open and unliquidated, between
" the ſaid *Eraſmus Carver* and *William Carver*, and the ſaid
" *Archibald Gieſler*, which ſhall be ſettled and adjuſted within
" the ſpace of ſix months next after the diſſolution of the
" houſes of either of them, the ſaid *Eraſmus Carver* and
" *William*, and *Archibald Gieſler*; and alſo, that at the expi-
" ration of the ſaid term of ſeven years, it ſhall be at the option
" of the ſaid *Eraſmus Carver* and *William Carver*, to renew
" this agreement for the further term of ſeven years, under
" and ſubject to the ſeveral clauſes, covenants, and agreements
" herein before particularly mentioned and ſet forth, which the
" ſaid *Archibald Gieſler* doth hereby engage to do. And it is
" hereby further covenanted, declared, and agreed, by and be-
" tween the ſaid *Eraſmus Carver* and *William Carver*, and
" *Archibald Gieſler*, that theſe preſents do not, nor ſhall be
" conſtrued to mean to extend to ſuch ſhips or veſſels that may
" come to the addreſs of either of the ſaid parties reſpectively,
" for the purpoſe of loading or delivering any goods, wares, or
" merchandize, it being the true intent and meaning of theſe
" preſents, and the parties hereunto, that the foregoing articles,
" ſhall not, nor ſhall be conſtrued to bear reference to *their*
" *particular or ſeparate mercantile concerns or connections*; and
" that in caſe any diſputes or miſunderſtandings ſhall hereafter
" ariſe between them, reſpecting the true intent and meaning
" of any of the articles or covenants herein before contained,
" that then ſuch diſputes or miſunderſtandings ſhall be ſub-
" mitted to the arbitration of two indifferent perſons, one to
" be choſen by the ſaid *Eraſmus Carver* and *William Carver*,
" and the other by the ſaid *Archibald Gieſler*; and in caſe ſuch
" two perſons cannot agree about the ſame, then they are hereby

" empowered

" empowered to name ſome third perſon, as an umpire; and it " is hereby declared and agreed, that the award and determi- " nation of the ſaid referees and umpire, or any two of them, " concerning the object in diſpute, ſhall be made and ſettled " ſix calendar months next after ſuch differences ſhall have " ariſen between the ſaid parties, and ſhall be abſolutely final, " concluſive, and binding. And laſtly, for the true perform- " ance of all and every the covenants, articles, and agreements " herein before contained, they, the ſaid *Eraſmus Carver* and " *William Carver*, and *Archibald Gieſler*, do hereby bind " themſelves, their heirs, executors, and adminiſtrators, each " to the other, in the penalty of five thouſand pounds of lawful " money of Great-Britain, firmly by theſe preſents." In purſuance of theſe articles, *Gieſler* removed from Plymouth and ſettled at Cowes, where he carried on the buſineſs of a ſhip-agent, in his own name, and contracted for the goods, &c. which were the ſubject of the action. And the queſtion was, Whether the defendants were partners on the true conſtruction of the articles?—Lord Chief Juſtice EYRE: This caſe has been extremely well argued, and the diſcuſſion of it has enabled me to make up my mind, and removed the only difficulty I felt, which was, whether by conſtruing this to be a partnerſhip, we ſhould not determine, that if there was an annuity granted out of a banking-houſe, to the widow, for inſtance, of a deceaſed partner, it would make her liable to the debts of the houſe, and involve her in a bankruptcy. But, I think, this caſe will not lead to that conſequence. The definition of the partnerſhip, cited from *Puffendorf* (1), is good as between the parties themſelves, but not with reſpect to the world at large. If the queſtion were between *A.* and *B.* whether they were partners or not, it would be very well to enquire whether they had contributed, and in what proportions, ſtock or labour, and on what agreement they were to divide the profits of that contribution. But in all theſe caſes, a very different queſtion ariſes, in which that definition is of little ſervice. The queſtion is generally, not between the parties, as to what ſhares they ſhall divide, but reſpecting creditors, claiming a ſatisfaction out of the funds of a particular houſe, who ſhall be deemed liable in regard to theſe funds? Now a caſe may be ſtated, in which it is the clear ſenſe of the parties to the contract, that they ſhall not be partners; that *A.* is to contribute neither labour nor money, and, to go ſtill farther, not to receive any profits. But if he will lend his name as a partner, he becomes as againſt all the reſt of the world, a partner, not upon the ground of the real tranſaction between them, but upon principles of general

(1) " *Contractus ſocietatis eſt, quo duo pluresve inter ſe pecuniam, res, aut operas conferunt, eo fine, ut quod inde redit lucri inter ſingulos pro ratâ dividatur.*" *Puffendorf*, lib. 5. cap. 8.

policy,

policy, to prevent the frauds to which creditors would be liable, if they were to ſuppoſe that they lent their money upon the apparent credit of three or four perſons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing. The argument gone into, however proper for the diſcuſſion of the queſtion, is irrelevant to a great part of the caſe. Whether theſe perſons were to interfere more or leſs, with their advice and directions, and many ſmall parts of the agreement, I lay entirely out of the caſe, becauſe it is plain, upon the conſtruction of the agreement, if it be conſtrued only between the *Carvers* and *Gieſler*, that they were not, nor ever meant to be, partners. They meant each houſe to carry on trade without riſque of each other, and to be at their own loſs. Though there was a certain degree of control at one houſe, it was without an idea that either was to be involved in the conſequences of the failure of the other, and without underſtanding themſelves reſponſible for any circumſtances that might happen to the loſs of either. That was the agreement between themſelves. But the queſtion is, Whether they have not, by parts of their agreement, conſtituted themſelves partners in reſpect to other perſons? The caſe, therefore, is reduced to the ſingle point, Whether the *Carvers* did not entitle themſelves, and did not mean to take a moiety of the profits of *Gieſler*'s houſe, generally and indefinitely as they ſhould ariſe, at certain times agreed upon for the ſettlement of their accounts? That they have ſo done, is clear upon the face of the agreement: and upon the authority of *Grace* v. *Smith* (1), he who takes a moiety of all the profits indefinitely, ſhall, by operation of law, be made liable to loſſes, if loſſes ariſe, upon the principle that by taking a part of the profits, he takes from the creditor a part of that fund which is the proper ſecurity to them for the payment of their debts. That was the foundation of the deciſion in *Grace* v. *Smith*; and, I think, it ſtands upon the fair ground of reaſon. I cannot agree, that this was a mere agency, in the ſenſe contended for on the part of the defendants; for there was a riſk of profit and loſs: a ſhip-agent employs tradeſmen to furniſh neceſſaries for the ſhip, he contracts with them, and is liable to them; he alſo makes out their bills in ſuch a way as to determine the charge of commiſſion to the ſhip-owners. With reſpect to the commiſſion, indeed, he may be conſidered as a mere agent: but as to the agency itſelf, he is as much a trader as any other man; and there is as much riſk of profit and loſs, to the perſon with whom he contracts, in the tranſactions with him, as with any other trader. It is true, he will gain nothing but his diſcount, but that is a profit in the trade, and there may be loſſes to him, as well as to the owners. If, therefore, the

(1) 2 *Black.* 998. *ante*, p. 611.

principle

principle be true, that he who takes the general profits of a partnerſhip muſt of neceſſity be made liable to the loſſes, in order that he may ſtand in a juſt ſituation with regard to the creditors of the houſe, then this is a caſe clear of all difficulty. For though with reſpect to each other, theſe perſons were not to be conſidered as partners, yet they have made themſelves ſuch, with regard to their tranſactions with the reſt of the world. I am therefore of opinion that there ought to be judgment for the plaintiff.—The other Judges agreed.

Bolton *v.* Puller *et al.* aſſignees, &c. Tr. Ter. 36 Geo. 3. C. B. 1 *Pul. et Boſ.* 539.

A. B. C. and *D.* were partners in a banking-houſe at Liverpool, and *C.* and *D.* alſo carried on a ſeparate mercantile concern in London; *J. S.* having accepted bills payable at the houſe of *C.* and *D.* employed *A. B. C.* and *D.* to get them paid accordingly, and agreed to depoſit with them good bills indorſed by him, for the purpoſe of enabling them ſo to do; *A. B. C.* and *D.* debited *J. S.* in account for his acceptances, and credited him for all the bills which he depoſited; ſome of the bills ſo depoſited by *J. S.* were remitted by *A. B. C.* and *D.* to *C.* and *D.* upon the general account between the two houſes, and before any of the acceptances of *J. S.* became due both houſes failed, and *J. S.* was obliged to pay his own acceptances; the Court held that the aſſignees of *C.* and *D.* were entitled to retain againſt *J. S.* the bills remitted to them by *A. B. C.* and *D.* They alſo held that it made no difference that one of the bills remitted did not arrive in London till after the bankruptcy of *C.* and *D.* though ſent by *A. B. C.* and *D.* before that event.—This was trover for two bills of exchange; one of 4000l. and one of 398l. 8s. 3d. The defendants pleaded the general iſſue, and at the trial a ſpecial verdict was found to the following effect: *John Bolton* was a merchant at Liverpool; *John Forbes* and *Daniel Gregory*, for ſome years, and until they became bankrupt, were co-partners, and carried on buſineſs as merchants in London, under the firm of *Burton*, *Forbes*, and *Gregory*. On the 1ſt of May, 1774, *Forbes* and *Gregory* entered into partnerſhip with one *Charles Caldwell* and one *Thomas Smith*, in the trade and buſineſs of bankers, to be carried on at Liverpool, under the firm of *Charles Caldwell* and Co. and ſo continued to trade till that houſe became bankrupt. The houſe at Liverpool had dealings and tranſactions with *Forbes* and *Gregory*, carrying on buſineſs as merchants under the firm of *Burton*, *Forbes*, and *Gregory*, in London; and between the two houſes at Liverpool and London, there was an open account current. *Bolton* for ſome years, and until the houſe at Liverpool became bankrupt, employed that houſe as his bankers; and they uſed to procure bills which had been accepted by him, payable at the houſe in London, to be there paid when they fell due. Thoſe payments when made were carried by the houſe in London to their account with the houſe

houſe at Liverpool, and by the houſe at Liverpool to their account with *Bolton*. In the banking account between *Bolton* and the houſe at Liverpool, *Bolton* was made debtor for caſh received of them, and for bills accepted by him payable at the houſe in London; and was credited in ſuch account for bills and caſh paid by him into the ſaid houſe. An intereſt account was kept between *Bolton* and the houſe at Liverpool, which was balanced every three months; and the latter was alſo allowed a profit on the ſaid account of one-quarter *per cent.* on bills and caſh paid, either by them or by the houſe in London, on their account, for the uſe of *Bolton*. Bills having been accepted by *Bolton* to the amount of 19,702l. payable at the houſe in London, on the 28th of February, he propoſed to the houſe at Liverpool, that they ſhould procure the ſame to be paid as they fell due by the houſe in London, and that to enable the houſe at Liverpool to provide for ſuch payments, he ſhould deliver to them certain other bills of exchange, whereof thoſe mentioned in the declaration were parcel, with his indorſement thereon; to this propoſal the houſe at Liverpool agreed. In purſuance of this agreement, *Bolton* on the 1ſt of March, 1793, and on other days between that day and the 16th of March in the ſame year, delivered to the houſe at Liverpool ſeveral bills of exchange, amounting in the whole to the ſum of 11,583l. 2s. 9d.; among theſe was the bill for 4000l. mentioned in the declaration. On the 16th of March, 1793, he delivered to the ſame houſe other bills, with a check on that houſe (which they received as caſh), to the amount of 912l. 1s. 0d.; among theſe was the bill for 398l. 18s. 3d. alſo mentioned in the declaration. All theſe bills were the property of *Bolton*, and duly indorſed by him; the bill for 4000l. having alſo previouſly to the delivery been accepted by him. On the 4th of March, 1793, the bills accepted by *Bolton*, payable at the houſe in London, were by the houſe at Liverpool entered on the debit ſide of the account between them and *Bolton*; and the bills delivered by *Bolton* to the houſe at Liverpool, were by them carried to his credit in the ſame account at the times when they were reſpectively delivered. On the debit ſide of the books of the houſe at Liverpool, it appeared that *Bolton*'s acceptances, amounting to 19,702l. 13s. 10d. were entered thus:—"March 4th, 55 acceptances due in April, 19,702l. 13s. 10d."; and on the credit ſide the bills delivered to the houſe by *Bolton* were entered, ſome with the date of their delivery, and the day on which they were to fall due, and ſome with the former only. On the 2d of March, 1793, the houſe at Liverpool remitted the abovementioned bill for 4000l. together with other bills, to the amount in the whole of 30,000l. and upwards, to the houſe in London, to be carried to the account of the houſe at Liverpool; and on the 16th of March, they remitted

mitted the abovementioned bill for 3981. 18s. 3d. together with other bills, amounting in the whole to 8000l. and upwards, to be carried to the ſame account. This laſt bill for 3981. 18s. 3d. was received by the houſe in London on the 18th of March, 1793. Some of the bills delivered by *Bolton* to the houſe at Liverpool were negociated by them, and the value received to their own uſe. On the 28th of February, 1793, and from thence till the bankruptcy of the houſe at Liverpool, the houſe in London was largely in advance to the houſe at Liverpool. On the 16th of March, 1793, the houſe at London became inſolvent, and on the 18th of the ſame month a commiſſion of bankruptcy iſſued againſt them, under which the preſent defendants were aſſignees. On the ſame day the houſe at Liverpool alſo became bankrupt, and a joint commiſſion of the ſame date iſſued againſt *Charles Caldwell*, *Thomas Smith*, *John Forbes*, and *Daniel Gregory*, as partners in the banking-houſe at Liverpool. The houſe at Liverpool at the time of their bankruptcy was indebted to *Bolton* in the ſum of 2000l. and upwards; and none of that parcel of bills, amounting to 19,702l. 13s. 10d. accepted by *Bolton*, payable at the houſe in London, were paid either by that houſe or by the houſe at Liverpool, but were paid by *Bolton* himſelf. The defendants poſſeſſed themſelves of the two bills in queſtion as aſſignees of *Forbes* and *Gregory*, and refuſed to deliver them on demand. IT WAS ARGUED FOR THE PLAINTIFF—In the FIRST PLACE, that *Caldwell* and Co. at Liverpool, and *Forbes* and *Gregory* in London, were, with reſpect to the tranſactions on which this caſe ariſes, to be conſidered as the ſame perſons. SECONDLY, that the bills for which this action was brought, were appropriated by *Bolton* to the particular purpoſe of anſwering his acceptances at the houſe in London, and not paid in on the general account. THIRDLY, that trover is the proper form of action. —IT WAS ARGUED FOR THE DEFENDANTS—FIRST, that the bills in queſtion were paid in upon the general account between *Bolton* and the houſe at Liverpool. SECONDLY, that the houſe in London was diſtinct from that at Liverpool, and the acts of the former were not binding on the latter. THIRDLY, that trover was not the proper remedy. —PER CURIAM: The queſtion is, Whether the plaintiff can maintain this action upon this caſe? For him it is urged, that the houſe in London is a houſe of trade, carried on by two of the partners in the banking-houſe at Liverpool; though it is admitted, that the trade carried on in London is the ſeparate eſtate of thoſe two partners. It is inſiſted, that the bills in their hands remained in the ſame ſtate, ſubject to the ſame rules of law and equity, as would have applied to them in the poſſeſſion of the houſe at Liverpool; and that, having been appropriated (as it is called), or delivered

delivered to the houſe at Liverpool for a ſpecial purpoſe, and not having been ultimately applied to that purpoſe, and remaining in ſpecie in their poſſeſſion, *Bolton* would have been entitled to demand to have them delivered up to him by the banking-houſe at Liverpool, or by the aſſignees of that houſe, ſuppoſing them to have come to the hands of thoſe aſſignees. I take it to be now ſettled, that *bills in the hands of a banker, like goods in the hands of a factor, in the event of a bankruptcy, are to be delivered up, ſubject only to the lien which the banker may have upon them for the balance of his account.* On the other hand it is clear, that, *if indorſed bills are depoſited with a banker, and they are by him negociated to a third perſon, though the purpoſe for which they were depoſited ſhould be ever ſo cruelly diſappointed by his becoming bankrupt, the original owner can have no claim to recover them in trover againſt ſuch third perſon* (1). The preſent ſeems to be a middle caſe, and, I believe, is a new one. We muſt endeavour to aſcertain to which claſs it belongs. There can be no doubt, that, as between themſelves, a partnerſhip may have tranſactions with an individual partner, or with two or more of the partners having their ſeparate eſtate, engaged in ſome joint concern, in which the general partnerſhip is not intereſted; and that they may by their acts convert the joint property of the general partnerſhip into the ſeparate property of an individual partner, or into the joint property of two or more partners or *e converſo.* And their tranſactions in this reſpect will, generally ſpeaking, bind third perſons, and third perſons may take advantage of them in the ſame manner, as if the partnerſhip were tranſacting buſineſs with ſtrangers; for inſtance—ſuppoſe the general partnerſhip to have ſold a bale of goods to the particular partnerſhip, a creditor of the particular partnerſhip might take thoſe goods in execution for the ſeparate debt of that particular partnerſhip. In ſome reſpects therefore an individual partner, or a particular partnerſhip conſiſting of two or more of thoſe perſons, who are partners in ſome larger partnerſhip, may be conſidered as third perſons in tranſactions, in which the general partnerſhip may happen to be engaged with their correſpondent. On the other hand it will be difficult, if not impoſſible, for individual partners, or for particular partnerſhips compoſed of individual partners, to ſhake off privity in all the tranſactions of the general partnerſhip, or to avoid all the conſequences of privity. Each partner is a party, as well as privy, to the tranſactions of the general partnerſhip, though the general partnerſhip is not a party to the ſeparate tranſactions of the individual partners. *Forbes*

(1) Vid. *Collins* v. *Martin*, poſt. Hil. Ter. 1797.

and

and *Gregory* were therefore parties to the agreement which *Caldwell* and *Smith* entered into with *Bolton*, and were as much bound by it as *Caldwell* and *Smith* were. And I hold, that if *Bolton* had ſued the houſe at Liverpool for a breach of that agreement, and had recovered, he might have taken any part of that ſeparate eſtate of the houſe in London in execution, in ſatisfaction of his judgment. But this will not touch the queſtion, what ſhall be deemed the joint property, and what the ſeparate property, of perſons ſo circumſtanced. Joint or ſeveral, *Bolton*'s claim upon it, in the caſe ſuppoſed, would be equally available to him. Bankruptcy, when it intervenes, may very much change the ſituation of theſe parties. Mr. Juſtice *Heath* ſuggeſted this conſideration at the cloſe of the firſt argument. It is a very important conſideration. If all become bankrupts, all the joint and all the ſeparate property will veſt in the aſſignees, whether the commiſſions are joint or ſeveral. If a ſeparate commiſſion iſſue againſt one partner, his aſſignees will take all his ſeparate property, and all his intereſt in the joint property. If a joint commiſſion iſſues againſt all, the aſſignees will take all the joint property, and all the ſeparate property of each individual partner. In the diſtribution to creditors, a rule of convenience has been adopted. To underſtand it, we ſhould ſee, what the right of creditors were as to execution for their debts before the bankruptcy. A ſeparate creditor might take, at his election, the ſeparate eſtate of his debtor, or his debtor's ſhare of the joint eſtate, or both, if neceſſary. A joint creditor might take the whole joint eſtate, or the whole ſeparate eſtate of any one partner. But the rule of convenience, which has been adopted, reſtrains the ſeparate creditor from reſorting, in the firſt inſtance, to his debtor's ſhare of the joint property; and alſo reſtrains the joint creditor from reſorting, in the firſt inſtance, to the ſeparate property of his debtor. Bankruptcy has been called a ſtatute execution; but, if it has any analogy to an execution, it is certainly very much modified, and, as I take it, by the authority of the chancellor, who is to take order for the diſtribution of the effects of a bankrupt. Under the rule, the ſeparate creditors have a right to be ſatisfied for their debts out of the ſeparate property, in preference to the joint creditors(1). But what ſhall be deemed ſeparate property, or what effect the claims of third perſons upon that which (as between one partner and the part-

(1) This rule was adopted by Lord Chancellor *Hardwicke*, and acted upon till overturned by Lord Chancellor *Thurlow*. The ſubject has ſince been fully conſidered by Lord Chancellor *Loughborough*, in the caſe *Ex parte Elton*, 3 *Vez.* jun. 238. but does not appear to have been altogether ſettled, though the inclination of his lordſhip's opinion was ſtrongly in favour of the old rule adopted by Lord *Hardwicke*. For the caſes on this point, ſee *Cooke*'s *B. L.* from page 237 to 250. *ed.* 4.

nerſhip)

nerſhip) would be ſeparate property, are queſtions, which neither bankruptcy nor the rule of diſtribution ſeem to touch. The aſſignees ſtand but in the place of the bankrupts, and take the effects ſubject to every legal and equitable claim upon thoſe effects. And, therefore, I conclude, that though bankruptcy very much alters the ſituation in which I have placed Mr. *Bolton*, in the courſe of the argument, as a creditor having obtained a judgment againſt the banking-houſe at Liverpool, on the ground of this agreement; the queſtion now made between him and the aſſignees of *Forbes* and *Gregory* remains undecided, and muſt (as it appears to me) depend on an enquiry into the effect of the privity and participation of *Forbes* and *Gregory* in the tranſaction between *Bolton* and the banking-houſe at Liverpool, in which they were partners. The true nature of that tranſaction has been warmly diſputed in the courſe of the argument; but it comes out to be ſimply this: *Bolton* paid into his banker's hands theſe bills, on his general account, for a particular purpoſe. This has been called an appropriation; and legal conſequences are deduced from thence, as if appropriation was a technical term, or at leaſt was uſed in ſome definite or preciſe ſenſe; whereas no term in popular uſe can be more general, or more uncertain in its import. In truth, when I ſay, theſe bills were paid in on a general account for a particular purpoſe, I mean only to ſay, that the object which the parties had in their view was, that the bankers might be enabled to provide for the payment of Mr. *Bolton*'s acceptances in London. So far from being appropriated to any particular purpoſe, in the ſtrict ſenſe of the word, the bills in ſpecie were not intended to be applied to any other purpoſe than to be converted into caſh, in order to increaſe Mr. *Bolton*'s credit with his bankers; and, in the nature of things, they could not be applied in ſpecie to the particular purpoſe of paying Mr. *Bolton*'s acceptances in London. Theſe bills, at leaſt the bills in queſtion, were remitted to the houſe in London on the general account of the banking-houſes. We cannot think that this was a miſapplication; or that the confidence of Mr. *Bolton* was abuſed. It may be aſked, aſſuming that Mr. *Bolton* conſidered both houſes to be in full credit, Was it not the very thing he meant? Was not this the probable mode by which the banking-houſe would be enabled to provide for the payment of Mr. *Bolton*'s acceptances at the houſe of *Forbes* and *Gregory*? Then, what effect can the privity and participation of *Forbes* and *Gregory*, in the agreement between *Bolton* and the banking-houſe, have on this tranſaction? which, *as between the two houſes, undoubtedly changed the property in theſe bills*; a circumſtance which diſtinguiſhes this caſe from all the caſes which have been determined on this ſubject, and puts it out of the reach of the principle upon which the caſe of *Zinck* v. *Walker*, *ante*, vol. II. p. 125; and the late caſe of *Tooke* v. *Hol-*

v. *Hollingworth*, *ante*, vol. II. p. 112. in the court of Error, were determined. The privity of *Forbes* and *Gregory* to the tranſaction at Liverpool rather created a demand upon them to do what they did, than to take any other courſe; for there is no pretence to ſay that it was intended that a ſeparate account of theſe bills ſhould be kept by any body. The buſineſs went on in the regular channel, upon the foot of the agreement, without the leaſt imputation upon it, up to the moment of the bankruptcy, when the adverſe rights of the creditors of the two houſes attached. If, up to the moment of the bankruptcy, nothing affected the right of *Forbes* and *Gregory* to hold theſe bills on their ſeparate account, that right muſt veſt in the aſſignees of *Forbes* and *Gregory* with nothing to affect it. The aſſignees of *Forbes* and *Gregory* are bound to admit, that *Forbes* and *Gregory* knew that Mr. *Bolton*'s object, and that the object of the partnerſhip at Liverpool was, that by means of theſe bills the acceptances were to be provided for. But how were theſe bills to operate as means? They were to be dealt with as the banking-houſe thought fit to deal with them; to be negociated, if they thought fit; to be diſcounted at Liverpool, if they pleaſed, or remitted to whom they pleaſed; and were neceſſarily to be converted into money, in order to be means effectual to the purpoſe even of the parties who depoſited them. If then *Forbes* and *Gregory* were parties capable of acquiring a property in theſe bills, as capable as any third party, and did acquire it without reproach, and in truth in purſuance of that agreement upon which they were delivered to the banking-houſe; why are not *Forbes* and *Gregory* to be conſidered as third perſons, with whom theſe bills have been negociated? If they were to be ſo conſidered, this determines the claſs to which I ſaid, in a former part of the argument, we were to endeavour to reduce this middle caſe between the caſe of original parties to the tranſaction, and the caſe of third perſons holding ſuch bills as theſe in the ordinary courſe of the negociation of bills of exchange. A circumſtance belonging to the leſſer bill of 398*l.* 18*s.* 3*d.* was taken notice of in the argument, namely, that it came to the hands of *Forbes* and *Gregory* on the day when they became bankrupt. We are of opinion, that the bill having been remitted, as far as concerned the houſe remitting, before the bankruptcy, and to a creditor, cannot be recalled, and muſt follow the fortune of the other bill. It is a great misfortune to Mr. *Bolton* to have been ſo deeply concerned with theſe falling houſes. In ſuch caſes, it too often happens that heavy loſſes fall ſomewhere. The only conſolation is, that it is the law of the land, and not the caprice, or even error of any man, which can ultimately decide where they ſhall fall. Our opinion upon this caſe is, that the judgment muſt be for the defendants.

A. B.

Booth *et al.* aſſignees of G. Browne, a bankrupt, *v.* T. Hodgſon, and E. L. Hodgſon, Mic. Ter. 36 Geo. 3. B.R. 6 *Ter. Rep.* 405.

A. B. and *C.* became partners in inſuring ſhips (contrary to the ſtat. 6 *Geo.* 1. c. 18. ſ. 12.); but it was agreed that the policies ſhould be underwritten in the name of *A.* only; ſeveral policies were effected, and the premiums received by *C.* and *D.* as brokers: held that *A.* could not recover thoſe premiums from *C.* and *D.*—To this action for money had and received to the uſe of the bankrupt, &c. the defendants pleaded the general iſſue as to the whole declaration, except 2l. 2s. and a tender of that ſum; and ſecondly a ſet-off for work and labour, money paid, money had and received, and on an account ſtated. Replication to the ſecond plea that the plaintiffs were not indebted to the defendants, &c. At the trial the jury gave a verdict for the plaintiffs for 2455l. 17s. 1d. ſubject to the opinion of this Court on the following caſe. *G. Browne* and *H. Browne* before their bankruptcy were general partners as merchants; and having committed acts of bankruptcy, a joint commiſſion of bankrupt iſſued againſt them on the 5th of April, 1793, under which they were duly declared bankrupts, and their joint and ſeparate eſtate and effects were duly aſſigned to the plaintiffs. *T. Hodgſon* and *E. L. Hodgſon*, the defendants, were inſurance brokers and partners. Before the 1ſt of April, 1791, *G.* and *H. Browne* and *E. L. Hodgſon* agreed to become co-partners as underwriters of policies for the aſſurance of ſhips and merchandizes at ſea in the premiums and profits as well as the loſſes ariſing thencefrom, but that the name of *G. Browne* only ſhould be uſed in the ſubſcription of ſuch policies. In purſuance of that agreement policies were from time to time ſubſcribed in the name of *G. Browne*, and were ſigned under that name, ſometimes by him, and ſometimes by *E. L. Hodgſon*. The premiums for the policies which were underwritten in the office of the defendants, and which were ſubſcribed in the name of *G. Browne*, from the commencement of the partnerſhip to the bankruptcy of the *Brownes* were received by the defendants, and (after deducting loſſes, returns, and commiſſion) amounted to 2455l. 17s. 1d. The two *Brownes* made inſurances in the office of the defendants, and became indebted to them for premiums in the ſum of 2269l. 11s. 5d. If the Court ſhall be of opinion that the plaintiffs are entitled to recover, then the verdict to ſtand, unleſs the Court ſhall be of opinion that the defendants are entitled to ſet off the ſum of 2269l. 11s. 5d. in which caſe the verdict to be entered for the ſum of 186l. 5s. 8d. only: but if the Court ſhall be of opinion that the plaintiffs have not a right to recover, then a nonſuit to be entered.—Ld. Kenyon, Ch. J.: It is the great duty of every Court of juſtice to adminiſter juſtice as well as they can between the litigating parties; another, and not leſs material, duty is to ſatisfy thoſe parties that the whole caſe has been examined and conſidered:

It is a maxim in our law that a plaintiff muſt ſhew that he ſtands on a fair ground when he calls on a court of juſtice to adminiſter relief to him. Now is that the caſe with theſe plaintiffs. By the ſtat. 6 *Geo.* 1. c. 18. certain privileges were ſecured to two corporations, then to be created by the crown for the purpoſe of inſuring and lending money on bottomry; they were to bring large capitals in order to be reſponſible to thoſe with whom they made their engagements, and they were to pay a conſideration to the public for theſe advantages; and one way of ſecuring theſe privileges was by enacting that they ſhould find no competitors in numbers of perſons forming themſelves into corporations. And, therefore, though the legiſlature thought it right that ſingle individuals might make inſurances, they enacted that no larger capital than that belonging to one perſon (except in the inſtance of the corporations there mentioned) ſhould be pledged to the aſſured, and that all policies contrary to that act ſhould be void. If indeed a perſon, profeſſing to be only engaging his own individual capital, pledge himſelf as ſuch to the aſſured, he muſt be anſwerable to the latter who knows nothing of a ſecret partnerſhip between the former and ſome third perſon. But here the plaintiffs avow that they have inſured in direct violation of the ſtatute; all their claim ariſes out of this tranſaction, which is contrary to the act of parliament; and yet they aſk the Court to give effect to it. If the caſe of *Sullivan* v. *Greaves* had been merely a determination at *Niſi Prius*, I ſhould not have relied upon it at all: but being preſſed by the plaintiff's counſel at the trial, I afterwards conſulted the other judges of this Court, who all concurred in the opinion I gave at Guildhall (1). That caſe therefore has by that mean acquired an authority beyond a mere *Niſi Prius* deciſion, and it is in favour of the defendants. So alſo is the caſe of *Mitchell* v. *Cockburne*, 2 *H. Blackſtone*, 379, *ante*, 265, which was decided by the unanimous opinion of the Court of Common Pleas. As to the two caſes of *Faikney* v. *Reynous*, vol. I. p. 325, and *Petrie* v. *Hannay*, vol. I. p. 275, 590; they are diſtinguiſhable from the preſent caſe. The plaintiffs therefore cannot recover.—The other Judges concurred.—Poſtea to defendants.

Graham *et al.* v. Robertſon, Hil. Ter. 28 Geo. 3. B.R. 2 *Ter. Reſt.* 282.

The plaintiffs, together with *A.* and *B.* being owners of one ſhip, and the defendant of another, a prize was taken, condemned, and ſhared by agreement between them; afterwards the ſentence of condemnation was reverſed, and reſtitution awarded, with coſts, which was paid ſolely by the

(1) There the action was brought by one partner againſt the inſurance broker to recover a moiety of the loſs received by the latter from another partner, the firſt having paid the whole loſs to the aſſured; but it was determined that the action could not be maintained, becauſe its object was to enforce an illegal contract of partnerſhip.

plaintiffs,

plaintiffs. *A.* and *B.* having in the mean time become bankrupts; and it was held that an action could not be brought by the plaintiffs alone for a moiety of the reſtitution money and of the coſts, becauſe it was either a partnerſhip tranſaction, when *A.* and *B.* ought to be joined; or not, when ſeparate actions ſhould be brought by each of the perſons paying—The plaintiffs brought this action for money paid to the uſe of the defendant under theſe circumſtances: The *Trimmer* privateer, of which theſe plaintiffs and two other perſons of the name of *Grant* were joint owners, during the courſe of the laſt war took two prizes in conjunction with the *Maidſtone*, another privateer, of which the defendant was owner, and which were condemned in the Vice Admiralty Court of *Minorca*. In conſequence of an agreement between the plaintiffs and defendant to ſhare all prizes, half the money ariſing from the ſale was paid to the defendant's agent. Afterwards, on appeal to the King in council, the ſentence of condemnation was reverſed, and the money decreed to be refunded to the appellants, with coſts, which was paid by the preſent plaintiffs alone, the other partners having in the mean time become bankrupts. The ſentence of reſtitution was awarded previous to the bankruptcy; but the report of the regiſtrar, aſcertaining the amount of the reſtitution, was not made, and the final decree, confirming the interlocutory decree of reſtitution, did not take place till after. This action was brought to recover a moiety of the ſum paid by the plaintiffs. BULLER, J. before whom the cauſe was tried, was of opinion, upon the objection being taken for want of proper parties; that the plaintiffs having paid the money on account of a partnerſhip tranſaction, muſt be nonſuited, becauſe the other partners or their aſſignees were not joined; and directed it accordingly.—Afterwards a rule was obtained to ſhew cauſe why the nonſuit ſhould not be ſet aſide, UPON THE GROUND *that thoſe other partners, having become bankrupts before the payment of the money, and conſequently before the cauſe of action aroſe, and not having contributed any thing towards the payment of that ſum, and therefore not being in any degree damnified, there was no occaſion to join their names or thoſe of their aſſignees in this action.*—PER CURIAM—This nonſuit is right. Either this money was paid by them on the partnerſhip account or not; if it were, then the other partners who are become bankrupts, or their aſſignees, ſhould have been joined. If it were not paid on a partnerſhip account, then it ſtands as a ſeparate payment by each individual of the plaintiffs; and then the ſum demanded muſt be recovered by each in a ſeparate action, they not being partners *quoad* this tranſaction. So that in either caſe the action is wrongly conceived. Rule diſcharged.

If *two* are *partners*, as *attornies* and *conveyancers*, and *one* receive money to be laid out on mortgage, the *other* is *liable* for

Willet v. Chambers, Ea. Ter. 18 Geo. 3. 3 B. R. Cas. 814.

for the amount, though his partner gave *a ſeparate receipt* for it. This was an action for money had and received to the plaintiff's uſe, brought againſt the defendant, as *ſurviving partner* of one *Dadley*. Plea, *non aſſumpſit*. Verdict for the plaintiff, damages 480l.

Upon a rule to ſhew cauſe why a new trial ſhould not be granted, the facts appeared to be as follows: That *prior* to any partnerſhip between the defendant and *Dadley*, who was an *attorney* and *conveyancer* at Coventry, the *latter*, in the year 1771, received of a Mr. *Bindley*, the ſum of 350l. to be laid out on a real ſecurity: *Dadley* accordingly furniſhed him with a *mortgage* from a Mr. *Hughes* to that amount; which, as it afterwards appeared, *Dadley* had *forged*. At *Midſummer*, 1776, *Dadley* and *Chambers* entered into partnerſhip: ſhortly after which, *Bindley* wanted to call in his money. The pretended mortgagor was ſuppoſed at the ſame time to want a further ſum of 150l. which, added to the original mortgage money, made together the ſum of 500l. The plaintiff *Willet* was ready to advance this ſum: And, in conſideration of his doing ſo, an aſſignment was made to him of the *pretended* mortgage before made to *Bindley*. As to 180l. *part* of this ſum of 500l. *Willet* paid it into *Dadley*'s office, to *Chambers*, who gave the following receipt for it: "Received of Mr. "*Benjamin Willet*, the ſum of 180l. for which *I* promiſe "*to account to him on demand.—Chambers.*"—*Dadley* was not at home, when this ſum was paid.—Some time after, the plaintiff called at the office to pay 300l more, part of the remaining 320l; due. *Dadley* being then at home, *Willet* paid the money to *him*; and, in return, *Dadley* gave him the following receipt: "Received on account, of Mr. *Benjamin* "*Willett*, 300l; the remainder of the money to be paid being "20l.—*Dadley.*" It was admitted, that the defendant *Chambers* was in no reſpect privy to the forgery; and that *no procuration money* was paid, either to *Chambers* or *Dadley*.—Lord *Mansfield*: Both parties in this caſe undoubtedly are innocent; and the loſs which will fall upon the defendant, if the law is againſt him, will be much greater than that which will be ſuſtained by the plaintiff, if he fails. It is indeed ſo hard a caſe upon the defendant, that every leaning of the Court would be in his favour. But THE QUESTION is, "Whether, in *point of law*, this engagement with *Dadley* does not make *Chambers* anſwerable?" To go by ſteps.—It is neceſſary to ſee what the buſineſs was, which *Dadley* carried on alone, before his connection with the defendant in the year 1776. By admiſſion of the counſel on both ſides, it was the buſineſs of an *attorney* and *conveyancer*. By proof in the cauſe, it appears to have been a *great deal more*. For he had *many appointments*, though the nature of them is not particularly mentioned. He had alſo *agencies*, and was *clerk to a navigation*. But there is no pretence that he ever received *procuration money*.

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The buſineſs of conveyancing, in the very nature of it, as carried on in the country, is this: *Where there is an attorney or counſel of credit, they receive money to place out upon ſecurities; and perſons who want to borrow, as well as thoſe who want to lend, apply to them for that purpoſe.* Their *profit* ariſes from *having the money* in their hands, before it is laid out upon the intended ſecurities; and from *their fees and bill of charges* upon the conveyances they draw. It is not diſputed but that this was the nature of *Dadley*'s conveyancing buſineſs: he did not act however as a ſcrivener, who ſometimes does not touch the money; but who in all caſes gets *procuration money*. There is no proof of any tranſaction of that kind; nor indeed is it cuſtomary for attornies, like him, to do ſo; for they get profit enough without it. I remember a caſe before me of a perſon who was truſted to the amount of many thouſand pounds, in the manner I have ſtated; and *that* is the nature of the buſineſs. This was the buſineſs of *Dadley*, *before the partnerſhip*. Let us ſee then, what was the nature of the partnerſhip, afterwards entered into, between *Dadley* and the preſent defendant; whether it was *a general partnerſhip* in *all Dadley*'s buſineſs, or *confined* to *one particular branch* of it only; for to be ſure, there *may be* ſuch a *confined partnerſhip*. The evidence as to this point conſiſts in the heads and terms of an agreement entered into between them, which were afterwards extended and reduced into form. From them it appears, there was no particular reſtriction; it was not to be confined to ſuits, nor to conveyancing only, but they were to be *partners in the buſineſs* which Mr. *Dadley* carried on. Each was to be worth a certain ſum.—The profits are ſtated at 800l.—Then it is agreed, that a proviſion ſhall be made for the family of whichever of them ſhould happen to die firſt. And then comes the following *clauſe*, at the end, which, though not taken notice of by the counſel on either ſide, is very material indeed upon this occaſion. My object in examining it in particular, was to ſee whether it contained any reſtriction. The clauſe is this: "*Note*, this ſcheme of partnerſhip is intended to include *all* Mr. *Dadley*'s preſent and future practice and appointments, ſuch as *agencies*, *navigation-clerk*, *&c.*: But *not* to extend to any *public* office or place, which may at any future time be given to either of the parties." The only reſtriction therefore is that; or, more properly ſpeaking, it is the only exception to this general partnerſhip. Thus the partnerſhip commences, without waiting for articles; and from that time, the *buſineſs* was carried on in partnerſhip. One branch of that buſineſs, was *conveyancing*. Incident to *conveyancing* is, the *receiving of money* to place out upon ſecurities. Receiving it *from the lender* to advance to the *borrower*, and acting for both parties reſpectively. From that, the profit ariſes; not from *procura-*

tion money, but from the money laying in their hands before it is placed out; and when placed out, from the charges and fees for drawing and engroſſing the conveyances. The facts then are ſhortly theſe:—The plaintiff *Willett*, wanting to place out a ſum of 500l, applies to the office without making any diſtinction between the two partners. The firſt ſum he advances is 180l. This he pays to *Chambers*, who gives a geral receipt for it, not expreſſing it to be for *Dadley*, or for what, or whoſe uſe; but making himſelf accountable for the amount on demand. He receives it therefore, as the *principal*, *not* as the *agent* of *Dadley*: and it is admitted he knew the uſe, by placing it out upon the ſecurity for which it was put into his hands. The next ſum, which was 300l, is paid by the plaintiff to *Dadley*, who receives it exactly in the ſame manner as *Chambers* did the former ſum; as *principal*; and gives a receipt for it, not as for ſo much money to be placed out, but as a ſum for which he was to be accountable. The two ſums together, come within 20l. of what was wanted upon the ſecurity.—Afterwards the bill for conveyancing is brought in. *Hughes* being the original mortgagor, if he had not been a fictitious perſon, and had wanted a further ſum of money upon the aſſignment, *he* ſhould have paid the expence of conveyancing. But the bill is brought in, to the plaintiff, and made out "debtor to *Chambers* and *Dadley*." *Chambers* receives the money, and gives a receipt for it. In that tranſaction therefore, he is clearly conſidered *as a partner*, and the tranſaction itſelf, as a *partnerſhip tranſaction*. If *Dadley* had received the procuration money, and that kind of dealing had been excepted out of the articles; or, if ſeparate accounts had been kept of the money got by theſe tranſactions, and it had all been ſet down to the profits of *Dadley* only, it might have varied the caſe: and Mr. Juſtice *Aſhhurſt*, who tried the cauſe, would have been very glad to have given a direction in favour of the defendant. He ſuffers by the raſcality of a man who had a very good character. I am very ſorry for the defendant; but upon this evidence I cannot ſay, but that it is a *partnerſhip tranſaction*. Mr. *Newenham* informed the Court, that the bill included other buſineſs, as well as the particular tranſaction of the mortgage. Lord *Mansfield* ſaid, *that* proves nothing, but that in general they were partners in the fees of conveyancing. *Per Cur.* Rule for a new trial diſcharged.

Smith *et. al. v.* Robert and Thomas Jameſon, Eaſter Term 22 Geo. 3. B. R. 5 *Term Rep.* 601.

One of two partners applied truſt-money in the trade with the privity of the other partner; afterwards they ſeparated, and the partnerſhip effects were aſſigned over to the firſt who took on him the debts; this was held to be no payment in diſcharge of the other partner, but both were liable to make good the truſt-money. This was an action for money had and received, brought againſt theſe perſons as nominal defendants

fendants by an order of the Court of Chancery, to try a queſtion ariſing in their bankruptcy. Both the defendants were merchants and partners in buſineſs previous to *December*, 1792, at which time they ſeparated, and the buſineſs was tranſacted by *Robert* alone till *May*, 1793, when he ſtopped payment. A joint commiſſion of bankrupt was afterwards taken out againſt both of them. *Robert Jameſon* was originally, and before his ſeparation from *Thomas*, a co aſſignee with the plaintiffs of the eſtate of *Lewis* and *Potter*, bankrupts, but upon his becoming bankrupt he was diſcharged by an order of the Lord Chancellor, and a new aſſignment was made to the plaintiffs. While he was in that character he received certain ſums amounting to 2563l. which was brought by him into the partnerſhip fund of *Robert* and *Thomas Jameſon*, with the privity of the latter, and was employed by them for their joint intereſt. The partners kept ſeparate accounts of what was brought in or taken out of the partnerſhip fund by each of them reſpectively; and at firſt this money ſtood in the name of *Robert*; but on a ſettlement of accounts in *September*, 1790, *Thomas* objected to it, and the principal ſum then amounting to 2083l. was entered on the joint account. At the time when the partnerſhip was diſſolved as above mentioned, both of the defendants were ſolvent; and all the partnerſhip effects and credits were aſſigned over to *Robert* who took upon him the debts. The queſtion ſubmitted to the Court was, Whether the plaintiffs could maintain this action againſt the the partnerſhip of *Robert* and *Thomas Jameſon* for the amount of the ſum received by *Robert*, in quality of aſſignee of *Lewis* and *Potter*'s eſtate, and appropriated by him in the manner before mentioned? At the trial a verdict was taken for the plaintiffs, with liberty for the defendants to move to ſet it aſide, and enter a nonſuit. For which purpoſe a rule was accordly obtained on a former day on two grounds; 1ſt. that the truſt-money which had been brought into the partnerſhip fund had been repaid again to *Robert*, upon the ſeparation and ſettlement of accounts: 2d. That at any rate the application of the money in ſuch a manner being a breach of truſt in *Robert*, the money could not be recovered back in this form of action. PER CURIAM—It is unneceſſary to conſider whether or not this action be right in point of form, becauſe it is brought under an order of the Court of Chancery, and is to abide the future directions of that Court, where care will be taken that Juſtice is finally adminiſtered to all the parties. The queſtion intended to be decided is whether or not the partners were liable to pay the debt in queſtion to the aſſignees of *Lewis* and *Potter* after the diſſolution of the partnerſhip by the defendants. When the defendants agreed to diſſolve their partnerſhip, and the effects were aſſigned over to *Robert* on his undertaking to diſcharge the debts due from both, that agreement was obligatory upon them; but their creditors

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ſtill had their remedy againſt both, for they were not bound by any private arrangement among the partners. It ſeems to be clear that if this action had been brought againſt both the defendants before the bankruptcy of the defendant *Robert*, both would have been liable: and if the debt were not then extinguiſhed, neither is it now; for nothing has ſince occurred to diſcharge the other defendant *Thomas*. With regard to the other point made, that a breach of truſt may not be the ground of an *aſſumpſit*, there is not an abridgement in the law which does not contradict ſuch a propoſition. Rule diſcharged(1).

Saville *v.* J. Robertſon and Hutchinſon, Tr. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 720.

Acts ſubſequent to the time of delivering goods on a contract may be admitted as evidence to ſhew that the goods were delivered on a partnerſhip account, if it were doubtful at the time of the contract: but if it clearly appear that no partnerſhip exiſted at the time of the contract, no ſubſequent act by any perſon, who may afterwards become a partner (not even an acknowledgement that he is liable, or his accepting a bill of exchange drawn on them as partners for the very goods), will make him liable in an action for goods ſold and delivered; though he will be liable in an action on the bill of exchange. This was an action for goods ſold and delivered, brought under the following orders of the Lord Chancellor, made upon the petition of the plaintiff and others in the bankruptcy of the defendants; "I do order that the "petitioner *W. Saville* be at liberty to proſecute ſuch action "at law as he ſhall be adviſed for the value of the ſaid cop-"per, &c.; in the defence to which action the ſaid bankrupts "are not to ſet up their bankruptcy; and all books, &c. to "be produced, &c.; and all further directions on the matter "of the petition are hereby reſerved until after the trial, &c.; "dated 2d *Auguſt*, 1790." "I do order that the petitioner "*W. Saville* be at liberty to try the ſaid action for goods "ſold and delivered, as directed by my order made in this "cauſe on 2d *Auguſt*, 1790; with liberty, if the Court "wherein the ſaid action ſhall be tried ſhall think fit, *to give "the ſaid bills in evidence without prejudice to the form of the "action*, as now directed: and all further directions, &c. re-"ſerved, &c.; dated 7th *May*, 1791." At the trial a ſpecial caſe was reſerved, which ſtated as follows: In *April*, 1787, the defendants and one *Samuel Pearce*, ſince deceaſed, and *William Robertſon*, ſince a bankrupt, entered into the following articles of agreement. Articles of agreement made this 19th of *April*, 1787, between *J. Robertſon* and *J. Hutchinſon* of *London*, merchants and co-partners, as well on the part and behalf of themſelves, as of others who have or ſhall ſubſcribe their names on the back of theſe preſents, of the one part, and *S. Pearce* of, &c. merchant, of the other part, &c. Whereas the ſaid *S. Pearce* is the ſole owner and proprietor of the ſhip

(1) Vide *Boardman* v. *Moſman*, 1 *Bro. Ch. Caſ.* 68; and *Ex parte Clowes*, 2 *Bro. Ch. Caſ.* 595.

Triumph,

Triumph, &c; and whereas the ſaid *J. Robertſon*, *J. Hutchinſon*, *S. Pearce*, and others, who have ſubſcribed their names on the back of theſe preſents, have mutually *agreed upon a joint undertaking and riſk as to profit and loſs in a certain voyage* or maritime adventure about to be performed under the direction of the ſaid parties who have or ſhall have a majority of intereſt therein, or of a committee appointed by them; now theſe preſents witneſs that they the ſaid *J. R.* and *J. H.* on behalf of themſelves, and all others who have or ſhall ſubſcribe, &c. and the *S. P.* for himſelf, in conſideration of the truſt which they ſeverally repoſe in each other, and alſo in purſuance of the ſaid agreement, have, and do each for himſelf, his heirs, executors, &c. mutually covenant and agree with each other, &c.; 1. That the ſaid ſhip *Triumph*, whereof the ſaid *S. Pearce* is ſole owner, ſhall from the day of the date and until her return from her intended voyage, be at the diſpoſal, direction, and riſk of all the ſaid parties hereto jointly, at the valuation of 3750l. &c. 2d. That the ſaid *J. R.* and *J. H.* by themſelves and others who have or ſhall ſubſcribe, &c. ſhall and will on or before the 24th *Auguſt* next procure and provide a cargo of goods for the ſaid intended voyage to the value of between 22,000l. and 25,000l. and *which goods ſhall in the judgment and opinion of the majority of the parties to theſe preſents be deemed eligible* and proper for the voyage and markets; and that the ſaid goods ſhall be furniſhed or purchaſed at the loweſt caſh prices, although not payable till the uſual period of credit is expired; the difference between the ſaid caſh terms and the given credit to be made good by giving bonds bearing intereſt from the date of the contract of ſuch goods; and that they the ſaid *J. R.* and *J. H.* and other the perſons who ſubſcribe, &c ſhall and will prepare and ſhip the ſaid cargo at ſuch time and in ſuch manner as the majority of the ſaid concerned or their committee ſhall direct. That all additional out-fits of the ſhip *Triumph* in cables, &c. which ſhe may require, &c. after the date hereof, &c. until her voyage be concluded, ſhall be on the joint account, &c. 4th. That in caſe the ſaid *S. Pearce* ſhall be deſirous to increaſe his intereſt in the *ſaid joint concern*, he ſhall be permitted ſo to do, by ſhipping on *the joint account* as many goods, over and above the goods to be ſhipped by the ſaid *J. R. J. H.* and others who ſhall ſubſcribe, &c. as he may think proper: but the ſaid goods ſo to be ſhipped by the ſaid *S. Pearce* are to be *ſuch articles as the majority of the concerned or their committee ſhall approve of* as proper for the voyage and market. 5th. That the ſaid 3750l. together with the amount of the additional out-fits, to be advanced by the ſaid *S. Pearce*, the amount of half o the premiums of inſurance to be made by the ſaid *S. P.* on the ſaid ſhip, freight, and cargo, and ſuch amount of goods as the ſaid *S. P.* may ſhip on the joint account

count as above mentioned, ſhall be conſidered *as the ſaid* S. P.'*s ſhare or capital in the ſaid joint undertaking*; and he the ſaid *S. P.* ſhall be entitled to receive the profit or bear the loſs thereon in the exact proportion as the amount of all ſuch ſums ſhall be to the remainder or other part of *the ſaid joint concern*; and that the ſaid *J. R.* and *J. H.*, and the ſubſcribers, &c. ſhall receive the profit or bear the loſs in the like proportion as to the ſums ſet oppoſite to their ſeveral names. 6th. Provided that *S. Pearce* ſhall get the inſurances effected, and guaranty the ſolvency of the underwriters, if called upon: and when the policies are effected, each of the ſaid parties is to hold his own reſpective proportion thereof, to the amount of his ſhare and intereſt in the ſaid joint concern. 7th. Although the ſaid *S. P.* is to procure the whole of the ſaid inſurances on the ſaid ſhip, freight and cargo, yet only half of the premiums of inſurance ſhall be added to his intereſt in the ſaid joint concern, purſuant to the 5th article: but all the ſaid parties hold themſelves bound with him to be anſwerable for the whole amount of the ſaid premiums of inſurance, and which is to be a charge on the voyage. 8th. That *S. P.* ſhall be the ſhip's huſband to ſuperintend ſuch outfits of the ſaid ſhip as the majority, &c. ſhall deem neceſſary. (The 9th. relates to a ſchedule of the ſhip's tackle, &c.) 10th. That all money received on account of the ſhip, &c. ſhall be paid to the ſupercargo on the joint account. 11th. That in caſe the ſaid *S. P.* ſhall want the aſſiſtance of the ſaid *J. R.* and *J. H.* or the ſubſcribers, &c. to procure him the loan of any money to enable him to complete the outfits, they engage to procure him 500l. to be repaid by him in manner as therein ſtipulated. (12th. Not material.) 13th. That from and after the ſaid ſhip ſhall leave the port of London, all the expences on the voyage ſhall be paid by the ſupercargo or agent for the ſaid joint concern who ſhall be ſupplied with money for that purpoſe, or be empowered to pay the ſame out of the proceeds of the cargo. And if the ſaid ſupercargo during the voyage is under the neceſſity of drawing bills on either of the ſaid parties for the ſame, or he ſhall think the drawing ſuch bills more beneficial to the joint concern than reimburſing himſelf out of the ſaid proceeds, then each of the ſaid parties intereſted in the ſaid maritime adventure ſhall bear and pay his reſpective portion of ſuch bills. 14th. That the parties hitherto, or a committee, ſhall appoint officers of the ſhip. 15th. That when the ſhip is ready laden for ſea, and previous to her ſailing, *J. R.* and *J. H.* ſhall deliver an invoice of her cargo to the ſupercargo, who ſhall enter the ſame in proper books; and each party intereſted ſhall be therein credited with the amount of his reſpective accounts, and the ſupercargo ſhall prepare a ſtatement of the whole amount of the ſaid ſhip, outfits, cargo, and charges, declaring the exact proportions or ſhares which each

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perſon hath in the voyage, which ſhall be ſigned by each of the parties, and ſhall be a voucher for aſcertaining the ſaid ſhares hereafter, in profit and loſs. 16th. That in caſe of any difference between any of the parties intereſted, it ſhall be referred to arbitration. 17th. That each party ſhall bind himſelf in the penal ſum of 2000l. for the performance of the articles. Signed and ſealed by *J. Robertſon*, *J. Hutchinſon*, *S. Pearce*, and *W. Robertſon*. On the 28th *July*, 1787, the following memorandum was indorſed on the ſaid articles by the ſame perſons; "Notwithſtanding what may be underſtood to be the meaning of the foregoing articles, it is hereby declared by all the parties that the minute made on the 26th *June* laſt, and ſigned by us reſpecting each of us, holding the proportions of one quarter each, that is to ſay, *Robertſon* and *Hutchinſon* one half, and *S. Pearce* and *W. Robertſon* one quarter each, it is now fully to be conſidered and underſtood that that minute is now declared null and void, and that each party whoſe name is hereunto ſubſcribed is to hold no other ſhare or proportion in the ſaid concern than the amount of what each ſeparately orders and ſhips; and which intereſt will be hereafter declared agreeably to the true intent and meaning of this agreement. And it is further declared that the orders given for the outfit of the ſhip are to be each ſeparately paid, and that one is not bound for any goods or ſtores ordered or ſhipped by the other. And that the ſaid *S. Pearce* has free liberty to ſhip what goods are ſuitable for the voyage, over and above the ſhip and outfit, leaving room clearly for thoſe ordered by *Robertſon* and *Hutchinſon* and *W. R*; and it is to be underſtood that the ſhip is made over in truſt for the general concern." In May, 1787, the plaintiff by the orders of *Pearce*, ſupplied copper to ſheath and repair the ſhip *Triumph*, to the amount of 482l. In Auguſt, 1787, the plaintiff by the orders of *Pearce* delivered copper on board the ſaid ſhip to the amount of 938l. 3s. 3d. which formed part of the cargo thereof. In October, 1787, the ſaid ſhip ſailed from London for Oſtend, and proceeded from thence to the Eaſt Indies with the goods ſo furniſhed by the plaintiff and other goods on board. In January, 1788, *Pearce* became a bankrupt, and *Saville* proved his debt under the commiſſion againſt him; and in February, 1788, *William Robertſon* alſo became a bankrupt. On the trial Mr. *Kaye*, the plaintiff's attorney, and who was ſolicitor to *Pearce*'s aſſignees, ſwore that the defendant *Robertſon* told him that in September, 1789, there had been an agreement between him (*Robertſon*) and *Pearce*'s aſſignees, that he ſhould go down to the coaſt to wait the ſhip's return from India; on her arrival he was to ſend word to the aſſignees, one of whom was to accompany him in the ſhip to Oſtend, and there the ſhip and cargo were to be ſold for the parties intereſted; that when the ſhip arrived, which was in July, 1789, he (*Robertſon*) went on board, and, without

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ſending advice to *Pearce*'s aſſignees, carried her to Oſtend, and ſold her for his own and *Hutchinſon*'s benefit; that his reaſon for not keeping his engagement with *Pearce*'s aſſignees was, that he and his partner were liable to pay the whole debts for ſhip and cargo, and therefore he had poſſeſſed himſelf of the whole to anſwer thoſe debts; and if there were a ſurplus he would account to *Pearce*'s aſſignees for a proportion of it. On the 29th October, 1789, the defendants accepted two bills of exchange of that date for the amount of the copper ſupplied by the plaintiff, drawn by the plaintiff payable two months after date, and ſtated to be for value delivered in copper to Meſſrs. *S. Pearce* and Co. In January, 1790, before either of the bills was paid the defendants became bankrupts. This caſe was twice argued—It was admitted, that the plaintiff was entitled to recover for the copper for ſheathing.—It was argued for the plaintiff, 1ſt. That the defendants were liable for the reſt of the goods, as partners, on the conſtruction of the articles, coupled with their ſubſequent acknowledgement, and their acceptance of the bills of exchange, drawn for the very goods; and theſe caſes were cited, *Abbott* v. *Smith*, 2 *Bl. Rep.* 947, *ante*, vol. I. p. 3; *Bloxam* v. *Pell*, cited in 2 *Bl. Rep.* 999, in the caſe of *Grace* v. *Smith*, *ante*, p. 611 (*a*); *Hoare* v. *Dawes*, *Dougl.* 371, 3d edition, *ante*, p. 609; and *Coope* v. *Eyre*, *H. Bl. Rep.* 39. *ante*, vol. I. p. 551. But 2dly, If the plaintiff could not recover in an action for goods ſold and delivered, that the defendants were liable on their acceptance of the bills; and that the Lord Chancellor intended by the ſecond order to give the plaintiff an opportunity of recovering either in the one form or the other. Theſe points were reſiſted by the counſel for the defendants; the firſt on this ground, that the defendants were not partners at the time when the contract was made; and that, though their ſubſequent acts might explain the original contract, if it were doubtful at the time, they could not alter the original contract againſt the intention of the parties, as expreſſed in the articles. On the ſecond head, it was ſaid that the meaning of the order was only to permit the bills to be given in evidence to explain the intention of the parties on the whole tranſaction, but not to make the bills the foundation of the action, which was expreſsly ordered to be brought to recover the value of the copper.—Ld. KENYON, C. J.—Some of the points made at the bar admit of no doubt. It is clear that, if all theſe parties had been partners at the time when theſe goods were furniſhed, though that circumſtance were not known to the plaintiff, they would all have been liable for the value of the goods. It is equally clear that ſuch an action might be maintained againſt the dormant partners alone, unleſs they pleaded in abatement. Nor can any doubt be entertained but that, if this had been an action on the bills of exchange, the plaintiff might have recovered: there was a

(*a*) See this caſe under title USURY.

conſideration

consideration for them; and being in writing, the statute of frauds would have been satisfied, though they were promises to pay the debt of another person. But the difficulty arises from the form of this action, which is for goods sold and delivered; for how can any act, which passed subsequent to the delivery of the goods, have any retrospect so as to alter the nature of the contract, which was not doubtful. It might have been evidence to explain it to be a partnership contract, if the contrary had not expressly appeared. The facts of the case are shortly these: Several persons who had no general partnership, nor any connection with each other in trade, formed an adventure to the East Indies. The outfit of the vessel was a joint concern of all the partners; and that delivers the case from one consideration, namely, the parcel of copper for sheathing the ship; which is admitted to be a partnership concern. But beyond that no partnership appears between the parties till all the parcels of the cargo were delivered on board; and that made it a combined adventure between all the parties. It was very properly asked, in the argument, If they were partners when the cargo was delivered, what share had *Pearce?* by the articles he was not to bring in any definite aliquot part of the cargo; but the agreement only was that he should share in proportion to the part he should bring in; it was optional in him whether or not he would bring in any goods; and by another part of the agreement, if he were under any difficulty in bringing in the money, the others were to lend him credit. It is true that it was to be determined by a majority of those concerned in the adventure whether the goods, which were to be sent to market, were or were not proper; and so far they all looked to each other's acts: but each of them was to bring in his share only: and this case is not distinguishable from that put at this bar, where several persons were to contribute their separate *quota* of money, and they applied to different scriveners to procure it; they could not all be liable for the capital which each should borrow. At the time when this copper was furnished, *Pearce* stood in no relation whatever to the other persons, but he alone bought the copper in his own name, without carrying to market the name of any other person but his own. Suppose the plaintiff had brought an action for this copper the instant it was delivered on board; against whom must the action have been brought? *Pearce* only; for he alone was answerable at that time. How then can it be said that these goods, which were sold to *Pearce* only, and on his sole credit and account, were sold and delivered on the partnership account. Afterwards indeed these defendants were to gain or lose by the joint cargo; when the other goods were brought in, the partnership arose; but each was to bring in his own particular stock. But in this case the question stops short of affecting the defendants; and it does not appear how the plaintiff can have

have a right to call on the defendants, as partners, for the value of theſe goods, on a ſuppoſed contract, when the real contract between the buyer and ſeller was conſummated before the joint riſk began. Suppoſe ſeveral perſons agreed to open a banker's ſhop, and it was agreed that each partner ſhould bring into the houſe a certain ſum of money as his ſhare; it could not be contended that, if one of them were to borrow money for his ſhare, all the others would be liable for it. The great queſtion, however, ſtill is, Whether, under all the circumſtances of the caſe, all theſe parties are anſwerable? I think they are; but they can only be adjudged to be reſponſible in another form of action, and not in this, which is an action for goods ſold and delivered. If the action had been brought upon the bills, I think they would have been liable.—Ashhurst, J. This caſe comes before us much entangled in the form of it: but, at preſent, the inclination of my opinion is, that even in this form of action for goods ſold and delivered, the plaintiff may recover. I admit, that evidence ſubſequent to the contract cannot vary the nature of the contract, but it may explain the intention of the parties to the original contract. If the ordering the goods by *Pearce* were the only evidence in this caſe, he alone would be anſwerable for the payment of them: but, when he beſpoke them, it is clear that he did it with a view to a partnerſhip tranſaction; and that this was a joint concern was ſhortly afterwards explained by the memorandum of July, 1787, which is indorſed on the articles; both of which muſt be taken into conſideration together, in order to ſee the nature of the contract. The fourth, fifth, and fifteenth, articles are ſtrong, to ſhew that this was a partnerſhip concern. By the fourth, *Pearce* was to be at liberty to ſhip, *on the joint account*, as many goods as he choſe, provided they were ſuch as the majority of thoſe concerned ſhould approve. Now, if this were not intended to be a partnerſhip account, the reſt of thoſe concerned in the adventure could have no intereſt or concern in the goods ſhipped by him: but if they were all to ſhare in the profit and loſs of the whole adventure, then there was good reaſon why they ſhould have an opportunity of approving of thoſe goods. The fifth article ſhews this ſtill more ſtrongly; it is, that the 3750l. &c. and ſuch amount of goods as *Pearce* may ſhip *on the joint account* as above mentioned, ſhall be conſidered as *Pearce*'s ſhare or capital in *the ſaid joint undertaking*; and that he ſhall be entitled to receive the profit, or bear the loſs, in proportion, &c. on the *joint concern*. Now a partnerſhip is a joint undertaking to ſhare in the profit and loſs; but ſuch was this undertaking: it was not only a joint concern in the ſhip, but alſo in the cargo. The fifteenth article alſo is material; which directs that, previous to the ſhip's ſailing, books ſhall be kept in which each party intereſted ſhall be therein credited, with the

the amount of his reſpective accounts; and that the books ſhall be ſigned by the parties, which ſhall be a voucher for aſcertaining the ſhares hereafter in profit and loſs. Now, that clearly evinces what was the original intention of the parties. It is true, that when the contract was made the goods were not furniſhed on the joint credit of *Pearce* and the defendants, but of *Pearce* alone: but that is the caſe with dormant partners, and there the party furniſhing the goods may reſort to all thoſe who are entitled to ſhare in the profits. For though, in ſuch caſe, the dormant partners may not be known at the time of the contract, yet, when that fact is aſcertained, the creditor has a right to avail himſelf of that evidence. The evidence of *Kaye* likewiſe is important; for he proved an acknowledgment by one of the defendants, that they were liable to pay the whole debt for the ſhip and cargo. This ſhews, that they conſidered themſelves as partners in the original tranſaction. And, though ſubſequent evidence will not make a new contract, it may explain what that contract was. However, if this opinion be not well founded, the plaintiff would be entitled to recover on the bills of exchange.—BULLER, J. The only difference of opinion between my Lord Chief Juſtice and myſelf ariſes on the laſt order of the Court of Chancery; but that order, I think, will be beſt explained hereafter by that Court. If this be conſidered purely as an action for goods ſold and delivered, brought adverſely in a court of law, and unconnected with the proceedings in the court of equity, I entirely agree with my lord that the plaintiff cannot recover againſt theſe defendants the amount of *Pearce*'s ſhare of the cargo. To make this caſe clear, ſuppoſe theſe defendants and *Pearce* had agreed to be concerned in a joint adventure, in which they were to be intereſted according to the proportion which each furniſhed, and that each were to bring in goods to the amount of 900l.; and ſuppoſe the two defendants had paid for their ſhares, and *Pearce* had not, and that the defendants were alſo to be liable with *Pearce* for his ſhare, in that caſe they would be liable for 900l. each more than *Pearce*, and would not be entitled according to the proportion which each brought in. In the argument, an attempt was made to diſtinguiſh between the time of the contract and the time of the delivery: it is certainly true, that if one partner order goods himſelf, without diſcloſing the names of the other partners, and the goods be afterwards delivered to them all, they are all liable, becauſe the delivery and the ſale are conſidered as forming one entire contract, and the delivery is ſuppoſed to be according to the ſale. In ſuch a caſe, the one partner who buys the goods, does not contract for himſelf, but on account of the partnerſhip. In that way of conſidering the queſtion, upon the firſt order of the Court of Chancery, I think the plaintiff could not recover againſt theſe defendants for the amount of the goods ſent in Auguſt, as *Pearce*'s ſhare, in an action at

common law for goods ſold and delivered; becauſe the goods were neither ſold nor delivered to the partnerſhip. But that would be to diſpoſe of the caſe according to the mere form of the action. But, according to my conſtruction of the ſecond order, we are not to conſider the queſtion in that light; for it is ordered that the plaintiff may give the bills in evidence, without prejudice to the form of the action; and, therefore, I think, that this caſe is to be conſidered on the broad ground of ſubſtantial juſtice. This lets in the other queſtion, Whether, if the action had been brought on the bills, the plaintiff would not be entitled to recover? And that he would, I think, no doubt can be entertained; for the bills of exchange were given for a good conſideration. The defendants took poſſeſſion of the cargo, declared themſelves liable for the amount, and accepted bills expreſsly drawn for the value of the cargo; and therefore, upon thoſe bills, the plaintiff might unqueſtionably recover. Conſidering this as an action brought under the direction of the Court of Chancery, I think it is our duty to ſtate the law upon the whole of the caſe.—GROSE, J. delivered his opinion in ſubſtance to the ſame effect as Lord *Kenyon*.—Lord KENYON, Ch. J. then ſaid, he hoped it would be remembered, when this caſe was returned into Chancery, that this Court were unanimouſly of opinion that, on the whole juſtice of the caſe, the plaintiff was entitled to recover.

Myers *et. al. v.* Edge, Ea. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 254.

A promiſe in writing, directed to *A.*, *B.* and *C.*, a houſe in trade, to pay for goods to be furniſhed to another, cannot be enforced in an action by *B.* and *C.* to recover the value of goods furniſhed after *A.* had withdrawn from the partnerſhip. —The declaration ſtated that, in conſideration that the plaintiffs would ſell to one *T. Duxbury* a quantity of cotton twiſt, the defendant undertook to pay as much as it ſhould be worth, if *T. Duxbury* did not when thereunto requeſted; that the plaintiffs accordingly ſold and delivered to *T. Duxbury* a certain quantity, but the defendant refuſed pay, &c.; to which the defendant pleaded the general iſſue. At the trial, the plaintiffs, to take the caſe out of the ſtatute of frauds, gave in evidence the following letter, written by the defendant, dated January 15th, 1794: "To Meſſrs. *Myers*, *Fielden*, *Ainſworth*, "and Co. If you pleaſe, you may let the bearer, *Thomas* "*Duxbury*, have ſix bunches of twiſt more than I told you, and "I will be anſwerable for them as before; and, after this, I "will be anſwerable for one pack and no more; ſo when he "pays you for the firſt half pack, you may let him have an- "other, and ſo on till I tell you to the contrary; and you may "make the invoice to us both," &c. At the time when this engagement was entered into, *Ainſworth* was a partner in the ſame houſe with the plaintiffs, and continued ſo till May, 1795; during which time many parcels of goods were delivered to *Duxbury*, which were all paid for by him, who was debited for

for them in the plaintiffs' books. The goods in queſtion were furniſhed to *Duxbury* by the plaintiffs alone after *Ainſworth* had retired from the partnerſhip, and *Duxbury* having failed to pay for them, they demanded payment of the defendant, who ſaid it ſhould be ſettled, and requeſted time; but afterwards refuſing to pay, this action was brought. IT WAS OBJECTED on the part of the defendant that the action could not be maintained by the preſent plaintiffs, becauſe *Ainſworth*, with whom alſo the contract was made, was not joined with them, and he not being a partner at the time when the goods were furniſhed. *Rooke*, J. over-ruled the objection, conſidering the ſecurity as having been given to the houſe and not to the individuals; and the jury found a verdict for the plaintiffs. A rule was granted in this term calling on the plaintiffs to ſhew cauſe why the verdict ſhould not be ſet aſide, and a nonſuit entered.—PER CURIAM: *Wright* v. *Ruſſel*, 3 *Wils.* 532. *ante*, vol. I. p. 334. is law. This is not a contract made with a corporation; it is made with a partnerſhip conſiſting of a certain number of individuals: and when one of the partners left the buſineſs, it put an end to this engagement. If the plaintiffs had intended to furniſh goods to *Duxbury* after this alteration in the partnerſhip, they ſhould have required a new undertaking.

One partner cannot bind the other partners by deed.—This was an action of covenant upon an agreement of three parts ſtated in the declaration to have been made on the 10th of July, 1794, between the defendants, deſcribing them as merchants and partners of the firſt part, *W.* and *J. Harriſon* of the ſecond part, and the plaintiff of the third part, of one part of which ſaid agreement, as being ſealed with the ſeal of the ſaid *W. Sykes* for himſelf and the other two defendants, the plaintiff made a profert in court. The declaration then ſtated the agreement and covenant of the defendants, the ſubject-matter of which agreement and covenant appeared on the agreement to be a partnerſhip tranſaction on the part of the defendants, and to have been entered into on a full and valuable conſideration received by them as partners. The declaration then ſtated the breach of covenant, whereby the plaintiff had ſuſtained damage to the amount found by the jury. To this declaration the defendants pleaded that the agreement was not the deed of the defendants. Iſſue being joined, the cauſe was tried, and the jury found a verdict for the plaintiff, ſubject to the opinion of this Court on the following caſe. The defendants were partners. The agreement ſtated in the declaration was produced; and the ſubſcribing witneſs proved that it was executed in his preſence by the defendant *Sykes* in the following form:—"For *Jackſon*, Self, and *Ruſhforth*; *W. Sykes*:" but neither *Jackſon* or *Ruſhforth* was preſent at the execution. THE QUESTION for the opinion of the Court was, Whether ſuch execution of the agreement by the defendant *Sykes* was binding on the other

Harriſon v. Jackſon, Sykes, and Ruſhforth, Ea. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 207.

defendants *Jackſon* and *Ruſhforth*?—PER CURIAM. The law of merchants is part of the law of the land; and in mercantile tranſactions, in drawing and accepting bills of exchange, it never was doubted but that one partner might bind the reſt. But the power of binding each other by deed is now for the firſt time inſiſted on. It was alſo ſaid that, if this partnerſhip were conſtituted by writing under ſeal, that gave authority to each to bind the others by deed: but that conſequence we deny as poſitively as the former; for a general partnerſhip agreement, though under ſeal, does not authorize the partners to execute deeds for each other, unleſs a particular power be given for that purpoſe. This would be a moſt alarming doctrine to hold out to the mercantile world; if one partner could bind the others by ſuch a deed as the preſent, it would extend to the caſe of mortgages, and would enable a partner to give to a favourite creditor a real lien on the eſtates of the other partners. Poſtea to the defendants.

Ball *v.* Dunſterville, *et al.* Tr. Ter. 31 Geo. 3. B. R. 4 *Ter. Rep.* 313.

But if one partner execute a deed for himſelf and his partner, by the authority of his partner and in his preſence, it is a good execution, though only ſealed once.—This was an action on a bill of ſale; and the declaration ſtated that by a certain bill of ſale made by the defendants, ſealed with the ſeal of one of them for and on behalf of himſelf and the other, and by the authority of the other, &c. Plea, *Non eſt factum.* At the trial it was proved, that *one of the defendants, in the preſence of the other, and by his authority, executed the inſtrument for them both, they being partners in this tranſaction*; but there was but one ſeal, and it did not appear that he had put the ſeal twice upon the wax. It was objected on the part of the defendants, that the inſtrument was not properly executed, for that they (not being a corporation) could not have a common ſeal; that the execution by one could not operate as an execution by both, even though they both conſented; and that the authority given by one to the other to execute a deed ſhould itſelf have been conferred by deed. The judge overruled the objection, and the plaintiff obtained a verdict, which it was now moved to ſet aſide. But *The Court* were clearly of opinion that there was no ground for the objection; that no particular mode of delivery was neceſſary, for that it was ſufficient if the party, executing a deed, treated it as his own. And they relied principally on this deed having been executed by one defendant for himſelf and the other *in the preſence of that other*.—Rule diſcharged.

Kilgour *v.* Finlyſon, Galbreath, and Harper, Hil. Ter. 29 Geo. 3. C. B. 1 *Hen. Black* 155.

On the diſſolution of a partnerſhip between *A.*, *B.* and *C.* a power given to *A.* to receive all debts owing to, and to pay thoſe owing from the late partnerſhip, does *not authorize* him to *indorſe a bill of exchange in the name of the partnerſhip*, though drawn by him in that name, and accepted by a debtor of the partnerſhip, after the diſſolution: ſo that the indorſee *cannot maintain an action on the bill* againſt *A.*, *C.* and *B.* as partners.

partners. Neither can ſuch indorſee maintain an *action againſt them for money paid* to the uſe of the partnerſhip, though in point of fact the money raiſed by diſcounting a note which he had given (in diſcounting the bill), be applied by *A.* to the payment of a debt due from the partnerſhip.—Indorſee againſt the oſtenſible indorſers, who alſo appeared to be the drawers of a bill of exchange. Money paid, money had and received, account ſtated.—Verdict for the Plaintiff. The circumſtances of this caſe were as follow: The plaintiff was a warehouſeman and factor, the defendants were alſo warehouſemen and factors in partnerſhip from Midſummer, 1785, to the 28th of July, 1787, when the partnerſhip was diſſolved, and notice of the diſſolution given in the Gazette as under: "Notice is "hereby given, that the copartnerſhip between *Thomas Finlyſon*, *Thomas Galbreath*, and *Henry William Harper*, of "Bow Church-yard, warehouſemen, under the firm of *Finlyſon*, *Galbreath*, and *Harper*, and alſo at Glaſgow under "the firm of *Henry William Harper* and company, was by "mutual conſent diſſolved this day: *all demands upon the "above firm will be paid by* Thomas Finlyſon *of Bow Church-yard, who is impowered to receive and diſcharge all debts due "to the ſaid copartnerſhip.*" At the time of the above diſſolution one *Scott* was indebted to the partnerſhip in 758l. and the partnerſhip indebted to *Sterling*, *Douglas*, and Co. in 890l. On the 21ſt of September, 1787, *Finlyſon* drew the bill in queſtion in the name of the late partnerſhip on *Scott*, payable on the 23d of November following, for 304l. 2s. which *Scott* accepted. On the 9th of October *Finlyſon* indorſed it, in the name of the partnerſhip, to the plaintiff, who diſcounted it, by giving his own promiſſory note for 304l. 3s. 6d. payable on the 25th of November (the difference of 1s. 6d. being on account of the note being due two days later than the bill). This note of the plaintiff's was indorſed by *Finlyſon* to *Sterling*, *Douglas*, and Co. who diſcounted it, and received the money they had advanced by ſo diſcounting the note, back again from *Finlyſon*, in part of payment of the debt owing to them from the partnerſhip. When the note became due, the plaintiff paid it to *Sterling*, *Douglas*, and Co. Two days before *Scott*'s bill became due, *Finlyſon* took it up, and gave in lieu of it, another bill to the plaintiff, accepted by *Lee*, *Strachan*, and Co. but did not take back *Scott*'s bill. Afterwards *Lee*, *Strachan*, and Co's bill not being paid, and *Finlyſon* having become a bankrupt, the plaintiff brought this action againſt all the partners on *Scott*'s bill, which remained in his hands, and obtained a verdict. A rule being granted to ſhew cauſe why this verdict ſhould not be ſet aſide, and a new trial granted, and cauſe ſhewn.—PER CURIAM: Conſider the nature of this tranſaction: *Finlyſon* applies to *Kilgour* to diſcount the bill accepted by *Scott*, and in part of the diſcount takes a promiſſory note from him; *Kilgour*, before *Scott*'s bill became due, changes it with *Finlyſon* for another, accepted by *Lee*, *Strachan*,

and Co. returns that and takes *Scott*'s bill back again. Now all this was carried on, without any idea of the former partners being bound by it. On the 10th of October, long before the plaintiff's note was due, the defendant applied to *Sterling*, *Douglas*, and Co. to diſcount it, who accordingly did diſcount it, but received the money back again in part of payment of their debt owing from the partnerſhip. When this note became due, the plaintiff paid it to *Sterling*, *Douglas*, and Co. but at that time no debt was owing to them from the partnerſhip; the payment therefore of the plaintiff, was not a payment to the uſe of the partnerſhip. Though the money raiſed by diſcounting his note before it was due, was in fact paid in diſcharge of a partnerſhip debt, yet he cannot follow the money through all the applications of it made by *Finlyſon*.

Eckhardt *et al.* v. Wilſon, Hil. Ter. 39 Geo. 3. B.R. 8 *Ter. Rep.* 140.

To *aſſumpſit* by ſeveral partners, the defendant may plead in bar the bankruptcy of one of them.—This was an action upon promiſes, to which the defendant pleaded in bar the bankruptcy of *A. G. Eckhardt*, one of the plaintiffs, and an aſſignment under it of all his debts and effects for the benefit of his creditors. The plaintiffs replied that, before the bankruptcy of the ſaid *A. G. Eckhardt*, he with the other plaintiffs who were partners in trade by a deed of aſſignment, dated the 11th of March, 1796, after reciting that they were indebted, and were unable to diſcharge their debts and carry on their trade, aſſigned to certain truſtees all their ſtock in trade, debts, and effects, for the benefit of all their creditors who ſhould execute the ſaid deed, with a power of attorney to the truſtees to ſue for and recover debts, &c. averring that the names of the plaintiffs were only uſed for and on behalf of the truſtees, and to enable them to receive the debt due from the defendant to them under the ſaid deed of aſſignment. To this the defendant rejoined that the bankrupt at the time of executing the ſaid deed of aſſignment and his bankruptcy, was indebted to ſeveral perſons who did not execute that deed, that their debts are unpaid, and that they have ſought relief under the commiſſion of bankrupt iſſued againſt *A. G. Eckhardt*; wherefore the deed of aſſignment mentioned in the replication is void as to *A. G. Eckhardt*'s ſhare in the partnerſhip debts and effects, and the deed of aſſignment made under the commiſſion of bankrupt is in full force, &c. The plaintiffs demurred generally to this rejoinder. It was argued in ſupport of the demurrer. First, That the plea itſelf cannot be ſupported. And for this were cited *Fowler* v. *Down* (1) and *Webb* v. *Fox* (2), where it has holden that an uncertificated bankrupt might maintain trover for goods acquired by him after his bankruptcy, which ſhews that this action may be

(1) *Boſ. & Pul.* 44. *ante*, vol. II. 234. (2) *Ante*, vol. II. 236.

ſupported

ſupported by the four partners, notwithſtanding the bankruptcy of one of them (his aſſignees not interfering). SECONDLY, That at all events the rejoinder gives no anſwer to the replication. It was ruled in *Winch* v. *Keeley* (1) that the aſſignor of a choſe in action, who is become a bankrupt, may ſue the debtor for the benefit of the aſſignee. THE COURT ſaid there was nothing in either of the objections. That the caſes of *Webb* v. *Fox*, and *Fowler* v. *Dunn* proceeded on this ground, that an uncertificated bankrupt had a ſpecial property in the goods in his poſſeſſion ſubſequent to his bankruptcy, in reſpect of which he might maintain an action of trover. But that they could not govern the deciſion in the preſent caſe, which was an action on a contract, and that the bankrupt's right of ſuing to enforce that contract was veſted in his aſſignees. That the plea was properly pleaded in bar, becauſe it ſhewed not merely that there were other perſons (namely, the aſſignees of the bankrupt partner) who ought to have ſued with the plaintiffs, but that one of the plaintiffs could not ſue at all. That the rejoinder alſo was good, for that an aſſignment by deed by traders of all their effects, unleſs all their creditors concurred, was not only fraudulent and void as againſt thoſe creditors who did not concur, but was an act of bankruptcy. That whether the creditors who did not concur were joint or ſeparate creditors was immaterial; for that the funds of the partners (bankrupts) were liable to all their creditors, firſt to the joint creditors, and afterwards the aliquot parts to the ſeparate creditors of each.—Judgment for the defendant.

Pauper.

A PROSECUTOR cannot proſecute *in forma pauperis*, without ſpecial cauſe.—It was moved to make a rule abſolute (on a proper affidavit of ſervice), for admitting a proſecutor of an *indictment to* proſecute *in forma pauperis*. But the Court (on being apprized that it was on behalf of a *proſecutor*) denied to make the rule abſolute; as it was founded only on the common petition and affidavit uſually produced by DEFENDANTS in order to *their* obtaining ſuch a rule: for, they held that PROSECUTORS ought not to be admitted to *proſecute in forma pauperis*, unleſs ſome *ſpecial* ground be laid for the motion.

Rex v. Clarke, *et al.* Hil. Ter. 2 Geo. 3. B. R. 3 *Burr.* 1308.

Payment.

A. SOLD goods to *B.*, for which the latter was to pay by a bill at three months, *B.* gave *A.* a check on his bankers (who were alſo the bankers of *A.*) requiring them to pay *A.* on demand, in a bill at three months; *A.* paid the

Bolton v. Richard, Hil. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 139.

(1) *Ante*, vol. II. p. 102.

check into the bankers, and took no bill from them: but the amount was transferred in the banker's books from *B.*'s account to *A.*'s with the knowledge of both; the bankers failed before the check became due; and it was held that *A.* could not recover the value of the goods againſt *B.*—On the trial of this cauſe, which was *aſſumpſit* for goods ſold and delivered, and to which the general iſſue was pleaded, the jury found a verdict for the defendant, ſubject to the opinion of this Court on the following caſe. The plaintiff and the defendant are both merchants reſident in Liverpool, the latter carrying on trade there under the firm of *Richard* and *Matheiſon*, *Matheiſon* having been his partner, but having died before the ſale hereafter mentioned. The defendant on the 16th of October, 1792, agreed with the plaintiff to purchaſe of him a quantity of mahogany, and to pay for the ſame in three months by bills at three months date; and on the ſame day the plaintiff ſent to the defendant a bill of parcels, as follows: "Liverpool, 16th of October, 1792, Meſſrs. *Richard* and *Matheiſon* bought of *J. Bolton*, payable in three months by bills at three months date, 138 logs mahogany *per* Lord *Howe*, 27,330 feet at 10d; 1138l. 15s. 0d." On the 20th of the ſame month the defendant purchaſed from the plaintiff a further quantity of mahogany on the ſame terms; and the plaintiff on that day ſent to the defendant a bill of parcels, like the former; thoſe goods amounted to 1137l. The two parcels of mahogany were delivered to the defendant, and amounted in value to 2272l. 2s. after making an abatement of 3l. 13s. for one damaged log. On the 7th of February, 1793, the defendant gave to the plaintiff a bill of exchange drawn by himſelf upon *Smith* and Co. bankers in London in favour of the plaintiff for 1558l. 9s. at 70 days date, which was duly paid by *Smith* and Co. when it became due, and alſo the following check or order in writing ſigned by the defendant on *Caldwell* and Co., then his bankers in Liverpool for 713l. 13s.; "Meſſrs. *Caldwell* and Co. Liverpool 7th February 1793. On demand pay the bearer Mr. *John Bolton* 713l. 13s. in a bill at 70 days 713l. 13s." The bill and check above mentioned, making together 2272l. 2s., were given to the plaintiff for the mahogany, and were drawn at 70 days, inſtead of 3 months, to prevent a loſs of intereſt to the plaintiff, to whom they were not given ſo ſoon as was ſtipulated by the original contracts for the purchaſes of the mahogany. *Caldwell* and Co. were the bankers of the plaintiff as well as of the defendant; both of whom kept duplicates of the bank books, containing their reſpective accounts current. Meſſrs. *Forbes* and *Gregory*, carrying on trade in London, under the firm of *Burton Forbes* and *Gregory*, were partners with *Caldwell* and Co. at Liverpool; and on the former the latter generally drew their bills. On the ſame 7th February the plaintiff paid the check in queſtion into the bank of *Caldwell* and

and Co., indorſed by him in blank, but did not take out a bill for it. *Caldwell* and Co. kept a diſtinct intereſt account with all their cuſtomers, which as well as the principal account was ſettled four times in the year, *viz.* the laſt day of February, the laſt day of May, the laſt day of Auguſt, and the laſt day of November. *Caldwell* and Co. on the ſame day that the check was paid in by the plaintiff credited his account with the amount thereof, and on the next ſettlement day, *viz.* the 28th of February, they debited him with intereſt thereon for 49 days, being the time between the laſt ſettlement day after the check was ſo paid in and the 70 days; and they alſo at thoſe times debited the defendant's accounts with the amount of the check, and credited him with intereſt thereon for the 49 days. The 70 days, at which date the check was drawn, expired on the 21ſt of April, 1793; before which day both *Forbes* and *Gregory* and *Caldwell* and Co. became bankrupts; *viz.* *Forbes* and *Gregory* on the 16th, and *Caldwell* and Co. on the 18th of the preceding month of March. The check ſo indorſed was in the hands of *Caldwell* and Co. at the time of the failure, and is now in the poſſeſſion of their aſſignees. Both the plaintiff and the defendant were, at the time when the check was drawn, and now are, very large creditors of *Caldwell* and Co. beyond the amount of the ſum demanded in this action. The plaintiff, under the circumſtances above ſtated, claims to recover from the defendant the ſum of 713l. 13s. the amount of the check in queſtion. PER CURIAM:—This appears to be a very clear caſe, when all its circumſtances are conſidered. The ground of our deciſion is not that a ſimple contract debt may be extinguiſhed by the agreement of other perſons to pay that debt: but the plaintiff was to be paid by a bill; and if he had received a good bill, there would have been an end of this demand. Inſtead, however, of taking bills from his bankers, he agreed to leave the check with them; and conſidering what paſſed afterwards, it is as if the plaintiff had diſcounted the check with them, and then depoſited the money with *Caldwell* and Co. as his bankers. From that moment it muſt be conſidered as the money of the plaintiff in the hands of his bankers. The defendant's books, which were debited for the payment of this money at the ſame time, alſo ſhew that this was the tranſaction between the parties.—Poſtea to the defendant.

Pawn-Broker.

A Pawn-Broker has no lien on plate after the death of a tenant for life, who pawned it with him, as againſt the remainder-man, although the pawnee had no notice of the ſettlement. This was trover for plate by the plaintiffs, who claimed under a remainder-man, againſt the defendant, to whom

Hoare *et. al.* v. Parker, Ea Ter. 28 Geo. 3. B R. 2 *Ter. Rep.* 376.

whom it was pawned by the tenant for life. Admiral *Stewart* by will gave his plate to truſtees for the uſe of his wife *durante viduitate*, requiring her to ſign an inventory, which ſhe did at the time the plate was delivered into her poſſeſſion. She afterwards pawned it with the defendant for a valuable conſideration, who had no notice of the ſettlement; and before the commencement of this action ſhe died. *Per Curiam:* This point (1) is clearly eſtabliſhed, and the law muſt remain as it is till the legiſlature think fit to provide, that the poſſeſſion of ſuch chattels ſhall be a proof of ownerſhip. Poſtea to the plaintiffs.

Perjury.

The King *v.* Edward Aylett, Mic. Ter. 26 Geo. 3. B. R. 2 *Ter. Rep.* 65.

THE indictment (after ſtating the proceedings in the Court of King's Bench, on which an attachment againſt the defendant was founded, and that a warrant thereon was directed to *Matthew Lenard* to arreſt him, &c.) ſtated, "That in Trinity Term, in the 24th year aforeſaid, a certain "cauſe was depending in Chancery, in which *Roger Moore* "and *Jane* his wife were plaintiffs, and the ſaid *Edward Ay*"*lett* and others were defendants; and that ſuch proceedings "were thereupon had, that afterwards, to wit, on the 4th of "Auguſt in the 24th year aforeſaid, at Lincoln's-Inn, in the "county of Middleſex, in a certain hall there, called Lin"coln's-Inn-hall, the ſaid cauſe came on to be heard before "*Edward* Lord *Thurlow*, &c. then being Lord High Chancellor "of Great Britain. That the ſaid cauſe was then and there "heard before the ſaid Lord *Thurlow*. That the ſaid *Edward* "*Aylett*, then being one of the ſolicitors of the ſaid Court of "Chancery, attended the hearing of the ſaid cauſe as ſolicitor "for himſelf and one of the ſaid defendants in the ſaid cauſe, "&c. That after the hearing of the ſaid cauſe, and before "the return of the ſaid writ, to wit, on the ſaid 4th day of "Auguſt in the 24th year aforeſaid, the ſaid *M. Lenard* by "virtue of the writ and warrant aforeſaid, at the pariſh of "St. Martin in the Fields, in the county aforeſaid, did duly "take and arreſt the ſaid *E. Aylett* and had and detained the "ſaid *E. Aylett* in cuſtody by virtue of the writ and warrant "aforeſaid. That after the ſaid *E. Aylett* was ſo in the cuſtody "of the ſaid *M. Lenard*, *to wit, on the ſaid 4th day of Au*"*guſt*, in the 24th year aforeſaid, *a certain complaint was* "*made* for and on the behalf of the ſaid *E. Aylett* to the ſaid "Lord *Thurlow*, then being in the ſaid Court of Chancery, "then held at Lincoln's-Inn-hall aforeſaid, that he the ſaid "*E. Aylett* was ſo taken and arreſted by the ſaid *M. Le*"*nard* on his the ſaid *E. Aylett*'s way from the ſaid hall call"ed Lincoln's-Inn-hall, after the ſaid cauſe was heard as

(*a*) Vide 1 *Vern.* 407. 2 *Vern.* 691. *Hartop* v. *Hoare*, 3 *Atk.* 44. *Cadogan* v. *Kennet*, *Cowp.* 432. *ante*, vol. III. p. 624. and *Parker* v. *Patrick*, *ante*, vol. I. p. 156.

aforeſaid,

" aforeſaid, to his the ſaid *E. Aylett*'s own houſe *ſituate in the*
" *pariſh of St. Martin in the Fields* aforeſaid in the ſaid coun-
" ty of Middleſex. That afterwards, to wit, on the ſaid 4th
" day of Auguſt in the 24th year aforeſaid, the ſaid *E. Aylett*
" did appear in his proper perſon before the ſaid Lord *Thur-*
" *low*, then being in the ſaid Court of Chancery, then held
" at Lincoln's-Inn-hall, in the cuſtody of the ſaid *M. Le-*
" *nard, to be examined touching the ſaid complaint then and*
" *there to be heard.* That it then and there became and was
" a material queſtion *on the hearing* of the ſaid complaint be-
" fore the ſaid Lord *Thurlow*, whether the ſaid *E. Aylett* was
" taken and arreſted by the ſaid *M. Lenard* as aforeſaid, on
" his the ſaid *E. Aylett*'s way from Lincoln's-Inn aforeſaid,
" after the ſaid cauſe was heard aforeſaid, to his the ſaid *E.*
" *Aylett*'s own houſe, ſituated in the Haymarket, in the pa-
" riſh of St. Martin in the Fields, in the county aforeſaid?
" That the ſaid *E. Aylett*, at and *upon the hearing of the ſaid*
" *plaint*, to wit, *on the 4th day of Auguſt*, in the 24th year
" aforeſaid, at Lincoln's-Inn aforeſaid, in the county afore-
" ſaid, in Lincoln's-Inn-hall, in the court of Chancery,
" then and there held before the ſaid Lord *Thurlow*, was duly
" ſworn and took his corporal oath to ſpeak the truth of and
" concerning the ſaid complaint (he the ſaid Lord *Thur-*
" *low* then and there having ſufficient and competent power
" and authority to adminiſter an oath to the ſaid *E. Aylett* in
" that behalf); that the ſaid *E. Aylett* being ſo ſworn as afore-
" ſaid, to cauſe and procure himſelf the ſaid *E. Aylett* to be
" diſcharged from and out of the cuſtody of the ſaid *M. Le-*
" *nard*, on the ſaid 4th day of Auguſt in the 24th year afore-
" ſaid, in Lincoln's-Inn-hall aforeſaid, *at and upon the ſaid*
" *hearing of the ſaid complaint, upon his oath aforeſaid, before*
" *the ſaid Lord Thurlow*, ſo then and there having ſufficient
" and competent power and authority to hear the ſaid com-
" plaint, and to adminiſter an oath to the ſaid *E. Aylett* in
" that behalf as aforeſaid, falſely did ſay, depoſe, and ſwear,
" of and concerning the ſaid complaint, to the effect follow-
" ing, to wit, that he the ſaid *E. Aylett had not been at home*
" *after attending the cauſe* (meaning that on the ſaid 4th day
" of Auguſt in the 24th year aforeſaid, he the ſaid *E. Aylett*
" had not been *at his ſaid houſe, ſituate in the Haymarket*
" *aforeſaid*, in the ſaid pariſh of St. Martin in the Fields, in
" the ſaid county of Middleſex, after attending the hearing of
" the ſaid cauſe in the ſaid Court, before he the ſaid *E. Ay-*
" *lett* was arreſted and taken by the ſaid *M. Lenard* as afore-
" ſaid); and that he the ſaid *E. Aylett* was arreſted upon the ſteps
" of his own door on his way home from attending the Court
" in the ſaid cauſe, and before he had been *within* the door
" of his houſe (meaning that on the ſaid 4th day of Auguſt
" in the 24th year aforeſaid, he the ſaid *E. Aylett* was arreſt-
" ed and taken by the ſaid *M. Lenard* as aforeſaid, upon the

" ſteps

" ſteps of the *outer* door of the ſaid houſe of him the ſaid *E.* " *Aylett* on his the ſaid *E. Aylett*'s way home to his ſaid houſe " from attending the ſaid Court on the ſaid hearing of the ſaid " cauſe in the ſaid court, and before he the ſaid *E. Aylett* had " been within the ſaid door of his ſaid houſe); whereas in " truth and in fact on the ſaid 4th day of Auguſt in the 24th " year aforeſaid, he the ſaid *E. Aylett* had been *at* his ſaid " houſe, after attending the hearing of the ſaid cauſe in the " ſaid court, before he the ſaid *E. Aylett* was ſo arreſted and " taken by the ſaid *M. Lenard* as aforeſaid; and whereas in " truth and in fact on the ſaid 4th day of Auguſt in the 24th " year aforeſaid, he the ſaid *E. Aylett* was not arreſted and " taken by the ſaid *M. Lenard* as aforeſaid upon the ſteps of " the ſaid *outer* door of the ſaid houſe of the ſaid *E. Aylett*, " on his the ſaid *E. Aylett*'s way home to his ſaid houſe, from " attending the ſaid Court on the hearing of the ſaid cauſe, " and before he the ſaid *E. Aylett* had been within the ſaid " door of his ſaid houſe. That the ſaid *E. Aylett* on the ſaid " 4th day of Auguſt, &c. in Lincoln's-Inn-hall aforeſaid *at* " *and upon the ſaid hearing of the ſaid complaint*, upon his " oath aforeſaid, before, &c. in *manner and form aforeſaid*, did " commit wilful and corrupt perjury, &c." After conviction, the defendant moved in arreſt of judgment, and ſix objections were taken by the counſel for the defendant in point of law to the indictment. 1ſt, That the indictment ſtates this perjury to have been committed *at and upon the hearing of the ſaid complaint*, without averring in direct and poſitive terms that the complaint *was heard*; ſo that it is by inference only the Court can collect that the complaint was heard. And further (as a ſecond part of the ſame objection), it only ſtates, " on the hearing of " the ſaid complaint, *upon his oath aforeſaid, before the Lord* " *Chancellor*;" by which it appears that the ſaid Lord Chancellor had adminiſtered the oath, but not that he had heard the complaint. As the words " before the Lord Chancellor" refer " to theſe immediately preceding, upon his oath aforeſaid," and not to " the hearing of the ſaid complaint," it cannot be collected even by inference that the perjury was committed before the Lord Chancellor on hearing the complaint. *Vaux*'s caſe, 4 *Co.* 44. 5 *Co.* 120, 2. *Long*'s caſe. 2dly, It adds, by way of innuendo, to the defendant's oath, " his houſe ſituate " in the Haymarket, in St. Martin in the Fields;" without ſtating by any averment, recital, or introductory matter, *that he had a houſe in the Haymarket*, or even admitting him to have ſuch a houſe, that *his oath was of and concerning the ſaid houſe* ſo ſituated. As it is the buſineſs of an innuendo to explain, but not to extend, the ſenſe, this innuendo is void, becauſe there is nothing antecedent to which it can be referred. *Rex* v. *Alderton*, *Sayer* 280. *Rex* v. *Matthews*, 9 *St. Tr.* 682. *R.* v. *Horne*, *Cow.* 672. *ante*, 115. 4 *Co.* 17. 3dly (Which objection goes to the firſt aſſignment of perjury), whenever

ever perjury is aſſigned, it muſt be a falſification of the defendant's oath. His oath is, "that he was arreſted before he "had been *within* his own houſe:" to contradict this, the aſſignment ſtates, "that he had been *at* his houſe," which is conſiſtent; for he might have been on the ſteps of his houſe. 4thly (Which objection goes to the ſecond aſſignment of perjury), The defendant ſwore that he was arreſted "upon the ſteps of "his own door;" and the innuendo introduces a new idea not warranted by any introductory matter, viz. the *outer door* of his houſe. 5thly, To both the aſſignments of perjury they have added *time* to the defendant's oath, and made it of the eſſence of it. Wherever time is part of the iſſue to be tried, it muſt be poſitively averred, and not introduced under a *videlicet*. Wherever time is put under a *videlicet*, it cannot be traverſed. It is ſtated, that *Aylett* was arreſted by *Lenard*, after hearing a cauſe in Chancery, to wit, on the 4th of Auguſt. Time is alſo mentioned in the innuendos, when there is not a word of time in the defendant's oath; *non conſtat*, therefore, but that he was ſpeaking of the 3d day of Auguſt. *Rex.* v. *Greep*, 1 *Salk.* 513. 1 Lord *Raym.* 256. 2 *Inſt.* 318. 3 *Inſt.* 230. 6thly, The perjury is ſaid to have been committed "of and concerning the ſaid complaint," without ſaying that ſuch a complaint exiſted: but it ought to have been "of and concerning the *premiſes*." *Cro. Jac.* 19 *Cro. Eliz.* 148. *Rex.* v. *Tuchin*, 5 *St. Tr.* 527. AGAINST THE RULE IT WAS INSISTED, that drawing indictments for perjury was rendered more eaſy than it was formerly by 23 *Geo.* 2. c. 11. and that the Court would not now liſten to ſo many trivial objections as before that ſtatute. THE COURT however were of opinion, that the ſtatute did not apply to the preſent caſe, it being only intended to obviate the difficulties in ſtating the whole record of the trial, on which the perjury had been committed; and they ſaid, it would have been ſufficient, if there had been no ſtatement of the proceedings in the King's Bench.—The ſeveral objections were then anſwered.—Lord MANSFIELD, Ch. J. It is neceſſary in every crime that the indictment charge it with certainty and preciſion to be underſtood by every body; alleging all the requiſites which conſtitute the offence: but every crime ſtands on its own circumſtances, and has peculiar rules. In the caſe of perjury, I take the circumſtances requiſite to be theſe; *the oath muſt be taken in a judicial proceeding, before a competent juriſdiction; and it muſt be material to the queſtion depending.* If there be any doubt on the words of the oath, which can be made more clear and preciſe by a reference to former matter, that may be ſupplied by an innuendo. There muſt be an allegation of time and place, which are ſometimes material and neceſſary, and ſometimes not. As to the firſt conſtituent part, that it does not appear that the oath was taken in a judicial proceeding, or

that

that it was heard before the Lord Chancellor, and therefore that a material part is wanting; there is no other anſwer neceſſary, than to read the record. If words can make a propoſition clear, they are here uſed. Conſider the nature of the proceedings on which this perjury was committed: it was a complaint perſonally made to the Lord Chancellor ſitting in the Court of Chancery, not by bill, but *ore tenus*. It was a complaint of an arreſt by a ſolicitor taken in returning home after the cauſe was heard, during which time he was privileged. And this is a well-known privilege, to which even witneſſes in a cauſe are entitled. This complaint was made to the Lord Chancellor, and the defendant appeared before him to be examined *touching the ſaid complaint then and there to be heard. On the hearing of the ſaid complaint before the ſaid Lord Thurlow*, a queſtion aroſe, which is ſtated to be a material queſtion. Then it goes on to ſtate, that, *at and upon the hearing of the ſaid complaint* the defendant appeared and was ſworn before the ſaid Lord *Thurlow*, who had a ſufficient authority to adminiſter an oath. Then it repeats that *at and upon the hearing of the ſaid complaint before the ſaid Lord Thurlow*, having authority to hear the ſaid complaint, and to adminiſter the oath, the defendant depoſed, &c. I proteſt I cannot comprehend words more expreſſive. The act of hearing was the defendant's depoſition; there was no other cauſe to be heard; hearing him ſwear was hearing the complaint; his own oath was the complaint; there was no other party to it on this record; it was a ſummary proceeding, on which he was examined on oath. No authority has been cited to ſupport the objection, and there is nothing in reaſon to warrant it. The next point is, as to the innuendo. Now the buſineſs of an innuendo is, by a reference to preceding matter, to fix more preciſely the meaning of it. The complaint was, that he was taken before he got to his own houſe in St. Martin's in the Fields. Now what was the material queſtion? The complaint cannot be diſtinguiſhed from the material queſtion. The material queſtion is the giſt of that which he ſwore. His houſe in the Haymarket in St. Martin in the Fields is not *another* houſe; but it is a more particular deſcription of *the ſame* houſe. It was not a queſtion put to him in theſe words. He was examined—then what was the materiality? That he was taken before he got to his houſe in the Haymarket. Then he ſwore he was taken before he got home. Where is that? His houſe is explained, by a reference to what goes before, to be in the Haymarket. The next objection is, that the *outer* door is added by way of innuendo. There was no occaſion for the innuendo. What is his door, but the outer one, as to the defendant's purpoſe? If he ſpoke of an inner door, that would not entitle him to his privilege. As to the objection of the *time*—throughout the whole of the record, it is laid to be on the 4th of Auguſt;

guſt; ſometimes with a *videlicet*, and ſometimes without. The cauſe was heard on the 4th of Auguſt; the complaint was made and heard on the 4th of Auguſt; and the defendant ſwore on the 4th of Auguſt. If the time be material, it muſt have been proved; and if not, it may be rejected, as it is laid under a *videlicet*. I am of opinion that the rule for arreſting this judgment ſhould be diſcharged. The other judges were of the ſame opinion. Rule diſcharged.

The King v. George Croſsley one, &c. Tr. Ter. 37 Geo. 3. B R. 7 *Ter. Rep.* 315.

An indictment for perjury aſſigned on an affidavit ſworn before the Court need not ſtate, nor is it neceſſary to prove, that the affidavit was filed of record or exhibited to the Court or in any manner uſed by the party. This was an indictment againſt the defendant for perjury, which ſtated that in Eaſter term, 36 *Geo.* 3. *Thomas Stokes* made a certain application to the Court of our lord the now king before the king himſelf againſt *G. Croſley*, *W. Clark*, and *T. Briarly*, he the ſaid defendant before and at the time of making the ſaid application being one of the attornies of the ſaid Court, &c. to wit, at Weſtminſter in the county of Middleſex. That on Friday next after one month from Eaſter-day in the thirty ſixth year aforeſaid the ſaid *T. S.* upon the affidavit of himſelf and others named, and a certain paper-writing thereunto annexed being read by the Court, &c. obtained a rule, &c. againſt the defendant, *W. C.* and *T. B.* whereby it was ordered that they on notice, &c. ſhould on, &c. anſwer the matters contained in the ſaid affidavits, and attend the ſaid court in perſon at the time of anſwering as aforeſaid. The indictment then ſet forth the ſubſtantive charge in *Stokes*'s affidavit, which was that he had found in the defendant's poſſeſſion a ſheet of paper having the proper ſtamp for affidavits thereon, with the name *W. Clark* written thereon at the left ſide of the paper, and the name and words "*Thomas Briarly*, a Maſter Extraordinary in Chancery," written on the right ſide of the paper, and no other writing thereon. It then ſtated another rule of Court made on Saturday next after the morrow of the Aſcenſion, &c. in the thirty-ſixth year aforeſaid, ordering that the third day of the then next term ſhould be further premptorily given to the defendant, *W. C.* and *T. B.*, to anſwer the matters contained in the affidavit in the ſaid rule, &c. and attend the ſaid court in perſon. And "that the ſaid defendant, contriving and intending to ſtop the courſe of public juſtice, on 30th May in the thirty-ſixth year aforeſaid did come in his own proper perſon to the court of our ſaid lord the king before the king himſelf, the ſaid court being at Weſtminſter in the county of Middleſex, and did then and there produce to ſaid Court a certain affidavit in writing of him the defendant to be exhibited to the ſaid Court for the purpoſe of diſcharging the ſaid rules, and then and there before the ſaid Court was duly ſworn and took his corporal oath, &c. that the contents of the ſaid affidavit of him (the defendant) were true,

the

the ſaid Court then and there having a lawful and competent authority to adminiſter the ſaid oath of the ſaid defendant and to take and receive his ſaid affidavit. That the ſaid defendant being ſo ſworn, &c. did then and there, to wit, on the ſaid 30th of May in the thirty-ſixth year, &c. at Weſtminſter aforeſaid in the ſaid county of Middleſex in and by his affidavit aforeſaid upon his oath aforeſaid before the ſaid Court, the ſaid Court then and there having lawful authority to adminiſter the ſaid oath, &c. and to receive his ſaid affidavit, falſely and corruptly, &c. depoſe and ſwear," &c. The indictment then ſet out the defendant's affidavit in anſwer (1) to the rule then depending againſt him, and the ſeveral aſſignments of perjury thereon; concluding "and ſo the jurors, &c. ſay that the defendant on the ſaid 30th May, &c. at Weſtminſter aforeſaid in the ſaid county of Middleſex, before the ſaid Court of our ſaid lord the king before the king himſelf, the ſaid Court then and there having competent authority to adminiſter the ſaid oath, &c. by his own act, &c. in and by his affidavit aforeſaid, &c. did falſely, &c. commit wilful and corrupt perjury againſt the peace, &c." The defendant having been found guilty upon this indictment, and being brought up to receive judgment in the laſt term, offered ſeveral objections in arreſt of judgment. But the only objection argued at the bar was, that it did not appear that after the affidavit, on which the perjury was aſſigned, was ſworn by the defendant it was exhibited in this court or filed. PER CURIAM: Let us examine the foundation of this objection on principle, on practice, and on the precedents. Firſt as to principle: This proſecution affects to bring to juſtice a perſon who has been guilty of a moſt enormous offence: his guilt or innocence muſt depend on his own act and on the motive by which he was actuated at the time. The affidavit, on which the perjury is aſſigned, might have been ſworn in a diſtant part of the kingdom; it might have been ſent up by the poſt, and detained in the hands of any perſon here for ſome time; and according to the doctrine urged on behalf of the defendant the guilt or innocence of the perſon making the affidavit in the country is to depend on the circumſtance of the perſon into whoſe hands it comes bringing it forward. But ſurely the guilt of the party cannot depend on the act of another perſon, when all that he had to do has been already conſummated. In the inſtance of making an affidavit in the country, the party is not to be indicted here where the affidavit may happen to be uſed, but in the county where the offence was

(1) The defendant by this anſwer attempted to get rid of the preſumption of mal-practice againſt him on account of his poſſeſſion of ſuch an inſtrument, by ſtating that it had been put into his hands many years before to be uſed as an affidavit in a certain cauſe then depending.

complete

complete by making the false oath. Then the practice has been referred to, and it is said that counsel have sometimes recommended it to the party who has made the affidavit not to produce it in court but to put it into his pocket: in one sense it may be of great importance to the party to put his affidavit into his pocket, to prevent its being produced in evidence against him on an indictment for perjury: but it is ridiculous to suppose that his guilt or innocence can depend on such an act. With regard to the precedents; it is admitted that there are many, on which the parties have been convicted, in which it is not stated either that the affidavit was exhibited or filed in court. The precedents referred to in *Hawkins* that allege, that the affidavit had been exhibited or filed, are all on the statute, and are therefore distinguishable from this case, for there an action is given to the party injured by the false oath, therefore there is no foundation for this objection.

In an indictment for perjury committed at an Admiralty Session, where the commission was directed to *A.*, *B.* and *C.* and others not named, of whom *A.*, *B.* and *C.* were amongst others *to be one*; the Court will take it to mean that if either of the persons named of the quorum were present, it would be sufficient. Stating that at such a court *J. K was in due form of law tried upon a certain indictment then and there depending* against him for murder; and that *at and upon the said trial it then and there became and was made a material question* whether, &c. are sufficient averments that the perjury was committed on the trial of *J. K.* for the murder, and that the question on which the perjury was assigned was material on that trial. The defendant was indicted at the last July sessions at the Old Bailey for perjury committed upon the trial of Captain Kimber for murder at an admiralty session held in June, 1792; the record was removed into this court by *certiorari*, and the defendant was tried and convicted at the sittings after Hilary term last. The record was as follows; London, &c. The jurors, &c. present that at the session of oyer and terminer, &c. holden for the jurisdiction of the admiralty, &c. at Justice Hall, &c. on Thursday 7th of June, 32 *Geo.* 3. &c. before Sir *James Marriott*, knight, Sir *W. H. Ashhurst*, knight, Sir *B. Hotham*, knight, *J. Fisher*, *J. Nicholl*, *J. H. Arnold*, *M. Swabey*, *J. Dyson*, and others their fellows, justices of our said lord the king assigned by letters patent to them the said Sir *J. M.* Sir *W. H. A.* [and the others before named] and others, and any four of them, under his great seal of *G. B.* directed [of which number the will and pleasure of our said lord the king was that the said Sir *J. M.* Sir *W. H. A.* Sir *B. H. J. F. J. N. J. H. A. M. S.* and *J. D.* amongst others in the said letters patent named *should always be one*] to enquire, &c. and to hear and determine, &c. one *John Kimber* was *in due form of law tried upon a certain indictment then and there depending*

The King *v.* Dowlin, Tr. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 311.

depending againſt him, by the name and deſcription of *J. K.* &c. by a certain jury of the county duly taken and ſworn between our ſaid lord the king and the ſaid *J. K.* in that behalf, for that, &c. [ſetting forth the indictment againſt *J. K.* for murder on the high ſeas.] And the jurors, &c. preſent that *Thomas Dowlin*, late of, &c. at and upon the ſaid trial on the ſaid 7th of June, 32 *Geo.* 3. at, &c. in open court at the ſaid ſeſſion, before the ſaid juſtices of our ſaid lord the king above named, did appear as a witneſs for and on behalf of our ſaid lord the king againſt the ſaid *J. K.*; and he the ſaid *T. Dowlin* did then and there in open court aforeſaid, &c. before the ſaid juſtices take his corporal oath, &c. the ſaid juſtices having then and there ſufficient and competent power and authority to adminiſter the ſaid oath, &c. The indictment then ſet forth the whole evidence given by the defendant upon the trial of *J. K.*, referring to the manner of the death, &c. (1); and then proceeded; "and the jurors, &c. preſent that at and upon the ſaid trial *it then and there became and was made a material queſtion*, whether the ſaid defendant had ever ſaid that he would be revenged of the ſaid *J. K.* and would work his the ſaid *J. K.*'s ruin." The indictment then proceeded to aſſign the perjury upon this and other allegations in the defendant's evidence, concluding in the uſual form. Two objections were made in arreſt of judgment; firſt, that it does not appear that the oath was adminiſtered before a competent juriſdiction, inaſmuch as the commiſſion by which the Court was conſtituted is either abſurd or nugatory in itſelf; or, according to the only ſenſible interpretation which can be put upon it, it does not appear that the Court for the trial of *J. Kimber* was held by all the perſons before whom it was required to be held. Secondly, That no plea appears by the record to have been pleaded on the trial of *J. Kimber*, and conſequently there could have been no legal trial on which perjury could have been committed. Lord KENYON, Ch. J. We have occaſion to lament in almoſt all the trials for perjury that the proſecutor does not avail himſelf of the excellent law which was paſſed in the late reign (2) to obviate difficulties in drawing indictments for this offence. Two objections have been made in arreſt of judgment; firſt, that it does not appear that the Court, where *Kimber* was tried, had juriſdiction to try him. I admit that, although it was not neceſſary for the proſecutor to ſet out in the indictment the commiſſion at the admiralty, yet as he has undertaken to do it, if it be not properly ſet forth, the indictment does not ſhew a ſufficient authority to try *Kimber*. But I am clearly of opinion that the commiſſion is ſufficiently ſet forth. The moſt that can be made of it is, that it is a clerical error:

(1) The perjury was committed upon the croſs examination.
(2) 23 *Geo.* 2. c. 11.

but there are many authorities to ſhew that ſuch an error is not a ſufficient objection in criminal proſecutions; for inſtance, "undertood" for "underſtood" was held not to be a variance in an indictment for forgery(1). And here, it is impoſſible for any perſon, reading this commiſſion, not to ſee that any one of the perſons enumerated in the quorum, together with three of the others not named of the quorum, might conſtitute the Court to try *Kimber*. The other objection is, that it does not appear, in the indictment, that the perjury was committed on the trial of *Kimber* for the murder. At the trial, it ſtruck me, that there was much weight in the objection; and if this were an indictment at common law, I ſhould ſtill think the allegation objectionable. But, notwithſtanding every thing that has been ſo ingeniouſly urged by the defendant's counſel, the whole of the argument, and all the authorities, are put out of the queſtion by the ſtatute 23 *Geo.* 2. c. 11. which enacts, that in every indictment for perjury, it ſhall be ſufficient to ſet forth the ſubſtance of the offence charged, and by what Court, or before whom, the oath was taken (averring ſuch Court, &c. to have competent authority to adminiſter the ſame), together with proper averments to falſify the matter, &c. without ſetting forth the bill, &c. or the commiſſion or authority of the Court before whom the perjury was committed. Thoſe material things are averred in this indictment: I do not know what can be called the ſubſtance of the offence charged, if alleging, "that at a court of oyer and terminer, &c. *J. Kimber* was, in due form of law, tried upon a certain indictment for the murder of *A.* by a certain jury of the county duly taken and ſworn; and that, upon the ſaid trial, in open court, at the ſaid ſeſſion, the defendant appeared as a witneſs, took his corporal oath, &c. and ſwore, &c." be not an allegation of the ſubſtance of the offence. This is, in my opinion, the ſubſtance, in contradiſtinction to the detail of the offence. But it has been objected, that it was neceſſary to ſet forth in the indictment ſo much of the proceedings of the former trial as will ſhew the materiality of the queſtion, on which the perjury is aſſigned. If it were neceſſary, and if the queſtion aroſe on the credit due to the witneſs, the whole of the evidence given before muſt be ſet forth: but that has never been held to be neceſſary; it having always been adjudged to be ſufficient to allege generally that the particular queſtion became a material queſtion.—That allegation was wanting in *R.* v. *M'Keron* from Lancaſter lent aſſizes, and that was held to be a deciſive objection. But here it is averred, that the queſtion on which the perjury was aſſigned was a material queſtion; and the jury have

(1) *R.* v. *Beach*, *Cowp.* 229, under title PLEADING.

found it to be ſo by their verdict. Without diſcuſſing this objection as it would have ſtood at common law, I am of opinion that the requiſitions of the ſtatute have been complied with, and that the ſubſtance of the offence is ſufficiently ſtated in the indictment. Ashhurst, J. agreed. Buller, J. The firſt objection ariſes on the conſtruction of the letters patent, conſtituting the admiralty court; and three conſtructions have been made; 1ſt, That any one of the perſons named in the quorum was ſufficient to conſtitute a legal court; 2dly, That the preſence of all was neceſſary; and, 3dly, That not only all of them, but alſo "the others" mentioned in the commiſſion ſhould be preſent. But this objection is founded on miſ-ſtating the commiſſion ſet out in the record; for that is, that eight perſons in number, and others, or any four of them, of whom the ſaid *A. B. &c.* (again naming the eight perſons) ſhall be one, ſhall have power to enquire, *&c.* It could not therefore be neceſſary that all the eight ſhould be preſent; for it is expreſsly ſtated that any four ſhall be ſufficient, provided the quorum be there; and that evidently means that any one of the quorum is ſufficient. And it appears upon the face of this record that all the eight were preſent. —With regard to the other objection, it does not admit of a doubt. It has been argued that it muſt appear in the indictment preciſely, that iſſue was taken in the proſecution againſt *Kimber*, or at leaſt that *Kimber* had pleaded to the indictment; and that it is not ſufficient to allege generally that he was tried on that indictment in due form of law. If that objection were well founded, it would equally have prevailed in moſt of the caſes cited by the defendant's counſel. Even if the allegation had been "that a certain iſſue was in due manner joined between the king and *J. Kimber*," it might with the ſame reaſon have been objected that it was not ſtated how, or in what manner, iſſue was joined. Nothing therefore will ſatisfy ſuch an objection, but ſtating the joining of the iſſue in the very words of it: but that is made unneceſſary by the act of parliament, and it is not ſtated in any of the caſes. In *R. v. E. Canning*, the ſimiliter was not added, and without that it does not appear that iſſue was joined. All that it is neceſſary to ſtate, is, that there was a certain cauſe, *&c.* and that it came on to be tried in due form of law: now here it is expreſsly alleged "that *J. Kimber* was in due form of law tried upon a certain indictment then and there depending againſt him for the murder of, *&c.*" Therefore the acquittal or condemnation of *Kimber* is immaterial; for it is ſtated that the defendant committed the perjury on the trial of *Kimber* on the indictment which charged him with murder. Grose, J. of the ſame opinion.—Rule diſcharged.

In

In perjury, upon an anſwer in Chancery, there is no need to prove the identity of the perſon, or the actual ſwearing.—The defendant having been convicted of wilful and corrupt *perjury*, in an *anſwer in Chancery*, Lord *Mansfield* (who tried him) made his report; in doing which, he ſtated an objection to the evidence, which had been made by the defendant's counſel at the trial, viz. "*That there was no proof of the identity of* "*the perſon who ſwore the anſwer, nor even proof that any per-* "*ſon at all ſwore it.*" This objection, he ſaid, he had *overruled* at the trial; thinking it ſufficient that the hand of the defendant and the maſter were proved. But he deſired to have the opinion of his brethren upon this point; that the defendant might have the benefit of the objection, if it ſhould ſeem to them to have any force in it (though he declared himſelf to be ſtill clear in his former opinion). Mr. Juſt. DENISON and Mr. Juſt. WILMOT entirely concurred with his lordſhip; and they were all unanimouſly of opinion, that as the *name* ſubſcribed to the anſwer was proved to be *his hand-writing*, and Maſter *Bennet* had proved that the *jurat*' was *ſubſcribed by him* (the maſter), *as being ſworn before him*; this was *ſufficient proof* "that he was the *ſame perſon*," and alſo, "that he actually "*ſwore* it." So far (at leaſt) as to put it upon him to ſhew or to raiſe a reaſonable ſuſpicion "*that he was perſonated*;" as it would otherwiſe be almoſt impoſſible to convict any one of perjury committed in an anſwer in Chancery.

Rex v. John Morris, Tr. Ter. 1 Geo. 3. B.R. 2 *Burr.* 1189.

A witneſs being indicted for perjury is no reaſon for poſtponing judgment againſt a perſon convicted.—It was moved, on behalf of the defendant, to *poſtpone the judgment of the Court upon him*, till Michaelmas term; having been convicted upon the *ſingle* evidence of *John Burbage*, of bribery(1), which ſingle witneſs, *John Burbage*, now ſtands *indicted for* PERJURY in giving *that very evidence*, and was indicted for it as early as was poſſible after committing the crime. On viewing the indictment, and the names indorſed upon it, it appeared that HAYDON himſelf was the firſt witneſs; and that all the reſt of the witneſſes, except one *Clarke*, were actually examined at *Haydon*'s trial —PER CURIAM: If the Court were to defer pronouncing judgment againſt *Haydon*, he *could not be a witneſs* upon the trial of this indictment for perjury againſt *Burbage*: becauſe he is ſo much intereſted in the event of it. And the other witneſſes, all but *Clarke*, have already been examined upon *Haydon*'s trial; and it does not appear, but that *Clarke might* have been. Therefore, there is *no* reaſon to *defer* our judgment. THE COURT, therefore, committed him, and ordered him to be brought up again to receive judgment; which was, to pay a fine of 200l. and be impriſoned for three months, and until the fine be paid.

Rex v. Thomas Haydon, Ea. Ter. 3 Geo. 3. B.R 3 *Burr.* 1387.

(1) *Vide*, vol. II. p. 465.

Rex v. Norris, Mic. Ter. 8 Geo. 3. B.R. 4 *Burr.* 2142.

A convict for perjury cannot be discharged as an insolvent debtor.—It was moved for a rule to bring up the defendant to be *discharged* as an *insolvent debtor*. He had been convicted of *perjury*; and *(inter alia) fined* 100l.—Lord MANSFIELD: This is not a *debt*, but a *punishment*. Motion denied.

The King v. Nurys & Galey, Ea Ter. 3 Geo. 3. B.R. 1 *Black. Rep.* 416.

These were the three subscribing witnesses to the will of a Mr. *Jolliffe* (see vol. III. p. 390), who were afterwards convicted of perjury, on three several indictments, for swearing at the trial at bar, that the testator was utterly incapable of making one: and they now received judgment, to be, each of them, imprisoned six months, to stand twice in the pillory, with a paper on their heads denoting the crime, once at Westminster-Hall gate, and once at Charing-Cross; and to be transported to America for seven years: but they afterwards obtained a pardon in respect to their transportation.

Physicians.

Rex v. Doctor Askew *et. al.* censors of the College of Physicians, Ea. Ter. 8 Geo. 3 B.R. 4 *Burr.* 2186.

CANDIDATES to be admitted of the college, are to be examined by the *comitia minora*, then proposed to the *comitia majora*, and elected by them, before they can claim to be admitted.—A rule had been obtained, upon the application of Dr. *Letch*, for the College of Physicians to shew cause why a *mandamus* should not issue, directed to them, commanding them to admit JOHN LETCH, doctor of physic, to be a *member* of the college. This rule was made upon the whole body of the college or community of the faculty of physic of the city of London; and also upon the president and censors of the said college.—The short state of the material facts, with respect to this *mandamus*, was—That Dr. *Letch*, who practised as a man midwife, was summoned by the College, to be examined. He thereupon came in, and was examined thrice at the *comitia minora*: and after the third of those examinations, he was there ballotted for, "whether he should be *approved of by them*, or not." A dispute arose upon this ballot. The *majority* of the number of balls *appeared* to be for approving him: but one of the censors declared, "that he had, by *mistake*, put in his ball FOR "approbation; which he meant and intended to be AGAINST "approving him." It was proposed "to ballot over again." But the president considered and declared this to be an approbation by a *majority of votes* on the ballot. On Dr. *Letch*'s being proposed to the *comitia majora*, nineteen to three of the members present were *against* putting the college-seal to his letters testimonial: and he was informed "that he was NOT "*elected*." His counsel insisted, that having been returned sufficient by the *comitia minora*, he had thereby acquired an inchoate right to admission; which the Court would enforce the completion

completion of, by mandamus. In this argument, the charter of the college appeared to bear date on the 23d of September, 10 *H.* 8. (1518). And the following ſtatutes were mentioned; 3 *H.* 8. c. 11. and 14 and 15 *H.* 8. c. 5. And ſome by-laws or ſtatutes of the College: particularly, caput octavum, "*de comitiis majoribus*," and caput decimum quartum. The former ſays, "*Comitia* vocamus congregationes illas licitas et "honeſtas, quas ut præſidens et collegium ſive communitas et "eorum ſucceſſores de ſeipſis habeant, Rex *Henricus* conceſſit. "Ordinaria autem ſive ſtata comitia, *majora* dicenda, quater "anno celebrenter, &c. In comitiis *majoribus* fiant ELEC-"TIONES et *admiſſiones* ſociorum, candidatorum et permiſſo-"rum. Quod verò ad candidatorum et permiſſorum exami-"nationes attinet, eæ fieri poſſint vel in majoribus comitiis, "vel in minoribus et cenſoriis, pro arbitrio præſidentis aut "propræſidentis et cenſorum, aut eorum partis majoris."—The caput decimum quartum (de examinationum et admiſſionum forma) enacts—"ANTEQUAM quiſpiam aut in candida-"torum ordinem, aut ad medicinæ facultatem in urbe *Londino* "et per ſeptem millaria in circuitu ejuſdem exercendam admit-"tendus proponatur, *examinetur in tribus comitiis*, ſive majo-"ribus ſive minoribus, pro arbitrio præſidentis aut propræſi-"dentis et cenſorum, aut eorum majoris partis, &c. Omnes "hæ *examinationes* fieri poſſunt in comitiis *minoribus* ſive cen-"ſoriis, à præſidente aut propræſidente, et quatuor cenſoribus; "aut (uno ex cenſoribus abſente) a præſidente aut propræ-"ſidente, tribus cenſoribus, et abſentis cenſoris vicario. Li-"ceat tamen *cuilibet ſocio*, pro arbitrio, diſputare et periculum "facere *quantum* examinandus in re medicâ *valeat*. Qui ad "hunc modum examinatus, et à præſidente aut propræſidente "et cenſoribus aut eorum *majori parte* (ſuffragiis per pilas "occultè acceptis) *approbatus* fuerit, in comitiis *majoribus* "*proximè inſequentibus*, ſiquidem commodè fieri poterit, ſin "minùs in comitiis *quibuſlibet majoribus*, ſive ordinariis ſive "extraordinariis, a præſidente aut propræſidente PROPO-"NATUR in candidatorum ordinem vel permiſſorum nume-"rum ADMITTENDUS: et SI *electus fuerit*, peractis iis ab "ipſo quæ per ſtatuta noſtra requiruntur, quam primùm AD-"MITTATUR."—Lord MANSFIELD, Ch. J. The counſel for the College have admitted the *juriſdiction of this Court:* and they certainly have juriſdiction over corporate bodies, to ſee that they act agreeably to the end of their inſtitution.—There is no doubt that where a party, who has a *right*, has *no other* ſpecific legal remedy, the Court will aſſiſt him by iſſuing this prerogative writ, in order to his obtaining ſuch right: (ſee title MANDAMUS). There can be as little doubt, that the College are *obliged*, in conformity to the truſt and confidence placed in them by the crown and the public, to *admit all* that are *fit*; and to *reject all* that are *unfit*. For under the reaſon and

ſpirit and true conſtruction of this charter and this act of parliament, *no* perſon ought to be *ſuffered to practiſe* phyſic, *but ſuch only* as have ſkill and ability, and have diligently applied themſelves to the ſtudy, and are well grounded in the knowledge of it: and, on the other hand, *all* perſons who *are ſo qualified*, and have beſtowed their time, and money, and labour in the proper ſtudies that tend to ſuch qualifications, have a *right* to be admitted to exerciſe and practiſe their profeſſion. And the *public* have alſo a *right* to the aſſiſtance of ſuch a perſon, who has, by his labour and ſtudies rendered himſelf capable of ſerving the public by giving them proper advice and directions. It is true. that the judgment and diſcretion of *determining* upon this ſkill, ability, learning, and ſufficiency to exerciſe and practiſe this profeſſion, is truſted to the College of Phyſicians: and this Court will not take it from them, nor interrupt them in the *due and proper* exerciſe of it. But their conduct in the exerciſe of this truſt thus committed to them ought to be *fair*, *candid*, and *unprejudiced*; not *arbitrary*, *capricious*. or *biaſſed*; much leſs, warped by *reſentment*, or *perſonal diſlike*. Caſes, indeed, *may* happen, where the rejection may be founded upon *other* grounds than inſufficiency in point of ſkill and ability or knowledge: it is poſſible, that other cauſes of rejection may occur; as *badneſs of morals*, for inſtance. But in the preſent caſe, they ſeem to have acted with candour and caution. Some of the gentlemen even make oath of their reaſons againſt admitting this candidate for a licence. Objections to perſons applying for licences to practiſe phyſic, may be grounded on a variety of reaſons: and the Court are to judge of ſuch objections, and the reaſons of them. If they are inſufficient, the Court may grant a mandamus. If they ſhould refuſe to examine the candidate, at all; the Court would oblige them to do it. In a manuſcript book of Reports which I have ſeen, the reporter cites (in reporting Dr. *Bonham*'s caſe) a *mandamus*, in the time of *Edw.* 3. directed to the univerſity of Oxford, commanding them to reſtore a man that was *bannitus*: which ſhews both the *antiquity* and *extent* of this remedy by *mandamus*. But the Court ought to be ſatisfied that they have *ground* to grant a *mandamus*: it is *not* a writ that is to iſſue *of courſe*, or to be granted *merely for aſking*.—The queſtion, therefore, is, "Whether here is a *proper* and "*ſufficient* ground for our granting a *mandamus?*" Conſider, then, what are the grounds of this application. Firſt, Dr. *Letch* can't diſpute theſe by-laws. This point is not open to him. For, *without them*, he has no ground to ſtand upon; he has never been examined by the body at large: therefore, he is under the neceſſity, upon *this* application, of *allowing* the by-laws to be good. The queſtion then will be, "Whether the "power is DEVOLVED *on the preſident and four cenſors*; or "REMAINS *with the body at large?*" I am clear, that the power

power *remains* with the *body*; and that the examination by the president and four censors is *only preparatory*, and for the ease of the body at large. There are various instances of *delegations* of a like kind. *Bishops* refer examinations of clergymen to their *chaplains*: so *universities* refer examinations to select parts of their bodies. But the *dernier determination* is in the body at large. These censors, to whom this examination is referred, take an oath, "not to approve of unfit persons, nor "reject such as are fit." The usage has been, to refer the examination of the person applying for licence, to the *comitia minora*, as more easy, and more convenient to be executed by a small than by a large number of examiners. But every fellow has notice of it, and may examine and argue with the candidate; though he has no vote at these *comitia minora*: so that every fellow has an opportunity of informing himself and satisfying his own judgment concerning the sufficiency of the candidate. The *comitia minora* have no power, upon their approbation, to admit the candidate: they have only power to approve. If they do approve, then the person so approved of by them is to be afterwards proposed to the *comitia majora*, for election: and if, upon being so proposed, he shall be elected, then he is to be admitted. Supposing the *comitia majora* to execute their power corruptly (taking this word in a large sense); and that they should refuse to admit a person who had been examined, approved, and regularly proposed to them, without being able to deny his fitness; this Court ought, indeed, in such a case, to interpose. But that is not pretended or even hinted to be the present case, with respect either to the *comitia majora*, or the *comitia minora*. Dr. *Letch* charges them with nothing of this kind, nor with any thing to which it is requisite for them to give an answer: his counsel rely on the usage. The question, therefore, is, "Whether the *comitia* "*majora* have acted corruptly?" Now, they have only referred him to a second examination, in future: they have not absolutely rejected him. At the *comitia minora* there were three who, in truth, meant and intended to ballot against Dr. *Letch*, though one of them made a mistake and balloted for him; which mistake was declared and taken notice of, at the very time; and it was proposed to ballot over again: and this was disclosed to the *comitia majora*. This fact (of a mistake in the ballot for approbation) being disclosed to the *comitia majora*, was it not extremely reasonable for them to refer the candidate to a further examination? I see no injustice in this. The intention of the ballot was, that he should be reported unfit: and two of the censors now swear "that they thought him so." I am satisfied, that the *comitia majora* had the power of rejecting him: and it does not, by any means, appear, that they have acted upon improper grounds, or arbitrarily and capriciously. Here is no ground laid for demanding a *mandamus*.

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His lordſhip concluded with a recommendation to the College, to ſettle all other matters amongſt themſelves, without coming to this court: at the ſame time, intimating to them a caution againſt narrowing their grounds of admiſſion ſo much, that if even a *Boerhaave* ſhould be reſident here, he could not be admitted into their fellowſhip. Mr. Juſtice YATES thought that Dr. *Letſh* might more properly have applied for a *mandamus*, requiring the College to grant him a licence to practiſe within London and ſeven miles of it. However, if he had laid a ſufficient ground for his preſent application, and ſhewn the Court "that he had a right to be a member of the College," the Court ought to grant him a *mandamus*, to enable him to obtain that right, if he had no other legal method of coming at it. But he has not laid a ſufficient ground for this application: he has not ſhewn that he has a right to be admitted a member of the College. And we ought not to iſſue a *mandamus* requiring the College to admit him a member; unleſs he firſt ſhews us, "that he has a right to ſuch admiſſion."—No man can now practiſe phyſic, until he ſhall have been examined and approved of, propoſed, elected, and admitted. He can't be a member of the College, till all theſe requiſites ſhall have been completed in him. This gentleman has been examined, it is true, by the preſident and four cenſors; and their ballot was in his favour, three to two, as to their approbation: but one of them declared, at the time, "that he meant "and intended his ballot to have been in *diſapprobation*." The preſident, however, conſidered him as approved by the majority. But the determination of the *comitia minora* is not final: the conſequence of their approbation is only, "that he "is to be afterwards propoſed to the *comitia majora*, for elec-"tion; and if they elect him, then he is to be admitted." The truſt was placed in the whole body. The College could not delegate this truſt placed in the whole body, to this ſelect part the *comitia minora*, ſo as to make their opinion final: but it was lawful for the College to delegate to them this power of preparatory examination; reſerving to the whole body the right of final judgment and determination. Neither have the College, in fact, delegated the final judgment to the *comitia minora*: they are only to examine and approve. The candidate, if he meets with their approbation, muſt ſtill be propoſed to the *comitia majora*; and is to be elected by them. So that it is the *comitia majora*, who are to judge and to elect: theirs is the final determination. The miſtake in the ballot, at the *comitia minora*, might be a ground for the *comitia majora* to judge "that the doctor had not ſatisfied the preſident and cen-"ſors of his ſufficiency to practiſe phyſic:" for, though, according to the ſtrict letter, the ballot might be ſaid to have pronounced him ſufficient, yet the majority of thoſe who ballotted thought, and even declared otherwiſe. Upon the whole;

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as Dr. *Letch* has laid before us no ground for a *mandamus*, there is no reaſon for us to grant him one. Mr. Juſtice Aſton—The queſtion is, "Whether Dr. *Letch* has laid a ſuffi-"cient ground for aſking a *mandamus* requiring the College "of Phyſicians to admit him a member of it?" I agree with my brother Yates "that he ſhould rather have applied for "a *mandamus* requiring the College to grant him a licence to "practiſe phyſic within London and ſeven miles of it, than "for a *mandamus* to admit him a member." No particular method of admiſſion is ſpecified, either in the charter or in the ſtatute. The College have therefore inſtituted a method; the method which has been now diſcloſed to us. And they have done right: it is a good and proper one. The examination of the candidate, by the *comitia minora*, is part of it: but their opinion is not final. The final determination is in the *comitia majora*. By the 14 and 15 *H.* 8. c. 5. it is enacted, "that "the ſix perſons named in the letters patent, as principals and "firſt named of the ſaid commonalty and fellowſhip, chooſing to "them two or more of the ſaid commonalty, be called elects; and "that the ſame elects yearly chooſe one of them to be preſident "of the ſaid commonalty; and as oft as any of the rooms and "places of the ſame elects ſhall fortune to be void by death "or otherwiſe, then the ſupervivors of the ſame elects ſhall "chooſe, name, and admit one or more, as need ſhall require, "of the moſt cunning and expert men of and in the ſaid fa-"culty in London, to ſupply the ſaid room and number of "eight perſons; ſo that he or they that ſhall be ſo choſen, be "firſt by the ſaid ſupervivors ſtrictly examined, after a form "deviſed by the ſame elects; and alſo, by the ſame ſupervivors "approved." This ſhews, that the makers of the acts of parliament looked upon thoſe of the faculty who reſided in London, to be members of the College. The power delegated to the *comitia minora* is, "to examine and to judge upon "the ſufficiency of the perſon whom they have examined; "and they are upon oath to act impartially therein:" but their opinion and judgment are not final. The election is not any part of their power: it is in the *comitia majora*. If the perſon examined by them had been approved, propoſed, and elected; then, indeed, a *mandamus* would lie: and ſo it would, if the College ſhould refuſe to examine the candidate at all. But there are none of theſe circumſtances in Dr. *Letch*'s caſe. He has been examined; he has been propoſed; he has not been elected: he has never acquired ſuch a right as can be a ground for aſking a *mandamus*. And even as to the approbation of the *comitia minora*, upon their examination of him, though the number of balls ſeemed to indicate their approbation of him, yet it is apparent that there was a miſtake in the ballot: and it was declared at the time. Now, ſuppoſe that miſtake to have been the contrary way; and that the cenſor, who made this miſtake, had meant to ballot for Dr. *Letch*, but had, by miſtake,

miſtake, actually ballotted againſt him; would it not have been thought a very hard caſe, that this ſhould be holden a diſapprobation of it; and that he ſhould be bound down, by this ſlip of the cenſor, contrary to his opinion and intention, to an undeſerved and undeſigned rejection? I think, the *comitia majora* have behaved with great candour and moderation. They knew that the majority of the *comitia minora* thought the candidate inſufficient. They refer him to further examination, whenever he ſhall find or think himſelf qualified to undergo it. When he ſhall become properly qualified, he may be again examined; and being found ſo upon ſuch ſecond examination, may be propoſed, elected, and admitted in the due and regular manner.—Mr. Juſtice HEWITT declined giving any opinion, "Whether London-licentiates are (1) members "of the College, or not:" though he hinted, that the more he thought of it, the more he doubted it. The preſent application is for a *mandamus* commanding the College to admit him a member. It is not for obliging them to grant him a licence to practiſe in London and within ſeven miles round it. The admiſſions into the College are "*in ſocietatem noſtram:*" the others, only licences to practiſe within theſe limits. Dr. *Letch* recognizes the by-law or ſtatute of the College, and grounds himſelf upon it; claiming his right of admiſſion, as ariſing from it: and upon this right, he applies to be admitted a member of the College. I think, we ſhould go a great way, if we ſhould ſay, "that a licentiate, to practiſe within London "and ſeven miles round, is a member of the College." Certainly, a perſon not admitted can't be meant as one of thoſe that are incorporated. But this gentleman has not laid a ſufficient ground of right, to ſupport a claim to admiſſion, within this by-law. It only repoſes a truſt in the *comitia minora*, "to examine the candidate." If they approve of him, they are to report their approbation to the ſociety or body at large, the *comitia majora*. Any member may be preſent at the examination; and aſk the candidate queſtions, to try his ſkill in medicine. The truſt repoſed in the *comitia minora* relates only to his ſkill in phyſic: it does not extend to his morals. They are not empowered to examine into them. The other part of his qualification they are to examine into; and if they approve, report ſo; but nothing further: it is the *comitia majora* who are to determine finally, and to elect. Therefore, without entering into any other points, I concur in the opinion, "that "this rule ought to be diſcharged."—Rule diſcharged.

Two terms afterwards, viz. on Friday, 20th of November, 1767, Sir *Fletcher Norton* moved for a rule upon Dr. *Aſkew*

(1) This queſtion had been ſtarted during the argument: but the Court afterwards declared the queſtion to be *ſtill open*. See the end of this caſe.

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and others (the four then censors), for them to shew cause why an information, in nature of a *quo warranto*, should not be granted against them, to shew by what authority they acted as censors of the College of Physicians. The objection was, that whereas the election ought to be by the whole body, these gentlemen had been elected only by a select body; namely, by the fellows, exclusive of the licentiates; though the licentiates demanded admittance; which was refused to them by the fellows, on pretence of their having no business there, upon that occasion.—Lord MANSFIELD: The question properly now before us is singly this, "Whether the persons ap-"plying for this information are fellows, and entitled to vote "in the election of censors?" If they are, the election of these censors being made in exclusion of their votes, is not good: if they are not fellows, and have no right to vote in the election of censors, then this election stands unimpeached. I consider the words, "*socii*, *communitas*, *collegium*, *societas*, *col-*"*lega*, and *fellows*," as synonimous terms; and every *socius* or *collega*, as a member of the society, or corporation, or college. The question is, "Whether these licentiates are *socii*, or *col-*"*legæ*, or *fellows?*" The facts are not disputed: and there is no doubt about the law, as far as relates to the question now before us. Here is a charter of incorporation. And it has been admitted on both sides, that there has been a great number of by-laws and long usages, which are agreed to appear upon their books and the extracts from them: and the permission of these licentiates, "to practise," is not disputed. But I doubt, whether this permission to practise, and these letters testimonial, can amount to an admission into the fellowship of the corporation or college. Nothing can make a man a fellow of the College, without the act of the College. The first act to be done by them is, their judging of the qualifications of the candidate. The admission into the fellowship is an act subsequent to that. The main end of the incorporation was to keep up the succession: and it was to be kept up by the admission of fellows after examination. The power of examining and admitting after examination, was not an arbitrary power; but a power coupled with a trust: they are bound to admit every person whom, upon examination, they think to be fit to be admitted, within the description of the charter and the act of parliament which confirms it. The person who comes within that description has a right to be admitted into the fellowship: he has a claim to several exemptions, privileges, and advantages attendant upon admission into the fellowship. And not only the candidate himself, if found fit, has a personal right; but the public has also a right to his service; and that, not only as a physician, but as a censor, as an elect, as an officer in the offices to which he will, upon admission, become eligible. In Dr. *Letch*'s case, the reasons for his rejection being

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ing called for, the anſwer was, " that they judged him to be " unfit:" and as the legiſlature have veſted the judgment in the *comitia majora*; and there was no pretence or ground to pretend that they had acted corruptly, arbitrarily, or capriciouſly; that anſwer was eſteemed a ſufficient one. And they have power, not only by their charter, but by the law of the land, to make fit and reaſonable by-laws; ſubject to certain qualifications. It appears, from the charter and the act of parliament, that the charter had an idea of perſons who might practiſe phyſic in London, and yet not be fellows of the College. The preſident was to overlook not only the College, but alſo " *omnes homines ejuſdem facultatis.*" So, when then the College or Corporation were to make by-laws, theſe by-laws were to relate not only to the fellows, but to all others practiſing phyſic within London or ſeven miles of it. The reſtraint from practiſing phyſic is thus expreſſed—" *Niſi ad* " *hoc admiſſus ſit*, by letters teſtimonial under their common " ſeal." Now, what does this " *ad hoc*" mean? It muſt mean " *ad exercendum facultatem medicinæ*," *admiſſus ſit.* And this is agreeable to the words uſed in 3 *H.* 8. c. 11. concerning admiſſions by the biſhop of London and dean of St. Paul's. The ſuperviſal of the cenſors is expreſſed to include not only the phyſicians of London, but *omnes etiam qui per ſeptem miliaria in circuitu ejuſdem medicinam exercent.* The ſame obſervation holds as to puniſhments. This muſt regard thoſe who had a right to practiſe in London and within ſeven miles of it, and were not fellows of the college. Theſe obſervations convince me, that the charter had an idea " that ſome perſons " might practiſe by licence under their ſeal, who were not fel- " lows of the college." Then let us ſee how the uſage was. In 1555, they muſt have had a probationary licence, before admiſſion into the college. Afterwards, it was to be a probation for four years before admiſſion. The College might grant ſuch probationary licences, with ſome reaſon, and agreeably to their inſtitution. This ſhews that ſome licences were granted to perſons not fellows of the college. The 3 *H.* 8. c. 11. takes away all former privileges; and ſays, that no perſon within London, or ſeven miles of it, ſhall exerciſe as a phyſician, except he be firſt examined, approved, and admitted by the biſhop of London or by the Dean of St. Paul's, calling to them four doctors of phyſic: and the charter and ſtatute confirming it have left every thing at large to the College, no way confined or reſtrained but by the fitneſs of the objects. In 1561, a partial licence was granted to an oculiſt: a perſon may be fit to practiſe in one branch, who is not fit to practiſe in another. Licences have alſo been granted to *women:* and that may not be unreaſonable in particular caſes; as, for inſtance, ſuch as Mrs. *Steven*'s medicine for the ſtone. Partial licences have been given, for above 200 years. Of late years, indeed, general

neral licences have been usual: and the persons applying for them have been examined, though not meant to be members of the corporation or college. In 1581, notice is taken of three classes; fellows, candidates, and licentiates: and from that time, they have given licences to practise. The licences probably took their rise from that illegal by-law (now at an end) which restrained the number of fellows to twenty. This was arbitrary and unjustifiable: they were obliged to admit all such as came within the terms of their charter. Yet it is probable that the practice of licensing was in consequence of their having made it. However, for above a hundred years, there has been a known distinction between fellows and licentiates: it is as well known as the distinction between graduates and under-graduates in the universities. This being premised, let us enquire "Who these gentlemen are, that are now apply-"ing to the Court." They are persons who set up a title directly contrary to the sense in which their licence is given to them and received by them. They can't avail themselves of their instrument, in this way: it would be a cheat upon the College. And they have acquiesced many years under this licence given them by the College, as merely a licence to practise. But even supposing them to have a right to be fellows; yet, as it is clear that the licence does not make them *ipso facto* fellows, they could not vote in the election of censors before their admission to the fellowship. And, therefore, the exclusion of their votes can not impeach this election. I am of opinion, "that this rule ought to be discharged." If my brothers should concur with me, the College, as now constituted, is at present to be considered as the body corporate. I have a great respect for this learned body: and, if they should think proper to hearken to my advice, I would wish them to consider whether this may not be a proper opportunity for them to review their statutes. And I would recommend it to them to take the best advice in doing it; and to attend to the design and intention of the crown and parliament in their institution. I see a source of great dispute and litigation in them as they now stand: there has not, as it should now seem, been due consideration had of the charter, or legal advice taken, in forming them. The statute of 14 and 15 *H.* 8. c. 5. after reciting the charter, mentions it to be expedient and necessary to provide "that no person of the said politic body and com-"monalty aforesaid be suffered to exercise or practise physic, "but only those persons that be profound, sad, and discreet, "groundedly learned, and deeply studied in physic." I do not say, that no man can be a licentiate, who is not perfectly and complely qualified to be a fellow of the college. Many persons of no great skill or eminence have been licensed: and there seem to be fewer checks, guards, and restrictions upon granting licences, than upon the choice of fellows. Yet it has

has been ſaid, "that there are many amongſt the licentiates, "who would do honour to the college, or any ſociety of "which they ſhould be members, by their ſkill and learning "as well as other valuable and amiable qualities; and that the "College themſelves, as well as every body elſe, are ſenſible "that this is in fact true and undeniable." If this be ſo, how can any by-laws, which exclude the poſſibility of admitting ſuch perſons into the college, ſtand with the truſt repoſed in them, "of admitting all that are fit?" If their by-laws interfere with their exerciſing their own judgment, or prevent them from receiving into their body perſons known or thought by them to be really fit and qualified; ſuch by-laws require regulation. Such of them, indeed, as only require a proper education, and a ſufficient degree of ſkill and qualification, may be ſtill retained: there can be no objection to cautions of this ſort; and the rather, if it be true, "that there are ſome amongſt "the licentiates, unfit to be received into any ſociety." It is a breach of truſt in the College, to licenſe perſons altogether unfit. I do not chooſe to ſpeak more particularly: but I recommend it to thoſe who are now likely to be eſtabliſhed the maſters of the college, to take good advice upon the points I have been hinting to them. Mr. Juſtice YATES obſerved, that upon this application of the licentiates, grounded upon their not being admitted to vote, it was incumbent upon them to ſhew "that they had a right to vote." They claim to be members of the corporation, equally with the fellows of the college: they inſiſt "that the charter has made them ſo." And it has been ſaid "that there is no other way of continu-"ing the corporation;" and "that no by-laws or uſage "can contravene the expreſs words of the charter." But I am far from thinking that all the men of and in London then practiſing phyſic, were incorporated by the charter. —The *immediate* grantees under the charter were the ſix perſons particularly named in it: the reſt were to be admitted by them. They were not *ipſo facto* made members. They were firſt to give their conſent, before they became members: they could not be incorporated without their conſent. Much leſs are future practiſers of phyſic of and in London actually incorporated by this charter. If the inhabitants of a town are incorporated, yet every one muſt be admitted before he becomes a corporator. The crown can't oblige a man to be a corporator, without his conſent: he ſhall not be ſubjected to the inconveniences of it, without accepting it and aſſenting to it. Upon moving for an information, in nature of a *quo warranto*, againſt a corporator, it is neceſſary to prove "that the corporation has accepted." The counſel for the licentiates inſiſt, that their admiſſion, by the letters teſtimonial, "to practiſe phyſic in London, and within ſeven miles

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"of it," is an admiſſion into the college or corporate body.—But this licence "to practiſe phyſic in London and within "ſeven miles of it," does by no means render the licentiate liable to all the burdens and inconveniences of being an actual member of the college. A man is not capable of being admitted into the college, without being poſſeſſed of certain qualifications which are made requiſite. But granting that he really is poſſeſſed of thoſe requiſite qualifications, yet his merely being qualified for becoming a member, does not make him one. The inſtrument which gives the licence or permiſſion "to practiſe," does not mention any ſuch thing as an admiſſion to be a member of the college. The word "admiſſus" is only uſed, in this inſtrument, as a more claſſical term than "permiſſus:" it don't import an actual admiſſion into the college. The charter and the act of parliament confirming it, make a diſtinction between the college or corporation, and other men of the ſame faculty: "to govern the ſaid fellowſhip "and commonalty, and all men of the ſaid faculty;" and again, "*collegium ſive communitatem prædict' et omnes homines ejuſdem* "*facultatis.*" A good deal has been ſaid about long uſage. But uſage only applies, where the conſtruction is doubtful. Here, the conſtruction is not doubtful. If it were, then, indeed, uſage for 200 years might have weight. But that is not the preſent caſe. The taking money of the licentiates has been urged as an argument on their ſide. But taking their money does not prove them to be members of the college. If it has been wrongfully taken from them, they may recover it back again. It has been called a taxing them, to be contributory to the corporate charges and expences: and ſuch a tax, it has been ſaid, can't be levied upon ſtrangers. From whence it has been inferred, that the College did not conſider them as ſtrangers, but as fellows. But this can't amount to a proof of their having been admitted into the college; even though it ſhould be granted to afford them a claim to admittance: it could not give them a right to vote, as being members of the corporation, at the election of cenſors. The preſent application is not for a *mandamus* to admit them; but is grounded upon the denial of their right to vote, as being members: it ſuppoſes them to have been already admitted. I am clearly of opinion, that the gentlemen now applying for this information are not members of the college.—Mr. Juſtice ASTON agreed, that the reſtraining the number of fellows to twenty was illegal: and he thought, that the diſtinction between fellows and licentiates had taken its riſe from the reſtriction of the number of fellows. He agreed, alſo, that no perſon can be obliged to be a member of a corporation without his conſent: and he allowed, that the charter included only ſuch perſons as accepted and aſſented to it. But, after expreſſing a very high opinion of Lord MANSFIELD's abilities, and Mr. Juſtice YATES's,

and a modeſt diffidence of his own, he acknowledged that his ſentiments, upon the conſtruction of the charter, connected with the act of parliament, and the right of admiſſion into the college, differed from theirs: and he thought, that in grants of this kind, the conſtruction ought to be made in a liberal manner; and this grant includes "*omnes homines ejuſdem facultatis* "*de et incivitate prædictâ*;" and the application to parliament for the act of 14 and 15 *H.* 8. c. 5. (entitled, "The Privileges and "Authority of Phyſicians in London"), to confirm the charter, is made by the ſix perſons particularly named in it, "and "all other men of the ſame faculty within the city of London "and ſeven miles about." All the acts of parliament made in *pari materia* ſhould be taken, he ſaid, together; and the conſtruction has been uniform, till the time of Queen *Mary*. Till then, there was no diſtinction of major and minor, amongſt theſe phyſicians. It ſeemed to him that the idea was, "that "all perſons duly qualified, who took teſtimonials under the "college-ſeal, were to be of the community." And this was ſufficient to continue the ſucceſſion, and perpetuate it. He ſhould, however, give no opinion, he ſaid, how it might turn out upon a *mandamus*. As to the motion now depending, he proceeded and concluded thus: But upon the foot of the preſent application for an information, in nature of a *quo warranto*, againſt the cenſors, to ſhew by what authority they exerciſe their office; only becauſe they have been elected without their intervention, who have never been admitted into the corporation (whatever claim they may have to demand ſuch admiſſion); I am clearly of opinion, that they have laid no ſufficient ground to ſupport it; and, therefore, that this rule ought to be diſcharged. Mr. Juſtice WILLES confined himſelf to the point directly and immediately in queſtion before the Court. Theſe gentlemen, the licentiates, can have no pretence, under the circumſtances in which they now ſtand, to object to the election of the cenſors, for want of the admiſſion of their votes. For, whatever right they may claim, or whatever right they may really have, to their admiſſion into the fellowſhip of the college or corporation; yet, as they never have been admitted into it, no mere right of admiſſion (be it ever ſo clear and indiſputable) can give them a right to vote in corporate-elections, before they ſhall have been admitted into the corporation. Therefore, they can not, before their admiſſion, maintain this rule.—Lord MANSFIELD: I reſt my opinion upon this ground; "that their preſent application to the Court is "under an inſtrument which ſhews, that they are not now "fellows of the college, nor admitted into the corporation." I think, that every perſon of proper education, requiſite learning and ſkill, and poſſeſſed of all other due qualifications, is entitled to have a licence: and, I think, that he ought, if he deſires it, to be admitted into the college. But I can not lay it down,

"that

" that every man who has a licence from the college, by letters " teſtimonial, to practiſe phyſic in London, and within ſeven " miles of it, does thereby actually become a member of the " college, and obtain a right to vote in corporate elections." The diſtinction between fellows and licentiates has been eſtabliſhed above a hundred years: and theſe gentlemen have accepted an inſtrument which was not underſtood, by either ſide, to convey a right to be *ipſo facto* fellows. And I am clear, that they can have no claim to vote before admiſſion. How it might be upon an application to the Court for a *mandamus* " to oblige the College to admit them," is another queſtion: I give no opinion at all upon that. Upon the former point I entirely concur with the Court. Mr. Juſtice YATES—I give no opinion how it might be upon a *mandamus*. Lord MANSFIELD concluded the whole, with obſerving, that that muſt depend upon the particular caſes of the perſons applying for ſuch *mandamus*, as they might be reſpectively circumſtanced. The Court were unanimous in diſcharging the preſent rule.

The diſpute between the College and the Licentiates ſtill continued, but it was left in this caſe undetermined, whether the licentiates in phyſic have in general a right to demand admiſſion into the college.—In Michaelmas term, 9. *G.* 3. on Thurſday, 17th November, 1768, Mr. *Morton*, ſupported by Sir *Fletcher Norton*, moved for a *mandamus*, to be directed to the college, commanding them to admit into their body and fellowſhip Dr. *Edward Archer*; to whom they had, after the proper examinations, in 1752, granted a *diploma* to practiſe phyſic in London and within ſeven miles thereof. They produced an affidavit of his having demanded an admiſſion into the fellowſhip of the college, and of his having been refuſed. And Mr. *Walker*, at the ſame time, made a like motion on behalf of Doctor *Fothergill*. Theſe motions were intended to try the queſtion " Whether the licentiates had a right to be " fellows or members of the faculty of phyſic?" Rules were accordingly granted, to ſhew cauſe, in both caſes: both which rules were made abſolute, on the laſt day of the following *Hilary* term; and afterwards writs of *mandamus* were iſſued, and returned; and Doctor *Archer*'s came on to be argued on Wedneſday, the 29d of November, 1769. The writ of *mandamus* recited, that Dr. Archer *having been duly examined and approved, was admitted to exerciſe the faculty of phyſic in the city of London and for ſeven miles round the ſame, by the preſident and commonalty of the faculty of phyſic in London, by the letters of the ſaid preſident and college, ſealed with their common ſeal; and*, by reaſon of the premiſſes, *the ſaid* Edward Archer *became lawfully entitled to be admitted a member* of the ſaid college, commonalty, and corporation, *and* ought *to be admitted a member of the ſaid corporation*, &c. &c. THE ANSWER of the preſident and college or commonalty of the faculty of phyſic in London

Rex v. College of Phyſicians. Tr. Ter. 11. G. 3. B. R. 5 *Burr.* 2740.

to the *mandamus* was as follows: "That true it is that the within named *Edward Archer*, doctor in physic, having been for that purpose duly examined and approved, was admitted to exercise the faculty of physic in the city of London, and for seven miles round the same, by the president and commonalty of the faculty of physic in London, by the letters of the said president and college, sealed with their common seal, as by the within writ is alleged. But we do further most humbly certify, that *by reason of the premisses the said* Edward Archer *did not become lawfully entitled to be admitted* a member *of the said college, commonalty, and corporation, as by the same writ is supposed*: and, therefore, we the said president and college or commonalty of the faculty of physic in London cannot admit or cause to be admitted the said *Edward Archer* a member, nor can we administer or cause to be administered to the said *Edward Archer* the oaths, &c. It was argued for Doctor *Archer*, that he was entitled to be admitted into the fellowship of the college: and the statute of 14, 15, *H.* 8. c. 5, was relied on. But Lord MANSFIELD and Mr. Justice YATES asked how it appeared that the Doctor was entitled to such admission into the college? observing, at the same time, that the statute relied upon, was only a private act, relating solely to a particular body of men. —ASTON, J. took notice, that here is no ground laid for such a claim. It is nothing more than that he was examined and admitted as a licentiate: and, therefore, he is lawfully entitled to be and ought to be admitted a fellow and a member of the corporation. But how does that follow?—YATES, J. He has shewn no colour of title to be so. How then can the Court issue a peremptory *mandamus* to admit him? here are no premisses whereupon to ground the conclusion "That he is entitled to "what he claims: here is no title at all shewn to support his claim."

In *Hilary* term, 10 *G.* 3. new rules of the like kind, in favour of the licentiates, were moved for, and a few days afterwards made absolute; and new writs of *mandamus* were thereupon issued and returned. The return to the new writ in the case of Dr. *Fothergill* was as follows: That true it is an act of parliament was made in the third year of *Henry* the Eight, &c.; and that such other act of parliament was made in the fourteenth year of the reign of *Henry* the Eighth; and that such other act of parliament was made in the thirty-second year of *Henry* the Eighth; and that such other act was made in the first of *Mary*, as in the said writ is in that behalf mentioned; and that *John Fothergill*, doctor in physic, in the said writ named, *having been for that purpose duly examined and approved, was admitted to exercise the faculty of physic in the city of London, and for seven miles round the same, by the president and college or commonalty of the faculty of physic in London, by the letters of the said president and college or commonalty, sealed with their common seal*, of the date in the said writ mentioned: but we

we do further moſt humbly certify *that, by reaſon of the premiſſes, the ſaid* John Fothergill *did not become lawfully entitled to be admitted a member of the ſaid college and commonalty and corporation*, as by the ſaid writ is above ſuppoſed. And we do further moſt humbly certify and return, that ever ſince the making of the ſaid acts of parliament, in the ſaid writ mentioned, *every perſon admitted a member of the ſaid college or commonalty*, hath been, and hath uſed and been accuſtomed to be, before his being admitted a member of the ſaid college or commonalty, *elected by the preſident and college or commonalty aforeſaid to be a member of the ſaid college or commonalty; and that the ſaid* John Fothergill *hath not been nor was elected by the preſident and college or commonalty aforeſaid to be a member of the ſaid college or commonalty.* And we do further moſt humbly certify and return to our ſaid moſt ſerene preſent ſovereign lord the now king, that after the making of the ſaid ſeveral acts of parliament in the ſaid writ mentioned, and long before the ſaid *John Fothergill* was admitted to the exerciſe of the faculty of phyſic in the city of London, and ſeven miles round the ſame, as in the ſaid writ is mentioned, to wit on the firſt day of February, in the year of our Lord one thouſand five hundred and fifty-five, at an aſſembly of the ſaid preſident and college or commonalty, a certain reaſonable ſtatute act and ordinance, commonly called a BY-LAW (not now extant in writing), was made and ordained by the then preſident and college or commonalty of the faculty of phyſic in London, whereby "it was ordained, that every perſon hereafter "to be admitted a member of the ſaid college or common-"alty ſhould, before his being admitted a member of the ſaid "college or commonalty, be elected by the preſident and col-"lege or commonalty aforeſaid to be a member of the ſaid col-"lege or commonalty;" which ſaid by-law ſtill is in full force and effect, in no wiſe repealed, reverſed, annulled, vacated, or made void; and that the ſaid *John Fothergill* hath not been nor was elected to be a member of the ſaid college or commonalty according to the form and effect of the ſaid by-law. And we do further moſt humbly certify and return to our ſaid moſt ſerene ſovereign lord the now king, that after the making of the ſaid ſeveral acts of parliament in the ſaid writ mentioned, and long before the ſaid *John Fothergill* was admitted to exerciſe the faculty of phyſic as in the ſaid writ is mentioned, to wit, on the firſt day of February, in the year of our Lord one thouſand five hundred and fifty-five, at an aſſembly of the ſaid preſident and college or commonalty a certain reaſonable ſtatute act and ordinance, commonly called a by-law (not now extant in writing), was made, enacted, and ordained by the ſaid preſident and college or commonalty for the wholeſome government, overſeeing, and correction of the ſaid college or commonalty, and of all men exerciſing the ſame

faculty in the city of London, and within ſeven miles round the ſame, " whereby perſons then exerciſing, or who ſhould " at any time thereafter exerciſe the ſaid faculty of phyſic in " the city of London, and within ſeven miles round the ſame, " were diſtinguiſhed into three claſſes or orders; namely, one " claſs conſiſting of the members of the ſaid college or com- " monalty for the time being, who were then and were to be " from thenceforth called fellows of the ſaid college or com- " monalty; another claſs conſiſting of ſuch perſons as had been " or ſhould be deſirous of becoming members of the ſaid col- " lege or commonalty, and had been, or ſhould be, examined " and approved of by the preſident and cenſors of the ſaid " college or commonalty to be candidates for election into the " ſociety or fellowſhip of the ſaid college or commonalty, who " were then and were to be from thenceforth called candi- " dates; and the other claſs to conſiſt of ſuch perſons as then " were or at any time thereafter ſhould be licenſed and ad- " mitted to exerciſe the ſaid faculty of phyſic in the city of " London, and within ſeven miles round the ſame, by the ſaid " preſident and college and commonalty, by their letters ſealed " with the common ſeal of the ſaid college or commonalty; " which laſtmentioned claſs not being members of the ſaid " college or commonalty, were then and were to be from " thenceforth called *permiſſi* or *licentiates*;" and that at the reſpective times of making the ſtatutes, acts, ordinances, or by-laws herein after mentioned, and before and at the time the ſaid *John Fothergill* was admitted to exerciſe the faculty of phyſic, as in the ſaid writ is mentioned; perſons exerciſing the faculty of phyſic within the city of London, and ſeven miles round the ſame, were diſtinguiſhed into the three claſſes or orders aforeſaid, and well known by the reſpective names of fellows, candidates, and licentiates: and we do further humbly certify and return to our moſt ſerene ſovereign lord the now king, that before the ſaid *John Fothergill* was admitted to exerciſe the faculty of phyſic as in the ſaid writ is mentioned, that is to ſay, on the fourth day of April, in the year of our Lord one thouſand ſeven hundred and thirty-ſeven, at an aſſembly of the ſaid preſident and college or commonalty of the faculty of phyſic, a certain reaſonable ſtatute act and ordinance, commonly called a by-law, was made, enacted, and ordained by the ſaid preſident and college or commonalty, for regulating the admiſſion of members of the ſaid college or commonalty, whereby it was enacted and ordained, " that " nobody ſhould be admitted into the ſociety of the college " who ſhould not firſt have been of the number of candidates " for one whole year, or publicly read phyſic for three years in " ſome univerſity of Britain, or been doctor of the chair in " ſome univerſity of this kingdom, or ordinary king's phyſi- " cian;" which ſaid laſtmentioned by-law, from the time of

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the making thereof, until, and at the time of the said admission of the said *John Fothergill* to exercise the faculty of physic in the city of London, and within seven miles round the same, and until the first day of April, in the year of our Lord one thousand seven hundred and sixty-five, continued in full force and effect. And we do further certify and return to our said most serene sovereign lord the now king, that on the first day of April, in the year of our Lord one thousand seven hundred and sixty-five, at an assembly of the said president and college or commonalty, a certain other reasonable statute act and ordinance, commonly called a by-law, was made, enacted, and ordained by the said president and college or commonalty of the faculty of physic aforesaid, for the regulating of the admission of members of the said college or commonalty, whereby it was enacted and ordained, "that nobody should be admitted into "the order of fellows who should not have been a candidate "for one whole year; except the king or queen's ordinary "physician with salary or royal professor of physic in the uni-"versity of Oxford or Cambridge;" which said last-mentioned by-law still remains in full force and effect, not reversed, annulled, repealed, or vacated. And we do further most humbly certify and return to our most serene sovereign lord the now king, that the said *John Fothergill* is not nor ever was candidate for one whole year, or any other time, nor ever publicly read physic for three years in any university of Britain, nor ever was doctor of the chair in any university of this kingdom, nor is nor ever was king or queen's ordinary physician, with salary or without salary, nor is nor ever was royal professor of physic in the university of Oxford or Cambridge. And we do further humbly certify to our most serene sovereign lord the now king, that after the making of the said several acts of parliament in the said writ mentioned, and before the said admission of the said *John Fothergill* to exercise the faculty of physic as aforesaid, that is to say, on the said fourth day of April, in the said year of our Lord one thousand seven hundred and thirty-seven, at an assembly of the said president and college or commonalty, a certain other reasonable statute act and ordinance, commonly called a by-law, was made, enacted, and ordained by the said president and college or commonalty, whereby, "reciting that many practised physic in the city of "London, whom the said president and college or commonal-"ty deemed altogether unfit to be adopted into the number of "fellows or candidates, either because they were not Britons "by birth, or had not taken the degree of a doctor, or were "not sufficiently learned, or sufficiently advanced in age and "gravity, or for other like causes, and yet might be able to "serve the public, and do good to men's health, at least in "some cures, it was ordained and appointed, that, after due "examination and approbation of the president and censors,

" ſuch perſons ſhould be permitted to practiſe ſo long as they " behaved themſelves well," which ſaid by-law or ordinance, from the time of making thereof, until and at the time of the examination, approbation, and admiſſion of the ſaid *John Fothergill* to exerciſe the faculty of phyſic in the city of London and within ſeven miles round the ſame, in the ſaid writ mentioned, and afterwards was in full force and effect; and divers perſons from time to time applied to be, and according to, and in purſuance of the laſtmentioned by-law or ordinance, were examined and approved of by the preſident and cenſor of the ſaid college or commonalty, for the time being, and licenſed and admitted to exerciſe the faculty of phyſic in the city of London, and within ſeven miles round the ſame, by the ſaid preſident and college or commonalty, by their letters ſealed with their common ſeal; which perſons ſo examined, approved, and admitted to exerciſe the faculty of phyſic in the city of London, and within ſeven miles round the ſame, have been, and are called and known by the name of licentiates. And we do further certify and return, that the ſaid *John Fothergill* applied to the ſaid preſident and college or commonalty of the faculty of phyſic in London aforeſaid, to be by them licenſed and admitted to exerciſe the faculty of phyſic in the city of London, and within ſeven miles round the ſame; and that the ſaid *John Fothergill* was thereupon, according to, and in purſuance of, the laſtmentioned by-law or ordinance, examined and approved by the preſident and cenſors of the ſaid college or commonalty, and was licenſed and admitted by the ſaid preſident and college or commonalty according to the ſaid laſtmentioned by law or ordinance, by their letters ſealed with their common ſeal, to exerciſe the faculty of phyſic in the city of London, and for ſeven miles round the ſame; which is the examination, approbation, and admiſſion of the ſaid *John Fothergill* to exerciſe the faculty of phyſic in the city of London, and within ſeven miles round the ſame, in the ſaid writ mentioned. And we do further certify and return to our moſt ſerene ſovereign lord the now king, that the ſaid *John Fothergill* never was examined, approved, or admitted to exerciſe the faculty of phyſic in the city of London, and within ſeven miles round the ſame, in any other manner, or for any other purpoſe than as and in order to his being a licentiate as aforeſaid. *And for theſe reaſons we cannot admit, or cauſe to be admitted, the ſaid* John Fothergill, *a member of the ſaid corporation*, together with all the liberties, privileges, franchiſes, emoluments, and commodities to one of the members of the ſaid corporation belonging and appertaining, as by the ſaid writ we are commanded.—THE GENERAL drift of the argument in ſupport of the claim of the licentiates was, that the charter meant to make them members of the corporation; that it equally incorporates every man then practiſing the faculty of phyſic in London

London, and is not confined to the particular persons named in it; that it includes all future practisers, as well as those then existing; that a person having a licence becomes thereby one of the body, and wants nothing but the form of admission. This, they said, was the sound and legal construction of the charter. A right to admission is a ground for a *mandamus*, where that admission is refused. They could not found their right upon any fact or precedent; because there had been a constant usurpation ever since the charter. But no usage or by-law could control the charter. And none of the reasons given in their return are sufficient to destroy the licentiate's claim. The college have duly examined him, approved him, and admitted him to practise, with full testimonials of his qualifications for it: and it does not lie in their mouths, after this, to say that he is not fit to be admitted into their body. They alleged that the by-law of the college exceeded their power; and that their usage is contrary to their charter. THE COUNSEL FOR THE COLLEGE urged the impropriety and unfitness, that the lowest licentiate should, by obtaining a mere licence to practise physic, be *ipso facto* invested with the important offices of the college, and be trusted with those regulations and inspections which are committed to great and eminent physicians. It is a claim that was never thought of for near two hundred and fifty years: that the contrary usage has been acquiesced under. The demand of admission into the corporation upon a mere licence under this by-law, is unfair, uncandid, ungenerous, and unjust. It is a fraud: it is contrary to the known condition of the licence, and to his own agreement. It is a breach of the condition of the licence. These by-laws are a proper check: no man ought to be admitted into the college without passing an examination as a candidate. The licentiates know very well that their examination reached only to those lesser degrees of learning, skill, and knowledge, which might serve merely to qualify them to begin to practise in the profession they had entered into. But it may very well be supposed, that many persons who have been admitted such licentiates, merely to enable them to practise, would not have been judged worthy, upon a stricter examination as candidates for fellowship, to become members of the college. The college exclude none from practising, who may be of service to mankind. But the important offices of the members of the college require a considerable degree of learning, knowledge, and judgment. This attempt aims at levelling all ranks: it would confound all distinctions, and make no difference between the most learned and experienced physician and the rawest beginner. Lord MANSFIELD said he had read over all their constitutions, statutes, and by-laws: and he intimated, that many of them are narrow, if not illegal. This matter came on before, upon a title not set out in the writ. A title is now set out:

out: which title is a licence from the college, after having been duly examined and approved, "To exercise the faculty "of physic in the city of London, and for seven miles round "the same." If that alone makes him *ipso facto* a fellow of the college, there is no need of admission. The return admits the four acts of parliament stated in the writ; and also the licence; but they deny it to be a consequence, "That *by reason* "*of the premises* he became lawfully entitled to be admitted a "MEMBER of the said college and commonalty and corpo-"ration, as by the writ is supposed." Then they set forth the usage ever since the making of the acts of parliament, that every person admitted a member must be, before his being admitted a member, *elected* to it by the president and college; and that the doctor had never been so elected. Then they set forth a by-law (1) to the same effect; and that he has not been elected a member according to that by-law. They then set forth another (2) by-law, which divides the faculty into three classes, viz. members of the college; candidates for election into such membership (who were to be examined and approved of by the president and censors to be candidates for election; and *licentiates* or *permissi*. They set forth another (3) by-law, that nobody should be admitted into the society of the college, who should not first have been of the number of candidates for one whole year, or publicly read physic for three years in some university of Britain, or been doctor of the chair in some university of this kingdom, or ordinary king's physician. They set forth another (4) by-law, that nobody should be admitted into the order of fellows, who should not have been a candidate for one whole year; except the king or queen's ordinary physician with salary, or royal professor of physic in Oxford or Cambridge. They aver that the doctor never was a candidate for one whole year, or any other time; and that he did not come within any of the exceptions in these two last-mentioned by-laws. Then they set forth a fifth by-law (made at the same (5) time with the third), whereby reciting "That many practised physic in the city "of London, whom the president and college or commonalty "deemed altogether unfit to be adopted into the number of "fellows or candidates, either because they were not Britons "by birth or had not taken the degree of a doctor, or were "not sufficiently learned or sufficiently advanced in age and "gravity, or for other like causes, and yet might be able to "serve the public and do good to men's healths, at least in "some cures," it was ordained, that after due examination and approbation of the president and censors, such persons should be PERMITTED TO PRACTISE, *so long* as they be-

(1) 1st February, 1555. (2) 1st February, 1572.
(3) 4th April, 1737. (4) 1st April, 1765. (5) 4th April, 1737.

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haved themselves well. That many persons, from time to time, applied to be, and according to and in pursuance of this last by-law were, examined and approved by the president and censors for the time being, and licensed and admitted to exercise the faculty of physic in the city of London and within seven miles round the same; and have been and are called and known by the name of *licentiates*. They add further, that Doctor *Fothergill applied* to the president and college, to be by them licensed and admitted to exercise the faculty of physic in the city of London and within seven miles round the same; and that he was *thereupon*, *according to and in pursuance* of the last-mentioned by-law, examined and approved by the president and censors, and was licensed and admitted by the president and censors, *according to* the said last-mentioned by-law, to exercise the faculty of physic in the city of London and for seven miles round it. And they aver *this* to be the examination, approbation, and admission of him in the writ mentioned; and that he never was examined, approved, or admitted to exercise the faculty of physic in the city of London, and within seven miles round the same, in any *other manner*, or for any *other purpose*, than *as* and *in order* to his being a LICENTIATE as aforesaid. Now, be this by-law good, or bad, yet the right of admission into the college is claimed *under* it. It would be a most unreasonable thing, to accept this licence *under* the by-laws, and yet to treat these by-laws as null and void; to turn this licence so accepted, against the persons from whom it was thus accepted; and to set it up, as the foundation of a right to be admitted under the charter. Therefore, as no other foundation of such right to be a fellow is shewn, it comes round to the very point upon which our former determination turned: and I am of opinion that the return ought to be allowed. ASTON, J. was entirely of the same opinion, that supposing the by-law to be bad; yet as the doctor came in *under* it, he was bound by it. As he claims his title to the fellowship under it he cannot now desert that title claimed under the by-law; and claim under the charter. His acceptance of the licence under the by-law contradicts his claim under the charter. And it would be a fraud upon the college, to make this use of their licence, directly contrary to the manifest and acknowledged intention of it. He also thought that the point had been, in effect, determined upon the former application. WILLES, J. likewise thought that this came round just to the same point that was determined before. He concurred with Lord *Mansfield* and his brother *Aston*. ASHHURST, J. did the like; and thought that the former determination governed this case. Doctor *Fothergill* has accepted this licence, *under* the by-law. He ought not therefore now to suppose it a bad one; and yet, upon the foundation of this very same licence, to insist upon a right under the charter. *Per Cur.* unanimously, let the RETURN BE ALLOWED.

lowed. Lord Mansfield gave a hint to the College, whether they would think it adviseable to trust to a return upon their present by-laws; or whether they would not consider about mending them: and it seems that they have been since amended.

The King *v.* the President and College of Physians, Ea. Ter. 37 Geo. 3. B. R. 7 *Ter. Rep.* 282

But in this case, it was finally decided that a doctor of physic, who has been licensed by the College of Physicians to practise physic in London and within seven miles, cannot claim as a matter of right to be examined by the College in order to his being admitted a fellow of the college. This was a rule calling on the President and College or Commonalty of Physic in London to shew cause why a mandamus should not issue, commanding them to examine *C. Stanger*, M. D. as to his qualification and fitness to be admitted into the said corporation as a member or fellow thereof. By stat. 3 *Hen.* 8. c. 11. it is enacted that no person within the city of London or within seven miles thereof shall take upon him to exercise as a physician, except he shall first be examined, approved, and admitted by the bishop of London or by the dean of St. Paul's for the time being, calling to him or them four doctors of physic; with a proviso that the act shall not be prejudicial to the universities of Oxford or Cambridge or to any privileges granted to them. King Henry Eighth afterwards, in the tenth year of his reign, by charter incorporated the College of Physicians: after reciting the mischiefs that had arisen to the public from the practice of unskilful and ignorant men, and his will "Collegium perpetuum doctorum et gravium virorum, qui medicinam in urbe nostrâ Londino et suburbibus intraque septem millia passuum ab eâ urbe quaquaversus publicè exerceant, instituì," he incorporated them thus, *J. Chambre*, *T. Linacre*, *F. de Victoria*, *N. Halsewel*, *J. Francisco*, and *R. Yaxley* medicis concessimus quod ipsi *omnesque homines ejusdem facultatis de et in civitate prædictâ* sint in re et nomine unum corpus et communitas perpetua sive collegium perpetuum." Then power is given to the college to elect annually a president of the college, "ad supervidendum recognoscendum et gubernandum pro illo anno collegium sive communitatem *et omnes homines ejusdem facultatis* et negotia eorundem." The president and college are then authorised to make by-laws "pro salubri gubernatione supervisu et correctione collegii seu communitatis *et omnium hominum eandem facultatem in dictâ civitate* seu per septem milliaria in circuitu ejusdem civitatis exercentium, &c." It then directs that no person shall practise physic in London or within seven miles thereof "nisi ad hoc per dictum presidentem et communitatem admissus sit," &c. And it gives the president and the college power to elect annually four persons (now called censors) "qui habeant supervisum et scrutinium correctionem et gubernationem omnium et singulorum dictæ civitatis medicorum utentium facultate medicinæ

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in eâdem civitate, ac aliorum medicorum forinſecorum quorumcumque facultatem illam medicinæ aliquo modo frequentantium et utentium infra eandem civitatem et ſuburbia ejuſdem ſive intra ſeptem milliaria in circuitu ejuſdem civitatis," &c. And it contains an exemption from ſerving on juries thus; "quod nec preſidens nec aliquis de collegio prædicto medicorum, nec ſucceſſores ſui, *nec eorum aliquis exercens facultatem illam ſummoneantur*," &c. The ſtat. 14 and 15 *Hen.* 8. c. 5. after reciting the above charter, and the expediency of providing that no perſon of the ſaid politic body and commonalty ſhould be ſuffered to exerciſe and practiſe phyſic but only thoſe who were "profound, ſad, and diſcrete, groundly learned and deepl ſtudied in phyſic," confirmed the charter, and enacted that the ſix perſons therein named chooſing to them more of the commonalty ſhould thenceforth be called the Elects, who ſhould annually chooſe a preſident of the ſaid commonalty; with power in caſe of the death of one of the elects to the ſurvivors of the eight to elect another; and it enacted that no perſon ſhould be ſuffered to practiſe phyſic throughout England until he ſhould be examined by the preſident and three of the elects, and have from the preſident and three of the elects letters teſtimonial of their examination, "except he ſhould be a graduate of Oxford or Cambridge, who had accompliſhed all things for his form without any grace." Dr. *Stanger*, after referring to the above ſtatutes and charter, ſtated in his affidavit that in 1783 he took a degree of doctor of phyſic at Edinburgh, after a reſidence there for three years, and after having ſtudied phyſic there and at other places for many years; that afterwards he went abroad to France, Italy, and Germany, and ſtudied phyſic there for ſeveral years more. That in 1789 he obtained a licence from the College of Phyſicians here in the uſual way to practiſe in London and within ſeven miles thereof, and that he has practiſed ever ſince. That in June, 1796, he applied to the preſident and college at their general meeting to be admitted by them to be a member of their corporation, ſubmitting himſelf to be previouſly examined by them concerning his qualification and fitneſs to be admitted a member of the corporation, which the college refuſed. Dr. *Stanger* alſo added in his affidavit that he was duly qualified and fit to be admitted a member of the College. The affidavits in anſwer to the rule diſcloſed the following (among other) facts. For two hundred years paſt there have been three claſſes of perſons practiſing phyſic in London and ſeven miles round; the fellows; candidates, perſons deſirous of becoming members, and who have been examined and approved by the preſident and cenſors to be candidates for election into the ſociety or fellowſhip; and the licentiates, who may practiſe as fully in all reſpects as fellows and have the ſame benefits and advantages. Various by-laws have been made by the College reſpecting the qualifications of perſons to

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be admitted fellows; one of them ſo long ago as 1637, by which it was ordained that no perſon ſhould be admitted a fellow unleſs he had performed all his exerciſes and diſputations in one of our univerſities without diſpenſation, and which has continued ever ſince with ſome little alterations. To prevent any miſtake ariſing from the words "aliquâ Britanniæ Academiâ" in ſome of the by-laws reſpecting this qualification, an explanatory by-law was made in 1751, in which it was declared that the meaning of the words was that no perſon ſhould be admitted who was not a Doctor of Phyſic of Oxford or Cambridge. The by-laws of the college have been reviſed and altered ſince the year 1768. By thoſe now in exiſtence no perſon can be admitted a fellow unleſs he has been a candidate for a year, except in certain caſes hereafter mentioned. No perſon can be admitted into the claſs of candidates unleſs he has been created a Doctor of Phyſic in the univerſity of Oxford or Cambridge, or unleſs he has obtained the ſame degree in the univerſity of Dublin, and has been incorporated into one of the univerſities of Oxford or Cambridge; nor can any ſuch perſon be admitted into the claſs of candidates until after he has been examined as to his knowledge of phyſic in three of the greater or leſſer meetings (called the comitia majora and comitia minora) of the college. After a perſon has been a candidate for a year, he may be propoſed by the preſident at one of the greater meetings and admitted a fellow, if the majority of the fellows conſent, without further examination. But by two other by-laws perſons not having the above qualifications may be propoſed in one of two ways; by one, the preſident is enabled once in every other year at the comitia minora to propoſe one licentiate of ten years ſtanding, who may (if the major part of the comitia minora conſent) be propoſed by the preſident at the next comitia majora to be elected a fellow, and if the majority of fellows then preſent conſent, he may then be admitted a fellow. By the other, any one of the fellows may propoſe any licentiate, of ſeven years ſtanding and of the age of 36, in the comitia majora to be examined; if the major part of the fellows conſent, ſuch licentiate may be examined by the preſident or vice preſident and cenſors, and if approved by the major part of the fellows then preſent he may be propoſed at the next comitia majora to be a fellow, and admitted if the majority of the fellows then preſent conſent. The ordinary greater meetings (comitia majora) are holden four times a year, and conſiſt of the preſident or vice-preſident and ten fellows at leaſt. The ordinary leſſer meetings (comitia minora), conſiſting of the preſident or vice-preſident, regiſtrar and cenſors of the college, are holden once a month. A letter was alſo inſerted in the affidavits written by King *Charles* the Second to the college in 1674, in which he ſignified his pleaſure and directed the college not to admit any perſon who had not had his education in either

either of our univerſities of Oxford or Cambridge: but it was admitted in the argument that no notice could legally be taken of this letter. It was alſo ſtated in the affidavits that Dr. *Stanger*, when he was licenſed, gave his faith or promiſe to the college that he would obſerve the ſtatutes of the college, &c. in the uſual mode. Lord KENYON, Ch. J.—The principal ground on which it was ſaid in 4 *Burr.* 2199, that the by-laws of the college were bad was, that "they interfered with their exerciſing their own judgment, and prevented them from receiving into their body perſons known or thought by them to be really fit and qualified;" and if I had found that that objection exiſted in this caſe, I ſhould have thought it fatal: but in the very ſentence in which Lord *Mansfield* expreſſed himſelf as above, he added "ſuch of them indeed as only require a proper education and a ſufficient degree of ſkill and qualification may be ſtill retained." Two univerſities have been founded in this country, amply endowed and furniſhed with profeſſors in the different ſciences; and I ſhould be ſorry that thoſe who have been educated at either of them ſhould undervalue the benefits of ſuch an education. In this caſe it is admitted that a licentiate does not *de facto* become a fellow of the college: it is admitted that he muſt be firſt examined, and that thoſe who are called the College of Phyſicians are to judge of his fitneſs. It ſeems that the appeal here is rather made *ad verecundiam*, and that Dr. *Stanger* could not be rejected if he were examined. If the college are not judges of the fitneſs of the perſon examined, I do not know who is. Then is this a reaſonable teſt of the fitneſs of the party? poſſibly they might have framed a better, though I do not ſay that they could; but the queſtion here is, Whether this is a reaſonable by-law? according to the concurrent opinions of all mankind it is. The Legiſlature have conſidered that perſons who have taken degrees in our univerſities are entitled to certain privileges in the church. So if we look into our own profeſſion, thoſe who have been educated at our univerſities have particular privileges; and though the inns of court are not corporations, yet their regulations ſhew that this has been conſidered as reaſonable. It is not that a perſon becomes qualified from keeping his commons within the walls of the inns of court or the univerſities, but living with thoſe of the profeſſion will probably advance him in the knowledge of that profeſſion for which he is a candidate. Again in the civil law; however competent any particular individual may be from extraordinary endowments or the exertion of ſuperior talents, he muſt firſt take his degrees at one of our univerſities, and afterwards continue a year in a ſtate of probation before he can practiſe. Thoſe regulations that are adapted to the common race of men are the beſt: it does not follow that all inſtitutions calculated for the ordinary claſſes of men are to be proſtrated merely becauſe they ſtand in the way of

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ſome few individuals of ſuperior talents. Then the queſtion is, Whether this is a reaſonable by-law that requires a degree to be taken at one of our univerſities, which in general is ſuppoſed to be conferred as a reward for talents and learning. If indeed this had been a *ſine qua non*, and it had operated as a total excluſion of every other mode of gaining acceſs to the college, it would have been a bad by-law; but theſe by-laws point out other modes of gaining admiſſion into the college. If Dr. *Stanger* has all thoſe requiſites that qualify a perſon for that high ſtation, any one of the fellows may now propoſe him; he may apply to the honourable feelings of the college, to the very ſame tribunal to which this mandamus (if it were granted) would refer him; for in all events he muſt ſubmit to their examination and determination. In the profeſſion of the church, we find that the biſhops inſiſt on having a teſtimonial of the perſon to be ordained ſigned by a certain number of clergymen; and though the biſhops themſelves may have the power of judging of the fitneſs of the perſon to be ordained, it was never doubted but that this was one reaſonable teſt of fitneſs even before examination: it is a teſt to regulate their own conduct. So here I think that this is a reaſonable teſt. Therefore on this ſhort ground, I am of opinion that theſe are good and reaſonable by-laws, and that we are bound to refuſe the writ. The other judges agreed. Rule diſcharged.

Plantations.

Campbell *v.* Hall, Mich. Ter. 15 Geo. 3. B.R. *Coxup.* 205.

ON the trial of this action for money had and received, a ſpecial verdict was found with the privity and *conſent* of the attorney-general, for the expreſs purpoſe of trying the queſtion as to the validity of impoſing the duty of 4½ per cent upon all goods and ſugars exported from the iſland of Grenada.—The verdict ſtated that the iſland of Grenada was taken by the Britiſh arms, in open war, from the French king. That the iſland of Grenada ſurrendered upon capitulation, and that the capitulation on which it ſurrendered, was by reference to the capitulation upon which the iſland of Martinique had before ſurrendered. The ſpecial verdict then ſtated ſome articles of the capitulation, and particularly the 5th article, by which it is agreed, That Grenada ſhould continue to be governed by its preſent laws until his Majeſty's further pleaſure be known. It next ſtates the 6th article; where, to a demand of the inhabitants of Grenada, requiring that they ſhould be maintained in their property and effects, moveable and immoveable, of what nature ſoever, and that they ſhould be preſerved in their privileges, rights, honours, and exemptions; the anſwer is, the inhabitants being *ſubjects* of Great

Great Britain, will enjoy their properties and privileges in like manner as the other *his Majeſty's ſubjects* in the other Britiſh Leeward Iſlands: ſo that the anſwer is, that they will have the conſequences of their being ſubjects, and that they will be as much ſubjects as any of the other Leeward Iſlands. Then it ſtates another article of the capitulation; viz. the 7th article, by which they demand, that they ſhall pay no other duties than what they before paid to the French king; that the capitation tax ſhall be the ſame, and that the expences of the courts of juſtice, and of the adminiſtration of government, ſhould be paid out of the king's demeſne: in anſwer to which they are referred to the anſwer given to the foregoing article; that is, being *ſubjects* they will be entitled in like manner as the *other his Majeſty's ſubjects* in the Britiſh Leeward Iſlands. The next thing ſtated in the ſpecial verdict was, the treaty of peace ſigned the 10th February, 1763; and it ſtated, that part of the treaty of peace, by which the iſland of Grenada is ceded. The next inſtrument was a proclamation under the great ſeal, bearing date the 7th of October, 1763, wherein amongſt other things it is ſaid as follows:—Whereas it will greatly contribute to the ſpeedy ſettling our ſaid governments, of which the iſland of Grenada is one, that our loving ſubjects ſhould be informed of our paternal care for the liberties and properties of thoſe who are and ſhall become inhabitants thereof: We have thought fit to publiſh and declare by this our proclamation, that we have in our *letters patent* under our great ſeal of Great Britain, by which the ſaid governments are conſtituted, given *expreſs power* and *direction* to our governors of the ſaid colonies reſpectively, that ſo ſoon as the ſtate and circumſtances of the ſaid colonies will admit thereof, they ſhall, with the advice and conſent of the members of our council, ſummon and call general aſſemblies, within the ſaid governments reſpectively, in ſuch manner and form as is uſed and directed in thoſe colonies and provinces of America, which are already under our immediate government; and we have alſo given power to the ſaid governors, with the conſent of our ſaid councils, and the *repreſentatives of the people*, to be ſummoned as aforeſaid, *to make, conſtitute, and ordain laws*, ſtatutes, and ordinances, for the public peace, welfare, and good government of our ſaid colonies and the inhabitants thereof, as near as may be agreeable to the laws of England, and under ſuch regulations and reſtrictions as are uſed in our other colonies. The next inſtrument ſtated in the ſpecial verdict was the *letters patent* under the great ſeal, or rather a proclamation, bearing date the 26th March, 1764; wherein the king recites a ſurvey and diviſion of the ceded iſlands, and that he had ordered them to be divided into allotments, as an invitation to purchaſers to come in and purchaſe upon the terms and conditions ſpecified in that proclamation. The

next inſtrument ſtated, was the letters patent under the great ſeal, bearing date the 9th of April, 1764. In theſe letters, there is a commiſſion, appointing General *Melville* governor, with a *power* to *ſummon an aſſembly* as ſoon as the ſtate and circumſtances of the iſland would admit, and to make laws with conſent of the governor and council, with reference to the manner of the other aſſemblies of the king's provinces in America. This inſtrument is dated the 9th of April, 1764. The governor arrived in Grenada on the 14th of December, 1764, and before the end of the year 1765 an aſſembly actually met in the iſland of Grenada. But before the arrival of the governor at Grenada, indeed before his departure from London, there is another inſtrument, upon the validity of which the whole queſtion turns; which inſtrument contains *letters patent* under the great ſeal, bearing date the 20th of July, 1764. Wherein, the king reciting, that whereas, in Barbadoes, and in all the Britiſh Leeward Iſlands, there was a duty of four and an half per cent upon all ſugars, &c. exported; and reciting, in theſe words: that whereas it is reaſonable and expedient, and of importance to our other ſugar iſlands, that the like duty ſhould take place in our ſaid iſland of Grenada; proceeds thus: we have thought fit, and our royal will and pleaſure is, "AND WE DO HEREBY, *by virtue of our prero-* "*gative royal*, order, direct, and appoint, that from and after "the 29th day of September next enſuing, the date of theſe pre- "ſents, *a duty or impoſt of four and an half per cent, in ſpecie*, "ſhall be raiſed and paid to us, our heirs and ſucceſſors, upon "all dead commodities, the growth and produce of our ſaid "iſland of Grenada, that ſhall be ſhipped off from the ſame, "*in lieu of all cuſtoms and import duties*, hitherto collected "upon goods imported and exported into and out of the ſaid "iſland, under the authority of his moſt chriſtian majeſty."— The ſpecial verdict then ſtates, that in fact this duty of four and half *per cent* is paid in all the Britiſh Leeward Iſlands, and ſets forth the ſeveral acts of aſſembly relative to theſe duties. The general queſtion that ariſes out of all theſe facts found by the ſpecial verdict is this: Whether the *letters patent* under the great ſeal, bearing date the 20th of July, 1764, are good and valid to aboliſh the French duties; and in lieu thereof, to impoſe the four and half *per cent* duty above mentioned, which is paid in all the Britiſh Leeward Iſlands? It was contended, at the bar, that the *letters patent* are void, on two points; THE FIRST IS, that although they had been made before the proclamation of the 7th of October, 1763, yet the king could not exerciſe ſuch a legiſlative power over a conquered country— THE SECOND POINT is, that though the king had ſufficient power and authority before the 7th of October, 1763, to do ſuch legiſlative act, yet, before the letters patent of the 20th of July, 1764, he had diveſted himſelf of that authority.

LORD

Lord Mansfield, Ch. J. laid down the following propoſitions as clear; 1ſt, A country conquered by the Britiſh arms becomes a dominion of the king, in right of his crown; and, therefore, neceſſarily ſubject to the legiſlature, the parliament of Great-Britain.

2dly, The conquered inhabitants, once received under the king's protection, become ſubjects, and are to be univerſally conſidered in that light, not as enemies or aliens.

3dly, The articles of capitulation upon which the country is ſurrendered, and the articles of peace by which it is ceded, are ſacred and inviolable according to their true intent and meaning.

4thly, The law and legiſlative government of every dominion, equally effects all perſons and all property within the limits thereof; and is the rule of deciſion for all queſtions which ariſe there. Whoever purchaſes, lives, or ſues there, puts himſelf under the law of the place. An Engliſhman in Ireland, Minorca, the Iſle of Man, or the Plantations, has no privilege diſtinct from the natives.

5thly, The laws of a conquered country continue in force, until they are altered by the conqueror: the abſurd exception as to Pagans, mentioned in *Calvin*'s caſe, ſhews the univerſality and antiquity of the maxim. For that diſtinction could not exiſt before the chriſtian æra; and in all probability aroſe from the mad enthuſiaſm of the Croiſades. In the preſent caſe, the capitulation expreſsly provides and agrees, that they ſhall continue to be governed by their own laws, until his majeſty's further pleaſure be known.

6thly, If the king (and when I ſay the king, I always mean the king, without the concurrence of parliament) has a power to alter the old and to introduce new laws in a conquered country, this legiſlation being ſubordinate, that is, ſubordinate to his own authority in parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for inſtance, from the laws of trade, or from the power of parliament, or give him privileges excluſive of his other ſubjects; and ſo in many other inſtances which might be put.

But the preſent change, if it had been made before the 7th of October, 1763, would have been made recently after the ceſſion of Grenada by treaty, and is in itſelf moſt reaſonable, equitable, and political; for it is putting Grenada, as to duties, on the ſame footing with all the Britiſh Leeward Iſlands. If Grenada paid more, it would have been detrimental to her; if leſs, it muſt be detrimental to the other Leeward Iſlands: nay, it would have been carrying the capitulation into execution, which gave the people of Grenada hopes, that if any new tax was laid on, their caſe would be the ſame with their fellow ſubjects in the other Leeward Iſlands. The only queſtion, then, on this firſt point is, Whether the king had a power to make ſuch change

between the 10th of February, 1763, the day the treaty of peace was ſigned, and the 7th of October, 1763? Taking theſe propoſitions to be true, which I have ſtated; the only queſtion is, Whether the *king* had, of *himſelf*, that power? It is left, by the conſtitution, to the king's authority to grant or refuſe a capitulation: if he refuſes, and puts the inhabitants to the ſword, or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection, and grants them their property, he has a power to fix ſuch terms and conditions as he thinks proper. He is intruſted with making the treaty of peace: he may yield up the conqueſt, or retain it upon what terms he pleaſes. Theſe powers no man ever diſputed; neither has it hitherto been controverted, that the king might change part or the whole of the law or political form of government of a conquered dominion. To go into the hiſtory of the conqueſts made by the crown of England.—The conqueſt, and the alteration of the laws of Ireland, have been variouſly and learnedly diſcuſſed by lawyers and writers of great fame, at different periods of time: but no man ever ſaid, that the change in the laws of that country was made by the parliament of England: no man ever ſaid the crown could not do it. The fact, in truth, after all the reſearches which have been made, comes out clearly to be, as it is laid down by Lord Chief Juſtice *Vaughan*(1), that Ireland received the laws of England, by the charters and commands of *Hen.* 2, King *John*, *Hen.* 3, and he adds an *et cetera* to take in *Ed.* 1. and the ſubſequent kings. And he ſhews clearly the miſtake of imagining that the charters of the 12th of John, were by the aſſent of a parliament of Ireland. Whenever the firſt parliament was called in Ireland, that change was introduced without the interpoſition of the parliament of England; and muſt, therefore, be derived from the crown. Mr. *Barrington* is well warranted in ſaying, that the ſtatute of Wales, 12th *Ed.* 1ſt. is certainly no more than *regulations* made by the *king* in his council, for the government of Wales, which the preamble ſays was then totally ſubdued. Though, for various political purpoſes, he feigned Wales to be a *feoff* of his crown; yet he governed it as a conqueſt. For *Ed.* 1ſt. never pretended that he could, without the aſſent of parliament, make laws to bind any part of the realm. Berwick, after the conqueſt of it, was governed by charters from the crown, without the interpoſition of parliament, till the reign of *Jac.* 1ſt. All the alterations in the laws of Gaſcony, Guienne, and Calais, muſt have been under the *king*'s authority; becauſe, all the acts of parliament relative to them are extant. For they were in the reign of *Edward* 3d, and all the acts of parliament of that time are extant. There are ſome acts of parliament relative to each of theſe conqueſts that I have named, but none

(1) *Vaugh. Rep.* 292.

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for any change of their laws, and particularly with regard to Calais, which is alluded to as if their laws were conſidered as given by the crown. Beſides the garriſon, there are inhabitants, property, and trade in Gibraltar: ever ſince that conqueſt, the king has made orders and regulations ſuitable to thoſe who live, &c. or trade, or enjoy property in a garriſon town. The attorney-general alluded to a variety of inſtances, and ſeveral very lately, in which the king had exerciſed legiſlation in Minorca: there, there are many inhabitants, much property, and trade. If it is ſaid that the king does it as coming in the place of the king of Spain, becauſe their old conſtitution remains, the ſame argument holds here. For, before the 7th of October, 1763, the original conſtitution of Grenada continued, and the king ſtood in place of their former ſovereign. After the conqueſt of New-York, in which moſt of the old Dutch inhabitants remained, King *Charles* 2d. changed the form of their conſtitution and political government; by granting it to the Duke of *York*, to hold of his crown, under all the regulations contained in the *letters patent*. It is not to be wondered at, that an adjudged caſe in point has not been produced. No queſtion was ever ſtarted before, but that the king has a right to a legiſlative authority over a conquered country; it was never denied in Weſtminſter-hall; it never was queſtioned in parliament. *Coke*'s Report of the arguments and reſolutions of the judges in *Calvin*'s caſe, lays it down as clear. If a king (ſays the book) comes to a kingdom by conqueſt, he may change and alter the laws of that kingdom; but if he comes to it by title and deſcent, he cannot change the laws of himſelf, without the conſent of parliament(1). It is plain he alludes to his own country, becauſe he alludes to a country where there is a parliament. The authority alſo of two great names has been cited, who take the propoſition for granted. In the year 1722, the aſſembly of Jamaica being refractory, it was referred to Sir *Philip Yorke* and Sir *Clement Wearge*, to know "what could be done if the aſſembly ſhould "obſtinately continue to withhold all the uſual ſupplies."—They reported thus: "If Jamaica was ſtill to be conſidered "as a *conquered iſland*, the *king* had a *right* to *levy taxes* "upon the inhabitants; but if it was to be conſidered in the "*ſame light* as the other *colonies*, no tax could be impoſed on "the inhabitants but *by an aſſembly of the iſland*, or by an *act* "*of parliament*." They conſidered the diſtinction in law as clear, and an indiſputable conſequence of the iſland being in the one ſtate or in the other. Whether it remained a conqueſt, or was made a colony, they did not examine. I have upon former occaſions traced the conſtitution of Jamaica, as far as there are papers and records in the offices, and cannot find that

(1) 7 *Rep.* 17. b.

any Spaniard remained upon the iſland ſo late as the reſtoration; if any, there were very few. To a queſtion I lately put to a perſon well informed and acquainted with the country, his anſwer was, there were no Spaniſh names among the white inhabitants, there were among the negroes. King *Charles* 2d. by proclamation, invited ſettlers there, he made grants of lands: he appointed at firſt a governor and council only: afterwards he granted a commiſſion to the governor to call an aſſembly. The conſtitution of every province, immediately under the king, has ariſen in the ſame manner; not from grants, but from commiſſions to call aſſemblies: and, therefore, all the Spaniards having left the iſland or been driven out, Jamaica from the firſt ſettling was an Engliſh colony, who, under the authority of the king, planted a vacant iſland belonging to him in right of his crown; like the caſes of the iſland of St. Helena and St. John, mentioned by Mr. Attorney-general. A maxim of conſtitutional law as declared by all the judges in *Calvin*'s caſe, and which two ſuch men in modern times as Sir *Philip Yorke* and Sir *Clement Wearge* took for granted, will require ſome authorities to ſhake. But, on the other ſide, no book, no ſaying, no opinion has been cited; no inſtance in any period of hiſtory produced, where a doubt has been raiſed concerning it. The council for the plaintiff, no doubt, laboured this point from a diffidence of what might be our opinion on the ſecond queſtion. But, upon the ſecond point, after full conſideration, we are of opinion, that *before* the *letters patent* of the 20th of July, 1764, the *king* had *precluded* himſelf from the exerciſe of a legiſlative authority over the iſland of Grenada. The firſt and material inſtrument is the proclamation of the 7th of October, 1763. See what it is that the king there ſays, with what view, and how he engages himſelf and pledges his word. "For the better ſecurity of the "liberty and property of thoſe who are or ſhall become in-"habitants of our iſland of Grenada, we have declared by "this our proclamation, that we have commiſſioned our go-"vernor (as ſoon as the ſtate and circumſtances of the co-"lony will admit) *to call an aſſembly* to *enact laws*, &c."— With what view is this made? It is to invite ſettlers and ſubjects. And why to invite? That they might think their properties, &c. more ſecure if the legiſlation was veſted in an aſſembly, than under a governor and council only. Next, having eſtabliſhed the conſtitution, the proclamation of the 20th of March, 1764, invites them to come in as purchaſors. In further confirmation of all this, on the 9th of April, 1764, three months before July, an actual commiſſion is made out to the governor to call an aſſembly, as ſoon as the ſtate of the iſland would admit thereof. You obſerve, there is no reſervation in the proclamation of any legiſlature to be exerciſed by the *king*, or by the governor and council under his authority,

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in any manner, until the aſſembly ſhould meet; but rather the contrary: for whatever conſtruction is to be put upon it, which, perhaps, may be very difficult through all the caſes to which it may be applied, it alludes to a government by *laws in being*, and by courts of juſtice, *not* by a *legiſlative* authority, until an aſſembly ſhould be called. There does not appear, from the ſpecial verdict, any impediment to the calling an aſſembly immediately on the arrival of the governor, which was in December, 1764. But no aſſembly was called then, or at any time afterwards, till the end of the year 1765. We, therefore, think, that by the two proclamations, and the commiſſion to Governor *Melville*, the king had immediately and *irrecoverably* granted to all who were or ſhould become inhabitants, or who had, or ſhould acquire property in the iſland of Grenada, or more generally *to all whom it might concern*, that the ſubordinate legiſlation over the iſland ſhould be exerciſed by an aſſembly, with the conſent of the governor and council, in like manner as the other iſlands belonging to the king. Therefore, though the aboliſhing the duties of the French king and the ſubſtituting this tax in its ſtead, which, according to the finding in this ſpecial verdict, is paid in all the Britiſh Leeward Iſlands, is juſt and equitable with reſpect to Grenada itſelf, and the other Britiſh Leeward Iſlands, yet, through the inattention of the king's ſervants, in inverting the order in which the inſtruments ſhould have paſſed, and been notoriouſly publiſhed, the laſt act is contradictory to, and a violation of the firſt, and is therefore void. How proper ſoever it may be, in reſpect to the object of the *letters patent* of the 20th of July, 1764, to uſe the words of Sir *Philip Yorke* and Sir *Clement Wearge*, "*it can only now be done, by the aſſembly of the iſland, "or by an act of the parliament of Great Britain.*" The conſequence is, judgment muſt be given for the plaintiff.

Pleading.

THE Court will cenſure an unneceſſary length of pleading.—On a reference to the maſter, to report by whoſe fault the pleadings were extended to an enormous length: he reported this to be an action of treſpaſs, battery, and falſe impriſonment, againſt eight defendants, in which the pleadings amounted to a paper book of near two thouſand ſheets, ariſing from the length and intricacy of the declaration: the action being only brought to try, whether the freeholders and copyholders of the manor of Ellerton, in Yorkſhire (whereof *Luke Robinſon*, eſq. a barriſter, was lord, in right of his wife) were entitled to common, in a ground called the Incloſure. *Robinſon* (who had prepared the declaration), in *propriâ perſonâ*, ſhewed

Yates v. Carliſle et. al. Hil. Ter. 1 Geo. 3. B R. 1 *Black. Rep.* 270.

ſhewed cauſe againſt this report, no other counſel caring to be employed; and THE COURT ſtrongly inclined to fix ſome heavy cenſure upon him; but deſired, that previouſly the queſtion of right might be tried: for which purpoſe, an iſſue was the next day ſettled in a quarter of a ſheet of paper; and went down to be tried on the northern circuit.

Yates *v.* Carlile *et al.* Tr. Ter. 1 Geo. 3. B R 1 *Black. Rep.* 291

When this cauſe went down to trial on the feigned iſſue, the defendant *Robinſon* made default at the aſſizes, and a verdict was had againſt him. And now, upon motion and ſolemn argument, the Court directed this verdict to be entered of record, and all the coſts incurred in every ſtage of proceedings (which amounted to near 1000l.) to be paid by *Robinſon*.

Smith *v.* Muller, Ea. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 624.

Declaration.]—A declaration muſt be entitled of the term when the writ is returnable; though in certain caſes, according to the practice of the Court, it need not actually be filed till the next term.—This was a rule, calling on the defendant to ſhew cauſe why the *poſtea* ſhould not be delivered to the plaintiff, and why the maſter ſhould not tax the plaintiff her coſts of the ſuit, and of this application, and why the plaintiff ſhould not have leave to ſue out execution for the ſame, and alſo for 1l. 11s. 6d.; a verdict having been taken for the plaintiff for 70l. ſubject to an award to be made between the parties. This action was brought for uſe and occupation, and for money paid, &c; the defendant pleaded the general iſſue, and paid money into court. At the trial there was a reference of all matters in diſpute between the parties in the cauſe, and the coſts of the cauſe were to abide the event and determination of the award. The arbitrator awarded and found theſe ſpecial facts; that the plaintiff ſued out her writ on the 14th November, 1788, returnable the 20th November, when ſpecial bail was put in; that the declaration was filed in *Hilary* term, 1789, entitled as of that term, ſtating the defendant to be indebted to the plaintiff for uſe and occupation before the 1ſt of January, 1789, and upon other counts; that 1l. 11s. 6d. became due at Chriſtmas, 1788, for a quarter's rent; that the defendant paid into court all the rent due at Michaelmas, 1788, and the plaintiff's other demands; that at Chriſtmas, 1788, he tendered the rent which became due at that time, which was refuſed; and that the ſum of 1l. 11s. 6d. was the whole ſum remaining due from the defendant to the plaintiff, after the payment of the money into court. On ſhewing cauſe, it was inſiſted on the behalf of the defendant, that the declaration could not include the rent which became due ſubſequent to Michaelmas term; it ſhould have been filed as of Michaelmas term, when the writ was returnable. The Court were clearly of opinion that the declation ſhould have been entitled of Michaelmas term; and that on application for that purpoſe they would have ordered it

it to be amended accordingly. The conſequence of which was, that the defendant was not liable to the coſts.—And BULLER, J. obſerved, that notwithſtanding the difference between a reference "of all matters in diſpute between the parties in the "cauſe," and "of all matters in diſpute in the cauſe between "the parties," was now clearly and fully underſtood by the practiſers of the court, yet that the diſtinction was too refined for the general underſtanding of mankind; and therefore he thought it would be better to amend the terms of the reference thus; to make the former a reference "of all matters in differ- "ence between the parties," omitting the other words "in the cauſe;" and the latter a reference of "all matters in difference "in the cauſe;" omitting "between the parties." With reſpect to this particular caſe, it is the clear and undoubted practice of the Court that the declaration ſhould have been delivered as of the term when the writ was returnable. According to the ancient practice, the declaration was actually delivered in the ſame term; it was only in eaſe of the plaintiff that the time of actual delivery was enlarged; but ſtill it muſt be conſidered as delivered *nunc pro tunc*. As to the practice of declaring by the bye; that goes on a different ground: a declaration by the bye is not on the original writ; but the party being in court in one action, a plaintiff may declare againſt him in another within two terms. Neither does any difficulty ariſe from the practice of pleading in abatement; for under ſuch circumſtances as the preſent, the defendant might have entered a ſpecial imparlance, if neceſſary, or he might have filed the plea in abatement as of the Michaelmas term. Then as to the laſt caſe put at the bar, of the action againſt two defendants; ſuch a caſe cannot exiſt on one writ. For if both defendants are ſerved before the return of the writ, and one of them do not appear in the ſame term, he muſt plead as of the term when he ought to have appeared; and if he be not ſerved before the return of the writ, the plaintiff muſt ſue out another writ.—Rule diſcharged.

Wilkes, eſq. v. the Earl of Halifax, Mic. Ter. 5 Geo. 3. C.B. 2 *Wils.* 256.

The title of the declaration in this caſe was made agreeable to the truth of the fact. The *pluries diſtringas* to compel the earl to enter his appearance was returnable on the morrow of St. *Martin* in this term; who then appeared, after having delayed the plaintiff by eſſoigning, and privilege of parliament for ſeveral terms, whereupon the plaintiff declared of this term of St. *Michael* generally, which is conſidered by relation as a declaration of the firſt day of the term in law; during the delay in this cauſe, and before the earl could be compelled to appear, Mr. *Wilkes* was outlawed upon an information filed by the attorney or ſolicitor general, and therefore the defendant wanted to plead the outlawry in abatement, which being a dilatory plea muſt be pleaded within four days from the time of the filing

filing the declaration, or it cannot be pleaded at all; and (if the declaration is to be conſidered as of the firſt day of the term, which it ſeems it is in point of law) then the defendant was too late to plead this dilatory, and it cannot now be received; and therefore it was moved on the part of the defendant, that the plaintiff might be obliged to entitle his declaration, "Of "the morrow of St. *Martin* in the term of St. *Michael* in the 5th year of the king," according to the truth of the caſe; for the earl did not appear till that day, and before he was in court the plaintiff could not declare againſt him. *Curia:* The defendant does not aſk this alteration to be made in the title of the plaintiff's declaration as a matter of favour, but of right; and if he has that right we are bound *ex debito juſtitiæ* to make this rule abſolute.—Can it be ſaid that the defendant has forfeited his right of pleading in abatement, or any dilatory, when four days are not paſſed ſince he was in court, and before that time the plaintiff could not, by law, declare againſt him, and the defendant may plead whatever plea he pleaſes? Therefore the rule muſt be made abſolute, and the title of the declaration, according to the truth, and fictions in law, ſhall never do injuſtice, for *in fictione juris ſemper eſt æquitas.*

Mellor, adminiſtrator of Mellor, v. Barber, Tr. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 387.

Where in debt on bond by an adminiſtrator, the declaration alleged that adminiſtration was granted by the biſhop of Lichfield and Coventry, and the venue in the margin was laid in London, but the bond was ſtated to be made at *Derby*, which is within the dioceſe; the Court, *on a general demurrer*, held that to be ſufficient; and that the bad venue laid in the margin was cured by the ſtat. of Jeofails.—BULLER, J.: On a ſpecial demurrer there might have been ſome doubt; but a bad venue, or the want of one, is cured by the ſtatute of Jeofails.—GROSE, J.: In the caſe of *Howſe* v. *Haſelwood*, *Barnes*, 4to. ed. 483, a motion was made to arreſt the judgment, becauſe the venue was laid at Norwich in the declaration, and Norfolk was added in the margin. But the Court afterwards diſcharged the rule; ſaying, "Had no venue been laid in the body "of the declaration, reference muſt be had to the margin; but "where a proper venue is laid in the body of the declaration, "the word in the margin ſhall not vitiate it: the county in the "margin will help, but not hurt." So here as the venue is laid in the body of the declaration at Derby, the addition of London in the margin will not vitiate it.

Sutton v. Fenn, Mic. Ter. 13 Geo. 3. C.P. 2 *Black. Rep.* 847. 3 *Wils.* 339.

In declarations the *county aforeſaid*, where more than one is named, always refers to the margin. The plaintiff declared as follows:—[Norfolk to wit] *William Fenn*, late of Marlborough, co. Wilts, yeoman, was attached to anſwer *Robert Sutton*, of a plea of treſpaſs on the caſe, &c. And thereupon the ſaid *Robert*, by his attorney, complains, that, whereas the ſaid *William*, 1ſt of January, 1772, at Catton in the county aforeſaid, was indebted

indebted to the ſaid *Robert*, in 120l. &c. with ſeveral counts in *aſſumpſit*. To this, the defendant demurs generally. For the defendant it was argued, that the declaration was at beſt uncertain; for that the county aforeſaid referred both to Norfolk and Wilts. *Curia:* We have not the leaſt doubt, but that judgment muſt be for the plaintiff; the county of Wilts is only mentioned in the declaration as part of the deſcription of the defendant, and the word *aforeſaid* is not ſo ſtrong as the word *ſame*. *Inſt.* 20 *b.* the words "*county aforeſaid*," have a *general* reference to Norfolk in the margin, and not a particular reference to part of the addition of the defendant's name in the writ; where a county is in the *margin* of a declaration, and the treſpaſs or thing is alleged to be done at D. and he doth not ſhew in what county D. is, yet it is well enough, becauſe it ſhall be intended to be in the ſame county which is in the *margin*, for a general intendment ſhall there ſerve. *Cro. Jac.* 96. And in the caſe of *Hall* v. *Walland*, the plaintiff declared, that whereas *W. M.* was poſſeſſed of ſuch land in *Melton Mowbrey pro termino diverſorum annorum*, *&c.* it was aſſigned for error, becauſe it was not ſhewn in what county *Melton Mowbrey* was, ſo it doth not appear where the land lies nor where the promiſe was made: *ſed non allocatur:* for Leiceſterſhire being in the margin, it is always intended to be the county where the land lies, none other being mentioned. So in the caſe at bar we are all of opinion, that the promiſe being laid to be made at Catton in the county aforeſaid, muſt be intended to be made at Catton in the county in the margin. But if this had not been a right venue, it would have been cured after a verdict by the *ſtat.* 16 & 17 *Car.* 2. c. 8. ſect. 1. Judgment for the plaintiff.

What is ſufficient certainty in a declaration.—*John Conner* of Barnett was ſummoned to anſwer *John Conner* of a plea that he render to him 68l. which he owes to him and unjuſtly detains, &c. and thereupon the ſaid *John Connor* (declares upon a bond), the defendant, craves *oyer* of the bond and condition, which is ſet forth, whereupon the defendant demurs in law, and ſhews for ſpecial cauſe of demurrer that it does not appear that the plaintiff hath any cauſe of action, or that the defendant is indebted, or that he executed the bond: it was objected, that it did not appear to the Court which *John Connor* executed the bond, becauſe there is no diſtinction by way of addition to the name of *John Connor* after the firſt line of the declaration; to which it was anſwered and reſolved by the Court, that ſufficient certainty appears upon the record that *John Connor* of Barnett is indebted upon a bond executed by him to *John Connor* of Friday-ſtreet, the *oyer* whereof is ſet forth; and therefore *John Connor* of Friday-ſtreet muſt have judgment againſt *John Connor* of Barnett.

John Connor v. John Connor, Tr. Ter. 8 Geo. 3. C. B. 2 *Wilſ.* 386.

In

Trevor *v.* Wall, Ea. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 151.

In an inferior court the declaration muſt allege that *the money was had and received* within the juriſdiction, as well as that the defendant *promiſed to pay* within it. Alſo a court of error cannot award a *venire de novo* when the proceedings originate in an inferior court: and therefore if any one count in the declaration be bad, and the judgment be general, it muſt be reverſed *in toto*.—This was error on a judgment in an inferior court in Shropſhire. The firſt count in the declaration, which was for money had and received, alleged that the defendant below was indebted to the plaintiff in a certain ſum, which he *promiſed to pay within the juriſdiction*; *but it did not ſtate that the money was had and received within the juriſdiction*. There was another count on an account ſtated, which alleged that the account was ſtated within the juriſdiction. The counſel for the defendant in error obſerved, that this was after verdict; and every thing neceſſary to ſupport it muſt now be preſumed to have been proved at the trial. But (even ſuppoſing it to be well founded) it went only to one count. The other, which is on an account ſtated, being indiſputably good. That therefore the judgment muſt be affirmed as to that count which is good, and there ſhould be a writ of enquiry to aſſeſs the damages on it; as it was impoſſible for this Court to aſcertain what damages were given on each count; and *Grant* and *Aſtle* (1) was cited to ſhew that a court of error may award a *venire de novo*. But, *Per Curiam*, there is no inſtance of a court of error granting a *venire de novo*, when the proceedings originated in an inferior court. We cannot now ſay on which of the counts damages were given. None of the ſtatutes of jeofails aſſiſt the preſent caſe. The firſt count is defective in ſubſtance, for the conſideration of the promiſe, which is the money had and received, is not alleged to be within the juriſdiction. Judgment reverſed. *The ſame point was determined in Oram* v. *Embry, without argument, on the authority of this caſe. Tr.* 29 *Geo.* 3. *B. R.*

Rees *v.* Abbott, Tr Ter. 38 Geo. 3. B.R. *Comp.* 832.

Declaration, that the defendant and another made their promiſſory note, by which they *jointly or ſeverally promiſed* to pay, is good. This was a writ of error from the Common Pleas, in an action upon a promiſſory note made by *two*, and the action brought againſt the defendant, the now plaintiff in error, *only*, who let judgment below go by default. The declaration ſtated, that the now plaintiff in error and another, made their promiſſory note, by which they *jointly* or *ſeverally* promiſed to pay. *Per Curiam:* If *or* is to be underſtood in this caſe as a *diſjunctive*, who is to *elect*, whether the note ſhall be *joint* or *ſeveral?* Certainly the perſon to whom it is payable. If ſo, the plaintiff has made his election. But *or*, in this caſe, is *ſynonimous* to *and*. They both promiſe that

(1) See this caſe under the title PRACTICE (*venire de novo*).

they

they or *one* of them ſhall pay: then *both* and *each* is liable *in ſolidum*. The nature of the tranſaction forces this conſtruction. It is ſaid that judges ſhould be *aſtute* in furtherance of right, and the means of recovering it. And therefore one is aſhamed to ſee either hitch or harg upon pins or particles, contrary to the true manifeſt meaning of the contract. Judgment affirmed.

Variance.]—In an action againſt the defendant for negligence as an attorney, in not proſecuting a debtor of the plaintiff's to judgment, the return of the writ on which the debtor was arreſted, being laid to be in the 25th year, &c. and the writ itſelf appearing to have been returnable in the 24th year, &c. this was held to be a fatal variance; even though the day of the return was alleged in the declaration under a *videlicet*. The writ was in fact ſued out on the 24th of January, 1785, but by a miſtake it was indorſed on the 24th of January, 1784. On the 31ſt of January, 1785. the defendant therein named was arreſted, and 4th of November, 1785, he was ſuperſeded, becauſe the plaintiff's attorney had not ſigned judgment. At the trial of the cauſe, on the production of the writ, it was objected that there was a material variance between the writ and the declaration, the writ itſelf appearing on the face of it to have been ſued out in January, 1784, but that was over-ruled; however the judge, being of opinion that *the return of the writ* was material, and there being a ſimilar variance in that reſpect, nonſuited the plaintiff; and it being now moved to ſet aſide this nonſuit, The Court were all of opinion that the time when the defendant ought to have charged the defendant in execution depending on the *return* of the writ, *the return* became material, and therefore the variance was fatal. Rule refuſed. Green v. Reanett. Ea. Ter. 27 Geo. 3. B. R. 1 *Ter. Rep.* 636.

By ſtat. 28 *Eliz.* c. 4. ſheriffs are liable to a penalty for taking more than a certain ſum on executions "upon the body, lands, goods, OR chattels." A declaration on this act in reciting the ſtatute, ſtated it thus, "body, lands, goods, AND chattels;" and this was held to be a fatal variance in arreſt of judgment. This was an action on the caſe grounded on the 28th *Eliz.* c. 4. (1) wherein the plaintiff declared, that by an act made in the 28th *Eliz.* &c. entitled, &c. it was amongſt other things enacted, that it ſhould not be lawful, &c. to or for any ſheriff, &c. by reaſon or colour of their or either of their office or offices to have, receive or take of any perſon, &c. for the ſerving or executing of any extent or execution upon the body, lands, goods, *and* (2) chattels, of any perſon, King v. Mackſack, Tr. Ter. 36 Geo. 3. B R. 6 *Ter. Rep.* 771.

(1) In 1 *Salk.* 331. it is ſaid that it appears by the Parliament Rolls to have been paſſed in the 28th *Eliz.* and ſo it is ſtated in pleading; but it appears in the printed ſtatutes as of the 29th *Eliz.*

(2) The word is "or" in the ſtatute.

&c.

&c. more or other conſideration or recompence than in the ſaid act was or ſhould be limited and appointed, which ſhould be lawful to be paid (1), received, and taken, that is to ſay, 12 d. of and for every 20 s. &c. upon pain and penalty that all and every ſheriff, &c. which, at any time, &c. ſhould directly or indirectly do the contrary, ſhould loſe and forfeit to the party grieved his treble damages, and ſhould forfeit the ſum of 40l. &c. as by the ſaid act relation being thereunto had will appear. It then ſet forth a *fieri facias* for 100l. againſt the plaintiff at the ſuit of *W. Jacob*, indorſed to levy 55l. 2s. excluſive of poundage, and the coſts and expences of levying, and that the defendant, as ſheriff, received for executing that writ more than is allowed by that act, viz. 40l. more, whereby the plaintiff is aggrieved to the amount of the ſaid 40l. contrary to the form and effect of the ſaid ſtatute, &c. There was a ſecond count for levying upon another *fieri facias* more than was allowed by the act; which concluded contrary to the form of the ſtatute in ſuch caſe made and provided. After verdict for the plaintiff, it was moved in the laſt term to arreſt the judgment upon two objections. Firſt, the plaintiff profeſſes to declare in a plea of treſpaſs upon the caſe wherein ſingle damages are claimed; and he has now demanded of the Court to enter up judgment for treble damages upon the ſtatute of *Elizabeth*. But if this be conſidered as an action at common law, the plaintiff cannot have judgment for treble damages; and if it be conſidered as an action on the ſtatute, he ſhould have declared in debt, and not in caſe. Lord KENYON, Ch. J.—This being an action for damages, I do not know what debt could be claimed by the plaintiff: and therefore without very ſtrong authority to the contrary, I ſhould conſider an action on the caſe as the proper remedy. In actions on the ſtatute of *Ed.* 6. for not ſetting out tithes, the value of the tithes which ought to have been ſet out is the certain meaſure of damages, and therefore may be claimed as a debt: but here the damages are uncertain, and conſequently the preſent form of action is beſt adapted to the injury.

The firſt objection was then abandoned, and a rule *niſi* obtained on another ground, viz. that there were ſeveral variances between the ſtatute of *Elizabeth* itſelf, and the recital of it in the declaration, viz. "ſerving *or* executing," inſtead of "ſerving "*and* executing," "goods *and* chattels," inſtead of "goods "*or* chattels;" "*paid*, received, and taken," inſtead of "*had* "received and taken." Lord KENYON, Ch. J. after argument and time taken to conſider, delivered the opinion of the Court. Several objections were taken by the defendant on account of variances between the declaration and the ſtatute on which the action is brought: but I ſhall only take notice of one of them, becauſe that appears to have great weight. In

(1) "Had" in the ſtatute,

the

the declaration, the ſtatute is recited thus, that the ſheriff ſhall not take above the ſum limited in that act for the ſerving or executing of any extent or execution upon the body, lands, goods, and chattels, of any perſon, whereas the words of the ſtatute are, "body, lands, goods, or chattels." This variance is material, if the effect of the word "or" uſed in the ſtatute is to diſtribute the prohibition, and apply it to an execution upon either the land, body, or goods, and to make the ſheriff anſwerable if he take more than is allowed on an execution either againſt one or the other; and if the effect of the word "and," which is uſed in the declaration, is to make the ſheriff reſponſible, only in caſe of his receiving too much on an execution againſt all three, namely, againſt land, body, and goods, and there are executions that may extend to all, namely a ſpecial *capias utlagatum*. The natural and obvious ſenſe of the words, as miſrecited in the declaration, is to confine the proviſion of the ſtatute to executions againſt all: but that is materially different from the words in the ſtatute, which ſpeaks diſtributively of writs againſt either of the objects of execution, and which inflicts a penalty on the ſheriff for taking more than is allowed for executing any execution againſt either the body, lands, or chattels, &c. The caſe of *Creſwick* v. *Rookſby*, 2 *Bulſt.* 47., which was cited on behalf of the plaintiff, does not, when it is thoroughly conſidered, aſſiſt him. That caſe, which agrees with the doctrine laid down in 2 *Hawk.* c. 25. ſect. 102., has only eſtabliſhed this, that where a ſtatute uſes ſeveral ſynonymous words, there the conjunctive recited inſtead of the disjunctive does no harm, for the ſtatute notwithſtanding the variance is truly recited. Nor according to the caſe of *Hall* v. *Gaven*, *Cro. Eliz.* 307. will the uſe of the word *and* inſtead of *or* hurt, if the word *or* in the ſtatute has always been conſtrued *and*. But no authority has been quoted to ſhew that, where the ſtatute uſes the disjunctive *or*, in which ſenſe it is to be underſtood, and the plaintiff in his declaration miſrecites the ſtatute, and uſes the word *and*, the Court are to conſtrue the word miſrecited to mean what the ſtatute does. Wherever the recital in the declaration anſwers the ſenſe of the ſtatute, it is ſufficient; ſo it is laid down in 2 *Ventr.* 215. But as in this caſe the ſenſe of the recital in the declaration does not anſwer that of the ſtatute, all the authorities agree that the declaration is bad. On the fair conſtruction of the act of parliament, and on the meaning of the legiſlature, without conſidering how far any minute verbal miſrecital will have ſuch an effect, we think that this is a material variance, and that the judgment muſt be arreſted. In the caſe of *Boyce* v. *Whitaker* (1), Lord MANSFIELD ſaid, "If the defendant had unneceſſarily ſet out the act of parliament, which it ſeemed to

(1) Dougl. 97. *infra*, p. 762.

him

him he had, he would hold him to half a letter." It is not neceſſary here to overſet the authority of that caſe, or to enquire whether or not that doctrine is carried too far; it is ſufficient for the determination of this caſe to ſay that there is a material difference between the declaration and the words of the act of parliament; and for this objection we are of opinion that the judgment ought to be arreſted.

Wyvill Clerk, v. Shepherd, Hil. Ter. 29 Geo. 3. C. B. 1 *Hen. Black.* 162.

In an action for an amercement in a court-leet, if the declaration ſtate the court to have been holden before the ſteward of the manor, and the evidence proves it to have been holden before the deputy ſteward, it is a material variance. Debt for an amercement in a court-leet. The declaration ſtated the amercement to have been affeered at a court holden before the ſteward of the manor; but it appeared in evidence, that the court was really holden before the deputy ſteward, who was appointed by letter of attorney from the ſteward. GROSE J. who tried the cauſe, thought this was a fatal variance, and therefore nonſuited the plaintiff. A rule was obtained to ſhew cauſe why the nonſuit ſhould not be ſet aſide, and a new trial granted, againſt which cauſe having been ſhewn, the Court ſeemed to have but little doubt of the variance being fatal, but ſaid, as the point was of conſequence to lords of manors, if the counſel for the plaintiff could produce any further authorities than thoſe mentioned (1) in ſupport of the rule, he ſhould be heard. No other caſe being found, the rule was diſcharged.

Raſtall v. Stratton, Tr. Ter. 28 Geo. 3. C. B. 1 *Hen. Black.* 49

In an action on a judgment, if the declaration ſtate the judgment to have been recovered in a term different from that which appears on the record, it is a failer of record. It is alſo a variance, if the declaration ſtates the judgment againſt one defendant only, when it was againſt more than one.—Debt—The declaration ſtated that in Trinity term, 1787, the plaintiff recovered by a judgment in B. R. 42l. 1s. for his coſts in the defence of an action brought by the defendant againſt *him the ſaid plaintiff* in that court.—Plea—*Nul tiel record.*—The record being brought by *mittimus* from the court of B. R. it was moved that it might be read; which being done, it appeared that the judgment on which the plaintiff declared, was recovered in Eaſter term, 1788, inſtead of Trinity term, 1787; and this was urged to be a failer of record.—It alſo appeared that the judgment in queſtion was recovered in an action brought by the defendant againſt the preſent plaintiff and one *William Avarne*, whereas the declaration ſtated it to have been only againſt the plaintiff. This it was contended was a fatal variance; and on both theſe grounds, but

(1) 12 *Mod.* 470. 490. 1 Ld. *Raym.* 660. *Salk.* 95. *Cro. Jac.* 32. *Yel.* 46.

chiefly

chiefly on the laſt, the Court gave judgment for the defendant (1).

Hare v. Cator, Ea. Ter. 18 Geo. 3. B. R. Cowp. 766.

The declaration being againſt the defendant as aſſignee of *all* the *eſtate*, &c. in certain premiſes: and the evidence that he was aſſignee of *part only*; was held to be a *fatal variance*. In covenant, the plaintiff declared againſt the defendant as *aſſignee* of *all* the eſtate, right, title, and intereſt in certain premiſes by her demiſed to Lord *Bolingbroke*. The defendant pleaded, that the eſtate, right, title, and intereſt of the ſaid Lord *Bolingbroke*, to the ſaid demiſed premiſes in the declaration mentioned, did not come to his poſſeſſion by aſſignment, as in the ſaid declaration alleged: and thereupon iſſue was joined. On the trial of the cauſe, the jury found a verdict for the plaintiff, ſubject to the opinion of the Court upon a caſe, ſtating in ſubſtance as follows: The marriage ſettlement of Lord *Bolingbroke*, dated November 4th, 1765, by which certain premiſes, conſiſting of the manor of Beckenham, and *eleven farms* in Kent, and other eſtates of the yearly value of 3,250l. of *which the premiſes in queſtion were part*, were conveyed to truſtees, to the uſe of Lord *Bolingbroke* for life, with remainders over: with a power to Lord *Bolingbroke* to leaſe, &c. and alſo a further power with the conſent of the truſtees to revoke the uſes of the ſaid ſettlement. 2. That by indenture of the 24th July, 1770, Lord *Bolingbroke*, for the conſideration there mentioned, demiſed the *eleven farms* in Kent, *and a meſſuage or tenement in Peckham*, in the county of Surrey, to the plaintiff for 99 years, if he the ſaid Lord *Bolingbroke* ſhould ſo long live, at a pepper-corn rent. That by indenture, 25th July, 1770, the plaintiff redemiſed all the ſaid premiſes to Lord *Bolingbroke*, at the yearly rent of 500l. for the term of 98 years and 11 months, if the ſaid Lord *Bolingbroke* ſhould ſo long live. Then it ſet out an indenture of the 20th of October, 1773, revoking the uſes in the ſettlement. That afterwards, by *leaſe* and *releaſe* of the 21ſt and 22d of October, 1773, made between the truſtees under the ſaid ſettlement of the one part, Lord *Bolingbroke* of the ſecond part, and the defendant of the third part, reciting the ſaid ſettlement, the revocation of the uſes, and that the defendant had contracted for the purchaſe of the *premiſes at Beckenham*, for 19,688l. the ſaid truſtees in conſideration, &c. granted and conveyed the ſaid *manor and eſtates at Beckenham*, to the defendant, his heirs and aſſigns. ——That the defendant *Cator* had *no aſſignment* of the ſaid *term of* 99 *years*, granted by Lord *Bolingbroke* to the plaintiff, nor of the redemiſe granted by the plaintiff to the ſaid Lord *Bolingbroke*.—That it appeared by the evidence there given for the plaintiff, that the defendant had notice of the annuity

(1) See Vol. I. p. 236.

granted to the plaintiff, and of the manner in which it was ſecured, before he completed his purchaſe. And that the price paid by the defendant *Cator* for the purchaſe of the ſaid eſtate, was not beyond a fair and adequate price, on a ſuppoſition of the eſtate being bought ſubject to the payment of the annuity granted to the plaintiff. The defendant's counſel objected to the *form* of the action, by reaſon that the *eſtate in Surrey*, let at 110l. *per ann.* comprized in the redemiſe from the plaintiff to Lord *Bolingbroke*, was *not purchaſed* by the defendant. The queſtion for the opinion of the Court was, Whether the action might be maintained? And on the argument ſeveral points aroſe. 1. Whether, under the circumſtances of the caſe, the defendant was aſſignee at all. 2. If aſſignee, Whether, as being aſſignee of part only, he was liable for the whole, or only an apportionment of the rent. 3. Whether the action could be ſupported in point of form; the declaration charging that the defendant was aſſignee of the whole, whereas by the evidence it appeared he was aſſignee of part only. THE COURT gave no opinion upon the point, whether the defendant was aſſignee; but determined upon the objection in point of form that the defendant was *improperly* charged as aſſignee of the *whole*, againſt the truth of the caſe; being, if at all, aſſignee of *part* only. Accordingly, a nonſuit was entered.

Douglas and others *v.* Irlam, Mic. Ter. 40 Geo. 3. B. R. 8 *Ter. Rep.* 416.

A writ ſued out by plaintiffs *as executors*, and declaration by them *in their own right*, was held a ſufficient variance for diſcharging the defendant out of cuſtody on filing common bail.

Symonds *v.* Ball and two others, Hil. Ter. 38 Geo. 3. B R. 8 *Ter. Rep.* 151.

An allegation in a plea, that "*A. by his writing ſold the aftermath of land to B.*," is not proved by evidence that at an auction held for the purpoſe of ſelling it *B.* was the purchaſer, that *B.* gave a promiſſory-note for the ſum, and that *B.*'s name was written (by *A.*'s agent) in the printed catalogue as the buyer. In replevin for taking the plaintiff's cattle at a common land called Hay. Avowry that the *locus in quo* has been immemorially parcel of a cuſtomary tenement of the borough of Launceſton, &c. of which *Froſt* was ſeiſed in fee according to the cuſtom of the borough, and becauſe the plaintiff's cattle were doing damage there the defendants ſeiſed them as a diſtreſs, &c. Plea in bar that by ſtat. 34 *Geo.* 3. it was enacted that all the aftermath ſhould be veſted in the mayor and aldermen for the time being, in truſt nevertheleſs *to ſell and diſpoſe thereof*, or otherwiſe to leaſe or demiſe the ſame by writing to any perſon, &c. for the beſt price or rent that could be had for the ſame; that by virtue of the ſaid act on the 3d of October, 1797, the mayor and aldermen of the borough *by their certain writing ſold* and diſpoſed of the aftermath of the common lands called Hay to the plaintiff from thenceforth until the 12th of January then next for 38l. being the

the beſt price that could be had for the ſame, by virtue of which ſelling and diſpoſing, the plaintiff became entitled to the aftermath from thence until the 12th of January; and being ſo entitled he put in his cattle, &c. until the defendants unjuſtly took and detained them, &c. Replication that the mayor and aldermen *did not ſell and diſpoſe* of the aftermath to the plaintiff *modo et forma*, &c. on which iſſue was joined. There was another plea in bar, that the mayor and aldermen by *their certain writing demiſed* the aftermath to the plaintiff, on which iſſue was afterwards taken. At the trial it appeared that at an auction, written conditions of ſale were produced, and the plaintiff being the higheſt bidder, the town clerk of the borough, who acted as agent for the mayor and aldermen, wrote down his name as the purchaſer at 38l.; and the plaintiff then gave his promiſſory note for the 38l. It was objected that this was not A SALE OR DEMISE in writing, as required by the act of parliament and the pleas in bar; the judge was of that opinion; but a verdict was taken for the plaintiff, with liberty to the defendants to move to ſet it aſide and to enter a verdict for them if this Court ſhould be of opinion that the plaintiff had not proved his pleas in bar; which motion being made, *The Court* were clearly of opinion, that the plaintiff had not eſtabliſhed his pleas in bar; ſaying that as neither the memorandum made by the town clerk or the note given by the plaintiff could be deemed *a ſale or demiſe in writing*, ſo neither could they be joined together for that purpoſe. Rule abſolute.

But a declaration ſtating it to be for maliciouſly indicting at the general *quarter* ſeſſions, inſtead of *general ſeſſions*, is good; the word *quarter* being only ſurpluſage. PER CURIAM: This variance is immaterial; the ſtatute of the 2 *Hen.* 5. c. 4. ordains the ſtated times for holding the ſeſſions of the peace throughout England, four times in the year, thence uſually called quarter-ſeſſions: and oftener if need be. The ſtatute of the 14 *Hen.* 6. c. 4. does not repeal the former, but only diſcharges the penalty in reſpect to Middleſex; provided that the ſeſſions be held at leaſt twice in the year. On the firſt act there have ariſen, in all other counties, two kinds of ſeſſions. 1ſt. General quarter ſeſſions, at the ſtatutable times. 2d. General ſeſſions, at other intermediate periods. The *quarter* ſeſſions has, by ſeveral ſtatutes, the ſame juriſdiction as the *general* ſeſſions, and more. In Middleſex, by the change of times, inſtead of *two*, *eight* ſeſſions are now become neceſſary: *Four* are held, not at the ſtatutable times exactly, but as near as may be. 2 *Hal. P. C.* 50. The other *four* in the intermediate ſpaces. They call the firſt *general quarter* ſeſſions, the latter only *general* ſeſſions. But both have an equal juriſdiction to take and try indictments. Now it is held in *Barns* and *Conſtantine*, *Cro. Jac.* 32. and *Yelv.* 46. (and we all con-

Buſby *v.* Watſon, Hil. Ter. 16 Geo. 3. C.B. 2 *Wils. Rep.* 1050.

cur in the ſame opinion) that where the declaration ſets out a court that has authority to proceed, it need not exactly copy the ſtyle ſet out in the record. But if a court of a different authority had been deſcribed, it were bad. As therefore the indictment was cognizable both at the *quarter* and the *general* ſeſſions, we think the inſertion of the word *quarter* was immaterial and merely ſurpluſage. Otherwiſe, had it been cognizable only at a *quarter* ſeſſions.

Brook v. Willet, Mic Ter. 34 Geo. 3. C.B. 2 *Hen. Black* 224.

A preſcription for common of paſture for a certain number of ſheep on A. every year at all times of the year, is well laid, though the evidence which proves the right of common, proves alſo that the tenant of a certain farm has a right to have the ſheep folded at night on his farm, after they have fed on the common during the day. In replevin and avowry for taking 20 ſheep of the plaintiff, the plaintiff in his plea in bar preſcribed to have *common of paſture in the ſaid place called* Undley Common, *in which, &c. for twenty ſheep levant and couchant in and upon his ſaid meſſuage and land with the appurtenances, every year and at all times of the year, at his and their free will and pleaſure, as belonging and appertaining to the ſaid meſſuage and land with the appurtenances.* The ſubſequent proceedings were in the uſual form traverſing the cuſtom. And on the trial of this cauſe, a verdict was found for the plaintiff, on the traverſes of the right of common; the evidence being, that he had a right to common of paſture at all times of the year on Undley Common, *but that the tenant of Undley-hall farm had a right to have the ſheep folded on the lands of that farm, when they fed on* Undley Common. It was alſo proved, by an old occupier of the farm, that he had received a compenſation from a perſon who had turned ſheep on the common, for not folding them on the farm. It was now moved that the verdict ſhould be ſet aſide, on the ground that *the preſcription was not proved as laid*, being qualified with the right of the occupier of Undley-hall farm, to have the ſheep folded on his lands. THE COURT at firſt ſeemed to doubt, whether the preſcription, ſtating the right of common for the ſheep at *all times of the year*, at the free will and pleaſure of the plaintiff, did not give him a right to continue the ſheep on the common all night; and if ſo, it was repugnant to the evidence, which proved that they were to be folded at night on Undley-hall farm. But upon conſideration, they held that the words "all times" were to be underſtood according to the ſubject-matter, and the general courſe of feeding ſheep, which ſeldom, if ever, remained during the night on the commons on which they were turned out to paſture, but were driven to a fold. The words, therefore, "all times" muſt be taken to mean all *uſual* times. That there were two preſcriptions, and that the folding the ſheep on Undley-hall farm, was not part of an entire preſcription for common of

paſture

paſture on Undley Common, but a condition or rather a conſideration, ſubſequent to the enjoyment of the right, and therefore not neceſſary to be ſtated; which it would have been, had it been precedent. And *Rocke*, J. mentioned *Gray*'s *caſe*, 5 *Co.* 78, *b.* where in "replevin between *Gray* and "*Fletcher*, in bar of the avowry for damage feaſance, the "plaintiff entitled himſelf to have common of paſture in the "place where, &c. to his copyhold, which cuſtom was tra-"verſed. And it was found, that he ought to have the ſame "common, but that every copyholder had uſed to pay, time "out of mind, *pro eâdem communiâ, unam gallinam, et quin-"que va annuatim*, and it was adjudged, that on this verdict "the plaintiff ſhould have judgment; for the plaintiff need "not ſhew more than makes for him, and that is of his "part (1). Rule diſcharged."

In an action of bribery at an election, where the declaration ſet forth the precept from the ſheriff to the portreeve of a borough, the improper inſertion of the word "*if*" in ſuch precept is not a fatal variance, but it will be rejected as ſurpluſage.—This was debt for two penalties of 500l. each, under the ſtatute of the 2 *Geo.* 2. c. 24. for preventing bribery at elections. At the trial the plaintiff was nonſuited, upon the ground that there was A VARIANCE *between the precept ſtated in the declaration and the one which was proved.*—1. The declaration recited the writ to the ſheriff for the election of members to ſerve in parliament; and then proceeded to ſtate that the ſheriff *made his precept* to the portreeve of the borough of *Honiton*, which concluded in theſe words, "and *if* the ſaid "election ſo made, diſtinctly, and openly, under the ſeal of "the portreeve, and the ſeals of thoſe who ſhould be preſent "at ſuch election, the ſaid portreeve ſhould certify to the ſaid "ſheriff, ſo that the ſheriff ſhould certify to his ſaid Majeſty, "in his ſaid Majeſty's chancery, at the day and place afore-"ſaid, without delay; remitting to the ſaid ſheriff one part "of the aforeſaid indentures, ſo that the ſaid ſheriff might re-"mit the ſame to his ſaid Majeſty, annexed to his Majeſty's "writ." 2. The precept when produced had not the word "*if*," which the judge thought did not ſupport the declaration. A rule having been obtained to ſet aſide this nonſuit and cauſe ſhewn. PER CURIAM: There is no neceſſity to ſet out the precept; but, being ſet forth, the queſtion is, Whether the variance be or be not material? It is impoſſible for any perſon to read this part of the declaration without knowing what it ſhould be; every one muſt ſee by it that the portreeve *is abſolutely to certify to the* ſheriff, &c. The inſertion of the word "*if*" is a mere miſtake. The caſe of the *King* v. *Beach* (*infra*) is much ſtronger than the preſent. There

Francis King v. Samuel Pippet, Ea. Ter. 26 Geo 3. B.R. 1 *Ter. Rep.* 235.

(1) Cited *Cro. Eliz.* 563.

the Court ſupplied a letter to make up a word, which was neceſſary in ſetting out an indictment: but here it was not neceſſary to ſtate the precept at all. But it does not reſt here only. There are other caſes equally ſtrong, as *Hendray* v. *Spencer*, ſittings at Weſtminſter after Mic. 1773, and *Cuming* v. *Sibly*, *E.* 9 *Geo.* 3. *C. B.* which was an action for bribery: there the declaration ſtated the precept to be directed to the *mayor only:* but the precept which was proved was directed to the *mayor and burgeſſes*; and the only queſtion in the caſe, which was reſerved for the opinion of the Court, was, Whether the precept that was proved ſupported the declaration? The court of Common Pleas was of opinion that it did, and gave judgment for the plaintiff. In that caſe there was a variance in the perſon to whom the precept was directed, but the Court was of opinion that if it were the ſame in ſubſtance as that which was ſet forth in the record, it was ſufficient, unleſs the *tenor* was ſtated. So in this caſe, the variance, to have any effect, muſt be a variance of ſenſe and of ſomething material.—The three principal caſes which have been argued in this court of late years are *Shute* v. *Hornſey* (1), *Briſtow* v. *Wright* (2), and *Grant* v. *Aſtle* (3), all of which were upon contracts. In theſe kind of caſes it is neceſſary to ſet out the contract in the declaration; and if it be different in any part, the whole foundation of the action fails, becauſe the contract is entire. In the caſe of the *King* v. *Lookup*, which was an indictment for perjury, the objection was, that the indictment ſtated the bill in chancery to be directed to "*Robert Lord Henley*, *&c.*" whereas it was directed to "Sir *Robert Henley*, Knight, &c." But that objection was overruled. The caſe of *Shuttleworth* v. *Pilkington* (5) is likewiſe extremely ſtrong. That was an action on a bail bond; the ſpecial original was returnable *coram domino regi ubicunque tunc fuerit in Angliâ:* but the words *ubicunque*, *&c.* were omitted in the bail bond: and it was objected that by the ſtat. of *Hen.* 6. (which was pleaded) the ſheriff could take no bond but ſuch as correſponded with the writ; whereas this might be to compel an appearance out of England, if the king ſhould happen to be ſo. But the Court ſaid it was ſufficient in theſe bonds to ſtate in *ſubſtance* the deſign of the writ; and that they would underſtand that by appearing before the king was meant before the *king in his court*, and not before the *king in perſon.* And the plaintiff had judgment. In the preſent caſe the ſenſe of the precept, as ſtated in the declaration, is the ſame as that which was proved; it commands the returning officer to proceed to an election. Therefore, as this is

(1) Cited in p. 15. *ante.* (2) *Ante*, p. 12. (3) Vol. I. 255.
(4) *Trin.* 7 *Geo.* 3. *B. R.* (5) 2 *Str.* 1155.

not

not a variance in ſenſe, the nonſuit muſt be ſet aſide. Rule abſolute (1).

In an action for bribery on the ſtatute 2 *Geo.* 2. c. 24. it is not a material variance if the declaration ſtate the precept to have iſſued to *the bailiffs of the borough*, but the precept produced in evidence is directed *to the bailiff*. For on the authority of *Cuming* v. *Silbey* (2), where the declaration ſtated the precept to be directed to the *Mayor only*, but the precept given in evidence was directed to the Mayor *and Burgeſſes*, which was holden to be an immaterial variance; THE COURT were clearly of opinion that this variance was immaterial. Rule abſolute to ſet aſide the non-ſuit. Warre *v.* Harbin, Tr. Ter. 32 Geo. 3. C.B. 2 *Hen. Black.* 113.

This was an action of debt on the ſtatute 9 *An.* c. 9. ſ. 32, 35. againſt the defendant for not inſerting in an indenture of apprenticeſhip the true ſum received by him from an apprentice, as the conſideration money. The declaration ſtated that by a certain indenture, made by one *William Rider* on the 27th of February, 1789, the ſaid *William put himſelf* apprentice to the defendant and his wife, &c.; that the defendant received with the ſaid *William*, as ſuch apprentice, the ſum of 25l. yet that he did not inſert in the indenture the full ſum of money ſo received by him, but on the contrary inſerted 10l. as the ſum, &c. At the trial the plaintiff produced, and proved the execution of that part of the indenture, executed by the defendant; and it being objected, on the part of the defendant, that that was not ſufficient evidence that *Rider* had put himſelf apprentice to the defendant, which could only be proved by the indenture executed by *Rider*. The plaintiff was nonſuited; but on a rule, calling on the defendant to ſhew cauſe why the nonſuit ſhould not be ſet aſide, and a new trial granted; *The Court* ſaid, that the indenture produced, executed by the defendant, in which it was recited that *Rider* had put himſelf apprentice to the defendant, was evidence againſt the defendant that *Rider* had executed the other part of the indenture; and they made the rule abſolute. Burleigh *v.* Stibbs, Mic. Ter. 34 Geo. 3. B.R. 6 *Ter. Rep.* 465.

The plaintiff in this action was a ſailor, and declared on a contract for 52l. 10s. for run-money, againſt the defendant, being captain of a ſhip bound from the Weſt-Indies to London. At the trial, a note was given in evidence, by which the defendant agreed to allow the plaintiff the above ſum; *together with a pint of rum* per *day*; the latter part of the agreement however, appeared to have been added to the note after ſignature. There being a verdict for the plaintiff, it Baptiſte *v.* Cobbold, Ea. Ter. 37 Geo. 3. C. B. 1 *Pul. et Baſ.* 7.

(1) Vide *Wyvill* v. *Shepherd*, *ante*, 704; *Gwinnet* v. *Phillips*, *ante*, vol. III. p. 267; and *Drewry* v. *Twiſs poſt.* 713.

(2) *Eaſt.* 9 *Geo.* 3. *C. B.* cited by *Buller*, J. in *King* v. *Pippet*, *ante*, p. 710.

was moved to enter a nonſuit, on the ground of a variance between the declaration and the evidence; and it was contended that the contract, being entire, could not be ſeparated; *Sands* and *Taſh* v. *Ledger*, *Ld. Raym.* 793, and *Briſtow* v. *Wright*, *ante*, p. 12. PER CURIAM: The agreement given in evidence correſponded with the declaration, as far as the declaration went. The caſe in Lord *Raymond* turned upon the deſcription of a written agreement, which, *if deſcribed at all*, muſt tally with the deſcription; here no written agreement was deſcribed. It is true that the agreement given in evidence contained ſomething more than was ſtated in the declation, but not material to it.

Peppin *v.* Solomons, Hil. Ter 34 Geo. 3. K.B. 5 *Ter. Rep.* 496.

In an action on a policy of inſurance the declaration ſtated, that *after* the making of the policy the ſhip ſailed; the evidence was that ſhe ſailed *before*; and it was held that the variance was immaterial.—This was an action on a policy of inſurance on the ſhip Sampſon, at and from London to Memel, and at and from thence back again to London. The policy was effected on the 7th of Auguſt, 1792. The declaration contained an averment that *after the making of* the policy, to wit, on the 10th of Auguſt, 1792, the ſhip was in ſafety at London; and that afterwards, to wit, on the ſame day, &c. ſhe ſailed upon her voyage to Memel, that ſhe afterwards arrived at Memel, and was loſt on her return to London. It appeared in evidence that the ſhip ſailed *before* the policy was effected, to wit, on the 27th of July, 1792; upon which it was objected that there was a variance between the averment and the proof of it: but Lord *Kenyon* thinking there was no weight in the objection, the plaintiff obtained a verdict. A motion was made to ſet aſide the verdict, and to enter a non-ſuit, and cauſe was ſhewn.—PER CURIAM: The caſe of *Briſtow* v. *Wright*, *ante*, p. 12. has been ſometimes doubted, but it was rightly decided. In order to entitle the plaintiff to maintain that action, it was neceſſary for him to ſhew that he was the landlord, it being an action againſt the ſheriff for taking the leſſee's goods without leaving a year's rent; and to ſhew that the plaintiff was the landlord, he was obliged to ſet forth a contract between himſelf and the tenant. Now contracts are in their nature entire; and in pleadings they muſt be ſtated accurately. But as the evidence in that caſe did not accord with the contract ſtated in the declaration, and which was the foundation of his action, it was properly determined that a judgment of nonſuit ſhould be entered. In the caſe of *Savage* v. *Smith* (under title SHERIFF), it was not neceſſary for the plaintiff to ſtate the judgment: but as the plaintiff alleged that the party recovered a judgment, and that he ſued out a writ of execution upon the *ſaid* judgment, the execution was neceſſarily tied down by that judgment; and therefore

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the judgment was made material by the ſubſequent words which were introduced. So in actions for words, where a long introduction is unneceſſarily inſerted in the declaration, if the charge be tied up to that introduction, the latter muſt be proved; becauſe the material part is thus made to depend on the immaterial part of the declaration. But the averment in this caſe does not ariſe out of the contract, nor is the contract, as ſtated in the declaration, to depend upon it. And if this averment were omitted, the declaration would be perfect without it. Rule diſcharged.

Proof that defendant's boat run down the plaintiffs *in* the half-way reach in the Thames will ſupport an allegation, that the boat was run down in the Thames *near* the half-way reach, in a declaration in an action on the caſe for negligence. Drewry v. Twiſs et al. Hil. Ter. 32 Geo. 3. B.R. 4 Ter. Rep. 558.

—PER CURIAM: This is a tranſitory action, and not like treſpaſs *quare clausum fregit*, where the boundaries of the cloſe muſt be proved as laid; for that action is in its nature local. And it is material to attend to the nature of the action, in order to diſtinguiſh this caſe from that of *Briſtow* v. *Wright*, *ante*, p. 12. where the plaintiff failed in proving a contract which he had ſtated in his declaration. A trivial variation in ſetting out a contract (1), a record, or any written inſtrument, is fatal; becauſe it does not appear that the contract given in evidence is that on which the plaintiff declares; it is matter of deſcription. But even in the caſe of perjury we all know that a trifling miſtake is not fatal; as where the word "undertood" was uſed in the aſſignment of perjury inſtead of "underſtood" (2). So in another caſe, where "pound" was written for "pounds." In this caſe, the defendants were not miſled by the declaration; for the giſt of the offence was the defendant's having run down the plaintiff's veſſel. This is not like the caſe of a juſtification to an action; for it frequently happens that the juſtification to an action for falſe impriſonment is local, becauſe the officer can only do the act, which he attempts to juſtify, within particular limits; ſo that the action, which was in its nature tranſitory, becomes local by the juſtification; and in ſuch a caſe the juſtification muſt be proved as it is laid. The argument that a recovery in this action could not be pleaded in bar to another brought for the ſame cauſe of action, begs the queſtion. If it were neceſſary for the plaintiff to prove that this accident happened *out of* half-way reach, the defendants could not plead this action in bar to another, where the act ſhould be ſtated to have been done in a different place: but when it is determined that the plaintiff may recover on this evidence, it neceſſarily follows

(1) Vide *Gwinnett* v. *Phillips*, *ante*, vol. III. p. 267.
(2) *R.* v. *Beach*, *infra*.

that

that the defendants may plead the recovery in this action in bar to ſuch other; becauſe the diſallowing of this objection muſt proceed upon the ground of the allegation in the declaration being immaterial. The recovery in this action might be pleaded in bar to another action, by averring that the running down of the plaintiff's ſhip in that caſe was the ſame as that complained of in the preſent. Therefore as this is an action on the caſe of negligence, which is tranſitory, this objection ought not to prevail. GROSE, J. mentioned the caſe of *Frith* v. *Gray* (1), as deciding the preſent.

Hirſt *v.* Smith, Ea. Ter. 37 *Geo.* 3. B.R. 7 *Ter. Rep.* 182.

In aſſumpſit brought by an adminiſtrator *de bonis non*, the promiſe may be laid to have been made to the firſt adminiſtrator.

Turing *v.* Jones, Mic. Ter. 34 *Geo.* 3. B.R. 5 *Ter. Rep.* 402.

The Court will not, on motion, permit a defendant to take advantage of a variance between the ſum mentioned in the *ac etiam* part of the latitat and the declaration. It was moved to diſcharge the defendant out of cuſtody on filing common bail, on the ground of a variance between the latitat and the declaration. The *ac etiam* in the writ was for a certain ſum in debt, and the declaration for only half that ſum. *Per Curiam:* The ſame ſtrictneſs, which prevails with regard to original writs, does not obtain reſpecting others. In order to prevent any incongruity on the record, it has been held that the declaration muſt purſue the original writ: but this objection will not appear on the face of theſe proceedings, this action having been commenced by bill. Where indeed the plaintiff has varied the nature of his action, as where he has ſued out a writ *quare claſum fregit*, and declared in trover, or where the objection has been to the plaintiff's right of ſuing, as where he has taken out a writ in his own name and declared as executor, ſuch objections have been allowed on motion. But there is no inſtance where the Court has interferred, on motion, for ſuch an objection as the preſent, which merely goes to the ſum ſued for. Rule refuſed.

Garrard, widow, adminiſtratrix, &c. *v.* Early, Tr. Ter. 9 *Geo* 3. C. B. 2 *Will.* 413.

In debt upon a bond; after the rule to plead was out, it was moved, that the defendant might have leave to plead two pleas; 1ſt, Performance of the condition of the bond; 2dly, That no ſuch letters of adminiſtration, as are ſet forth in the declara-

(1) *Hil.* 7 *Geo.* 3. *B. R.* That was an action upon the caſe, upon an agreement that the defendant would procure the plaintiff a booth at the horſe race on Barnet Common. The declaration ſtated that there being to be had a certain entertainment of horſe racing upon Barnet Common in the county of Middleſex, it was agreed, &c.; at the trial it was proved that the whole of Barnet Common lay in the county of Hertford, and an objection was taken on the ground of this variance. But Lord *Mansfield* and the reſt of the Court (on motion for a new trial) ſaid that the giſt of the agreement was the procuring the booth upon Barnet Common; that it was perfectly immaterial whether Barnet Common were in Middleſex or not; and therefore that thoſe words in the declaration might be rejected.

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tion, were ever granted to the plaintiff.—On ſhewing cauſe, it was objected for the plaintiff, that *the defendant cannot plead the ſecond plea without craving* oyer *of the letters of adminiſtration, and ſetting the ſame out in that plea*; and he not having craved *oyer* thereof in time, is now too late to demand it, becauſe the rule to plead is out, AND OF THAT OPINION WAS THE COURT; and ſaid, where there is any *variance* between the letters of adminiſtration ſet forth in the declaration, and the letters, &c. actually granted under the ſeal of the ſpiritual court; if the defendant will take advantage thereof, he muſt crave *oyer* thereof, before the rule to plead is out, muſt ſet the ſame out on record and demur for the variance, but that now he was too late.—Rule to ſhew cauſe diſcharged.

Joinder in action.]—The dippers at Tunbridge-Wells all joined; and, with their huſbands, declared in an action againſt the defendant for exerciſing the buſineſs of a dipper, not being duly appointed and approved according to a private ſtatute, and held well.—The defendant pleaded the general iſſue. And on the trial of the cauſe, a verdict was found for the plaintiffs upon the ſecond, third, fifth, and ſixth counts in the declaration, and five ſhillings damages, ſubject to the opinion of the Court upon the following caſe, which ſtates—" That the plaintiffs gave in evidence a private *act of parliament*, paſſed in the 13*th year of king Geo. the* 2*d.* confirming certain articles of agreement inſerted in the ſaid act, in which are contained the two following clauſes, viz.

John Weller and Elizabeth his wife, John Mercer and Suſannah his wife, Thomas Fry and Elizabeth his wife, Benjamin Fry and Sarah his wife, Ann Cripps widow, William Okill the younger and Ann his wife, v. Dorcas Baker ſpinſter, Tr. Ter. 3 Geo. 3. C. B. 2 *Wils.* 414.

" Fifthly; It is alſo further agreed between the ſaid parties, " that the ſaid *Maurice Conyers*, and his heirs and aſſigns, and " the ſeveral freehold tenants parties hereto, and their reſpec- " tive heirs and aſſigns, ſhall and will from time to time, and " at all times for ever hereafter, permit and ſuffer the ſaid " medicinal ſprings or wells of water called Tunbridge-Wells, " the place or ſhed near the ſaid ſprings called Dippers-Hall, " and the walks called Tunbridge-Wells Walks, and all ways, " paſſages, and open pieces of ground, part of the ſaid pre- " miſes, or leading thereto, which are particularly ſet forth and " diſtinguiſhed in the plan of the premiſes hereunto annexed, " to remain always open and free for the public uſe and benefit " of the nobility and gentry and other perſons reſorting to, or " frequenting Tunbridge-Wells, in the manner the ſame now " are, or lately have been uſed, and that the ſaid *Maurice* " *Conyers*, his heirs and aſſigns, ſhall and will, from time to " time, join and concur in doing all ſuch acts and things as " ſhall be neceſſary for the preparing and keeping the ſame " open and free, according to the true intent and meaning of " this agreement.

" Thirteenthly; Alſo it is hereby further agreed by and " between the parties hereto, that no perſon ſhall be permitted " to attend and follow the employment of a *dipper* of the ſaid " medicinal

" medicinal waters but ſuch as ſhall be *choſen* by the *homage*, " at the *court baron* to be held for the ſaid manor, and *approved* " by the *lord of the manor*; in which choice and approbation " the *wives, widows, and daughters of freehold tenants of the* " *ſaid manor ſhall be preferred*, and ſhall not exceed the num- " ber of twelve." It did not appear in evidence, that the homage and lord had ever acted under the ſaid act of parliament, or that there had ever been any *dippers choſen* by the *homage*, and *approved* by *the lord*, from the time the ſaid act paſſed until the 26th of May, 1768, when, at a *court baron* then holden, the *homage choſe*, and the *lord approved*, *&c. prout* the following entry upon the rolls of the ſaid court, viz.

" At a court baron of Sir *George Kelly*, knt. lord of the " manor of Ruſthall, held at Speldhurſt, in and for the ſaid " manor, on the 26th day of May, in the year of our Lord " 1768, before *Thomas Scoones*, gent. ſteward of the court of " the ſaid manor.

" Alſo the homage aforeſaid do chooſe *Elizabeth Weller* the " wife of *John Weller*, *Ann Crips* widow, *Sarah Fry* the wife " of *Benjamin Fry*, *Saſannah Mercer* the wife of *John Mercer*, " *Elizabeth Fry* the wife of *Thomas Fry*, *Ann Okill* the wife " of *William Okill*, *Mary* the wife of *William Friend*, and " *Dorcas Baker* ſpinſter, to attend and follow the employ- " ment of *dippers* of the medicinal waters within this manor, " commonly called Tunbridge-Wells, ſubject nevertheleſs to " the *approbation* of the lord of the ſaid manor.

" *The lord's approbation:* At this court, Sir *George Kelly*, " knt. *lord* of this manor, *approves* of all the perſons ſo *choſen* " by the *homage* for *dippers* as aforeſaid, *Dorcas Baker* only " excepted."

It did not appear in evidence, that any *notice* was given previous to the holding of the ſaid court, of any *intention* to appoint *dippers there*.

It appeared in evidence, that *Dorcas Baker*, the defendant, was the daughter of a freehold tenant of the manor, and alſo a freehold tenant in her own right, but no evidence was given by the plaintiffs that they, or either of them were, or was reſpectively the wife, widow, or daughter, of a freehold tenant. It appeared, that the defendant, *Dorcas Baker*, had acted as a *dipper* during the laſt ſummer, but there was no proof of her having received any gratuity, other than general evidence, that the employment of a *dipper* is attended with profits which ariſe from the voluntary contributions of the company reſorting to Tunbridge-Wells. The caſe was twice argued—

CURIA: There are two general queſtions in this caſe; 1ſt, Whether the defendant, *Dorcas Baker*, the daughter of a freehold tenant of the manor, and *choſen* by the *homage* to be a *dipper* at the Wells, but not *approved* of by the *lord* of the manor, can juſtly follow or exerciſe the *employment* of a *dipper*?

per? 2dly, Supposing she cannot, whether the plaintiff's have a right to recover in this action?

As to the first question, we are all of opinion that the defendant cannot justly follow or exercise the employment of a *dipper*; the words of the agreement between the lord and his freehold tenants are, "That no person shall be permitted to attend and follow the employment of a *dipper* of "the medicinal waters, but such as shall be *chosen* by the *homage*, at the court baron to be held for the manor, and *approved* by the lord, &c." which are now the words of an act of parliament, and as clear and plain as words can possibly be; none shall be *dippers* but such persons as shall be *chosen* by the *homage*, and also *approved* of by the lord: *Dorcas Baker* (it appears) was not *approved* of, but, on the contrary, was excepted against by the lord; therefore, by the clear words of the statute, she shall not be permitted to attend and follow the employment of a *dipper*. The intention of this statute is also plain; before the making thereof, there was a great contest between the lord and his tenants touching their right of common, these wells, and other matters; the lord was much benefited by the great resort of the nobility and gentry to drink the waters, and the tenants thought themselves injured in their right of common, &c. at length the articles of agreement were made and executed, and being found to be for the mutual advantage of the lord and tenants, were confirmed by parliament, and made firm and permanent; the benefit of these waters being thereby given freely to the public, it was necessary to establish a rule, how, and in what manner, they should be dealt out to the public. The tenants having lost part of their common, thought they ought, in consideration thereof, to have some benefit; therefore, to prevent strife, confusion, and a kind of civil war amongst the tenants, which must necessarily follow if every body who pleased was suffered to exercise the employment of a *dipper*, it was agreed, that the homage should *choose*, and the lord should *approve*, not more than twelve persons to be *dippers*; so that, by this law, all dissolute idle persons are prevented, and no person shall come to be a dipper at the wells, but whom the lord pleases, who is the owner of the soil where they are; *cujus est dare ejus est disponere*; it was a very right measure, that every person should be (as it were) stamped with the seal of both the lord and the homage, before she should be permitted to exercise this employment of *dipper*; so that we have no doubt but the lord must *approve*. Another *matter* was mentioned at the bar as to this first question, and *that* was, whether these words in the articles and the statute, viz. "*In which choice and approbation the wives, widows, and* "*daughters of freehold tenants of the manor shall be preferred*," are *mandatory* or *directory*: but this not being an action against the lord for refusing to *approve* of *Dorcas Baker*, after she was

was *choſen* by the homage, we need not determine this matter. There are many caſes where the words of a ſtatute ſeem to be *mandatory*, yet have been held to be only directory; and ſo *è contra*, where words which ſeem to be *directory* have been held to be *mandatory*; the ſubject-matter of a ſtatute muſt explain the true meaning thereof. The words, in the preſent caſe, ſeem to be *mandatory*; and yet, on the other hand, if they be *abſolutely compulſory*, it would take away the *choice* and *approbation* of any other perſons but the *wives*, *widows*, *and daughters of freehold tenants*; we give no opinion as to this matter, but think, that if the homage do chooſe the *wife*, *widow*, or *daughter of a freehold tenant to be a dipper*, the lord ought to *approve* of ſuch perſon, unleſs he has ſome good exception againſt her. If *Dorcas Baker* could have an action againſt the lord for not *approving* of her after the homage had *choſen* her, ſhe could only recover *damages*, and *not a ſpecific relief:* but let her right of action againſt the lord be what it will, it does not apply to our caſe. At preſent, we are of opinion, ſhe cannot juſtly follow or exerciſe the employment of a *dipper*; which brings us to the

SECOND QUESTION, which is, Whether the plaintiffs have a right to recover in this action?

Several objections were made by the counſel for the defendant; 1ST, It was ſaid, that there muſt be both an *injury* and a damage done to and ſuſtained by the plaintiffs, to ſupport an action upon the caſe: in anſwer to this, we ſay, here is both an *injury* and a *damage*; an *injury*, by the defendant's diſturbing the *dippers* in the exerciſe of their *right* or *employment*, and a *real damage* in depriving them of ſome *gratuity* which they would otherwiſe have received, perhaps more than they might truly deſerve for their labour and pains; beſides an action upon the caſe will lie for a poſſibility of a damage and injury. As for perſuading *A.* not to come and ſell his wares at the market of *B.* the lord of the market may have this action.

2DLY, It was ſaid, that this is not ſuch an *office* or *employment* for which an aſſiſe would lie, and therefore this action will not lie. In anſwer, we think this may be an *employment for life*, determinable upon miſbehaviour; and if ſo, it is a freehold, has a certain place where it is exerciſed, and may be put in view to the *recognitors*; however, we think it ſuch an *intereſt* or *employment* that an action upon the caſe will lie againſt a ſtranger for a diſturbance therein.

3DLY, It was ſaid, that no notice was given previous to the holding of the court baron on the 26th of May, of any intention to appoint *dippers* there, which ought to have been done; in anſwer to this, it is ſtated in the declaration, that the *dippers* were *choſen* and *approved* at *that* court baron; and Mr. Juſtice *Clive* has reported, that it was proved at the trial, that the uſual

notice

notice of holding the court baron was given; it is the court of the *freeholders* who are the judges thereof; the *ſteward* is only their *prothonotary*, and *notice* is never given of any particular buſineſs to be done at a court baron; if any body is to give notice, it muſt be done by the *freeholders*, for it is their court, and they are the ſuitors thereof. What? muſt the *freeholders* give notice to the *freeholders?* it is nonſenſe to ſay ſo; and, perhaps, the greateſt part of them may be diſperſed all over England, or many of them may be abroad in other countries. But here is the *act of parliament* which give them all *notice*; ſo we are of opinion, that *notice* of this particular buſineſs to be done was not neceſſary to be given by, or to any body.

4THLY, It was ſaid, the plaintiffs cannot join in this action. But we think they muſt join, for although the *dippers* are *ſeverally* entitled to receive for their own ſeveral uſe ſuch voluntary gratuities as the nobility and gentry are pleaſed to give them reſpectively, yet with regard to a ſtranger's diſturbing them in their *employment*, they are all jointly concerned in point of intereſt; it is a *tort* as done to them all, like the caſe of the two mills in 2 *Saund.* 215, 216, 217, whereof the two plaintiffs were ſeverally owners, and joined in action againſt the defendant for not grinding at one or either of their mills, which he was obliged to do by the cuſtom of the manor: the principal objection *there* was, that the plaintiffs had joined in *one* action, where it appeared their intereſts were *ſeveral*. *Hale*, C. J. and the whole Court, were of opinion, that they might well join in action; for although their intereſts are *ſeveral*, yet the not grinding at either of their mills is one *entire* joint damage to both the plaintiffs, for which they ſhall have their *joint* action, or otherwiſe the damages would be twice recovered, if they ſhould bring their ſeveral actions. 1 *Vent.* 167, 168. S. C. 2 *Lev.* 27. S. C. this caſe is directly in point as to this objection.

5THLY, It was objected, that the plaintiffs ought to have alleged in their declaration that the *dippers* were ready to dip at the wells: but they have alleged, that they took upon themſelves the ſaid employment of *dippers* at the wells; and that the defendant, well knowing thereof, diſturbed them, &c. that is well enough.

LASTLY, It is objected, that the *huſbands and wives* ought not to have *joined* in this action: in anſwer to this, it is very difficult to reconcile all the caſes in the books touching this matter of *joinder in action*; at preſent, it is ſufficient for us to ſay, that this action is not grounded on any contract expreſs or implied, but the *huſbands* are *joined* to aſſert the *right and intereſt* of their *wives*, which has been diſturbed and injured by the defendant. Whatever be the nature of this *right*, *intereſt*, or *employment*, it is her own, the *huſband* hath nothing at all to do with it, he only *joins* for conformity. It is a ſtronger caſe

caſe than an action by *baron and feme* touching the wife's lands where they muſt join, 1 *Bulſt.* 21. or than the caſe of a debt due to the *feme dum ſola*, wherein they muſt join. *Moor.* 422. *Baron* poſſeſſed of tithes in right of the *feme*, they muſt join in the action of debt, upon the ſtat. 2 *Ed.* 6. for not ſetting forth tithes, becauſe the *feme* is proprietor. *Cro. El.* 608, 613. So in the caſe at bar, the *feme* is the proprietor; and if ſhe muſt *join* in a caſe where the huſband has an intereſt in her lands *a fortiori*, ſhe muſt *join* in the preſent caſe. They may join in treſpaſs *de clauſo fracto* and cutting their graſs. *Cro. Eliz.* 96. And this ſame point was ruled in the caſe of *Willy and his wife* v. *Hawkſmore*, *B. R.* that they may *join* in treſpaſs *quare clauſum fregit* of the wife's land. Wherever the wife is the meritorious cauſe, ſhe may join in action. A very ſtrong caſe to this purpoſe is 2 *Sid.* 128. and ſo is *Cro. Jac.* 77. which was caſe by *baron and feme* upon an *aſſumpſit* for curing a wound by the wife, and alleged *in facto* that ſhe cured it, reſolved ſhe was the cauſe of the action; and ſo the action brought in both their names was well enough. The caſe of *Holmes and wife* v. *Wood* (argued in Mich. term, 3 *Geo.* 2. but not determined till Eaſter term following) was an action upon the caſe, wherein the plaintiffs declared, upon a *quantum meruit*, for a cure done by the plaintiff's wife; and upon another count for medicines and plaſters found and provided for the defendant. Upon a general demurrer, it was objected, that the *wife* could not *join*, for that ſhe was not the ſole cauſe of the action, becauſe the *medicines and plaſters* were the *huſband's own property*, and the damages could not be ſevered; and of *that* opinion was the Court: but they ſaid, that if the action had been brought for the *labour* of the *wife only*, ſhe might well have joined.

Dickon *v.* Clifton, C.B. Mic. Ter. 7 Geo. 3. 2 *Wils.* 319.

In this caſe it was determined, that caſe *on the cuſtom of the realm* againſt a carrier and trover, may be joined in an action; contrary to the old caſe of *Matthews* v. *Hopkin*, B. R. E. 17, *Car.* 2. 1 Sider. 224, and that the true criterion, to know what counts can be joined, is, not whether they require the ſame plea, but whether there is the ſame judgment in both, for that wherever there is the ſame judgment in both they may well be joined.

Maſt *v.* Goodſon, Mic. Ter. 13 Geo. 3. C.B. 3 *Wils.* 348, 2 *Black.* 848.

In this caſe, the Court recognized the caſe of *Dickon* v. *Clifton*, but ſaid, that although in all actions upon the caſe, damages only are recovered, and the final judgment in all of them, both upon contracts and torts, is the ſame, viz. that *it is conſidered by the Court that the plaintiff do recover his damges to ſo much money againſt the defendant, and that the defendant be in miſericordia.* Yet a count upon a common aſſumpſit for goods ſold, money lent, money had and received, and ſuch-like counts (which are mere nonfeaſances in non payment of money) cannot be joined with a count grounded upon a tort or misfeaſance

ſance, as trover, and that, therefore, the rule or teſt to try whether two counts can be joined, as laid down in *Dickon* v. *Clifton*, appeared to them to be rather too large, and not univerſally true; though it might be one good rule or teſt among others to try this point by.

But the common way of declaring againſt a carrier now is in aſſumpſit, to which trover cannot be joined; however, if the plaintiff declare on the cuſtom of the realm, a count in trover may be joined; it only depends on the form of the action, per BULLER, J. Brown v. Dixon, 26 Geo. 3. B.R. 1 *Ter. Rep.* 277.

BULLER, J. alſo ſaid: Perhaps the rule of judging whether two counts can be joined, by conſidering whether the ſame judgment can be given on both, is not true in its extent; but by adding another requiſite it is univerſally true; for wherever the ſame plea may be pleaded, and the ſame judgment given on two counts, they may be joined in the ſame declaration. But aſſumpſit and tort cannot be joined together, becauſe the pleas to both are not the ſame. Brown v. Dixon, 11 Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 276.

In this caſe the plaintiff declared in the firſt count, that the defendant did, by himſelf and ſervants, wrongfully and injuriouſly obſtruct and hinder the plaintiff from landing divers large quantities of his goods upon a wharf, contrary to a written agreement between him and the plaintiff before ſet forth in that count; the 2d count was in trover for coals and other goods detained by the plaintiff: on not guilty pleaded and iſſue thereon, the jury found a general verdict for the plaintiff, with 48l. damages; and it was now moved to arreſt the judgment, becauſe the damages were joint, and caſe and trover cannot be joined in one declaration. By the Court this is certainly a misfeaſance, and ſounds wholly in tort, force, and wrong, and not in contract, for the agreement or contract executed both by the plaintiff and the defendant, is only introductory to ſhew the tort or wrong done by the defendant to the plaintiff in hindering him from the enjoyment of his eaſement, which he had an undoubted right to enjoy, ſo that we are all clearly of opinion, that the firſt count in this caſe at bar is founded upon tort and not upon contract, and that trover may be well joined with it.—Judgment for the plaintiff. Maſt v. Goodſon, Mic. Ter. 13 Geo. 3. C.B. 3 *Wils.* 348, 2 *Black.* 848.

In a ſpecial action upon the caſe for diſturbing the plaintiff in his right of common and right to cut and take ruſhes upon the common for litter for his cattle; there was added a count in trover for two waggon loads of the ruſhes. It was objected after a verdict for the plaintiff with general damages, that the latter count in trover could not be joined, but upon ſhewing cauſe, the caſe of *Maſt* v. *Goodſon* being mentioned, the objection was given up. Beau v. Bloom, Mic. Ter. 14 Geo. 3 C.B. 3 *Ter. Rep.* 456.

The *firſt count* of this declaration was trover for a dog; the *ſecond count* was in ſubſtance, that the plaintiff, at the requeſt of the Brown v. Dixon, Tr. Ter. 26 Geo. 3. B.R. 1 *Ter. Rep.* 274.

the defendant, had delivered to the defendant a certain ſpaniel dog, to be ſeen and viewed, and to be returned in a reaſonable time, but that the defendant did not return the dog, but took and carried it away to places unknown to the plaintiff, and kept and detained the ſame, &c. until the ſaid defendant, by and through his great negligence and careleſſneſs, loſt the ſaid ſpaniel, &c. and *the third and laſt count* laid it, as for a dog *lent* to the defendant, and not redelivered but loſt; to the damage of the plaintiff, &c. To this there was a ſpecial demurrer, for that in the declaration the plaintiff had in the firſt count declared in trover, and yet in the ſecond and laſt counts, for ſuppoſed breaches of *expreſs* or *implied* promiſes, in not returning and redelivering certain dogs, and not for any wrongful converſion of them that the ſaid cauſes of action were different in their natures, incompatibly with each other, and ought not to be joined in the ſame declaration, and for that cauſes of action *founded on wrongs and injuries* ought not to be included in the ſame declaration with cauſes of action *founded on contract, or on negligence, inadvertence, or careleſſneſs.* THE COURT, after argument, ſaid, this could not be diſtinguiſhed from the caſe of *Dickon* v. *Clifton*; and per BULLER, J. Aſſumpſit and tort cannot be joined together, becauſe the pleas to both are not the ſame; but the whole of this is caſe; *the ſame plea* of not guilty, *goes to the whole declaration*, and the Court may give the ſame *judgment on the whole.* Judgment for the plaintiff.

How v. Denin, B. R. June 18, 1762, in error from C. B. 2 *Wilſ.* 142.

Pledges.] This was an action upon the caſe on ſeveral promiſes by bill againſt an attorney of the Common Pleas; judgment was given there by *nil dicit*, and upon error brought the common errors were aſſigned; and alſo that there were no pledges to proſecute appearing upon the record. But *per Curiam*, by the ſtat. of 4 & 5 *Ann.* for the amendment of the law this is become mere matter of form, and cannot be taken advantage of in error now, whatever it might have been before that ſtatute; and if the defendant had thought fit to have taken advantage of this defect of form, he ought to have demurred and ſhewed it for cauſe in C. B. and then the plaintiff there might have moved to amend; but not having done ſo, we will not reverſe the judgment for this mere defect of form; judgment affirmed.

Chapman v. Pickerſgill, Mic. Ter. 3 Geo. 3. C. B. 2 *Wilſ.* 147.

Averment.] Although, to render a declaration good, it may be neceſſary that it ſhould contain a particular averment, yet if after verdict it be moved to grant a new trial for want thereof, the Court will not grant one if it appear that the juſtice and equity of the cauſe is on the ſide of the verdict. Thus in an action upon the caſe for maliciouſly ſuing out a commiſſion of bankruptcy againſt another, it was moved after verdict for the plaintiff, that judgment might be arreſted, becauſe it was not averred that the plaintiff was not indebted to the defendant,

or

or that he never committed an act of bankruptcy; but the Court held that such averment was not necessary; the ground and substance of the declaration is *falsehood and malice*; there are no instances of such averments in conspiracy, that the party was innocent, or did not do the fact on which he was indicted; but the precedents are the other way. In an action for words, as for saying a man is a thief, the plaintiff has no occasion to aver he is not a thief; and this case is analogous, for after the plaintiff has alleged that the commission was false and malicious, it would be tautology to make such averment that he was not indebted, and this declaration would have been good on a demurrer, and more clearly so after a verdict.

Thus in an action on the case, for suing the plaintiff in an inferior court maliciously, and arresting him when that court had no jurisdiction of the cause; there being a verdict for the plaintiff, judgment was moved to be arrested, and an objection was taken, that it was not averred in the declaration that the defendant knew that the place where the cause of action arose was out of the jurisdiction of the court in which he sued; the Court thought that such averment was necessary, but were all of opinion that after a verdict, as the justice and equity of the cause was on the side of the verdict, they ought not to grant a new trial for a mere fault in the declaration against the justice of the case.

Goslin *v.* Wilcock, Ea. Ter. 6 Geo. 3. C. B. 2 *Wils.* 302.

In an action on the 34 *Geo.* 3. c. 23. for pirating a pattern for printing callico, the omission of an averment in the declaration "that the day of first publishing the pattern was printed at each end of the piece of callico" (which together with the name of the proprietor is required by that statute, the monopoly being limited for three months from the day of first publishing the pattern,) was holden to be aided by verdict; it being stated in the declaration that the defendants pirated the pattern *within the term of three months from the day of the first publishing thereof, and while the plaintiffs were entitled to have the sole right of printing the same, &c.* In an action on the case for pirating a pattern for printing callico, contrary to the provisions of the 34 *Geo.* 3. c. 23, the declaration stated, that the plaintiffs, after 1st July, 1794, and before the time of the committing the wrong thereinafter mentioned, had invented and designed, and had become and were the proprietors of a certain new and original pattern for printing callicoes, and had published and caused to be published the same, and had printed and caused to be printed the said pattern upon divers, to wit, 10,000 pieces of callico, and had also printed and caused to be printed the names of the plaintiffs as the said proprietors of the said pattern at each end of each and every piece of callico so by them printed and caused to be printed as aforesaid, according to the form of the statute in that case made and provided, to wit, at, &c.; by reason whereof, and by

Mackmurdo and another, *v.* Smith and others, 38 Geo. 3. B.R. 7 *Ter. Rep.* 518.

force of the ſtatute in ſuch caſe made and provided, the plaintiffs of right ought to have had and were entitled to the ſole right and liberty of printing and reprinting the ſaid pattern for the term of three months, to commence from the day of the firſt publiſhing thereof, to wit, at, &c.; nevertheleſs the defendants well knowing the premiſes, but diſregarding the ſtatute in that behalf made and provided, and contriving to defraud the plaintiffs, and to deprive them of the profits ariſing from their ſaid invention, during the ſaid term of three months, afterwards, and after the 1ſt July, 1794, and after the inventing and deſigning and printing and publiſhing of the ſaid pattern as aforeſaid, within the term of three months from the day of the firſt publiſhing thereof, and whilſt the ſaid plaintiffs were ſuch proprietors of the ſaid pattern as aforeſaid, and were entitled to have the ſole right and liberty of printing and reprinting the ſame as aforeſaid, to wit, on 1ſt June, 1797, within that part of Great Britain called England, to wit, at London, &c. without the conſent in writing of the plaintiffs firſt had and obtained in that behalf, wrongfully, unjuſtly and fraudulently did print and cauſe to be printed the ſaid original pattern of the plaintiffs, upon divers, to wit, 1000 pieces of callico, and the ſame pieces of callico, with the ſaid pattern ſo thereupon printed as aforeſaid, did then and there ſell and diſpoſe of, without the conſent, &c.; contrary to the form of the ſtatute in that caſe made and provided, and thereby deprived the plaintiffs of the ſole right and liberty of printing and reprinting the ſaid pattern within the ſaid term of three months, which right and liberty they during all that time ought to have had and enjoyed; by reaſon whereof the plaintiffs during the ſaid term of three months loſt great part of the profits and advantage of their ſaid invention and deſign, to wit, at London, &c. The 34 *Geo.* 3. c. 23, on which this action was founded, enacts, "That from and after the 1ſt "July, 1794, every perſon who ſhall invent, deſign, and print, "or cauſe to be invented, &c. and become the proprietor of any "new and original pattern for printing linens, cottons, &c. ſhall "have the ſole right and liberty of printing and reprinting the "ſame for three months, to commence from the day of the "firſt publiſhing thereof, which ſhall be truly printed with "the name of the printer or proprietors at each end of every "ſuch piece of linen, cotton, &c." And it then proceeds to give the action for infringing ſuch excluſive right within the time limited. After verdict for the plaintiff, IT WAS MOVED to arreſt the judgment, BECAUSE *there was no averment in the declaration that the day of the firſt publiſhing the pattern was printed at each end of the piece, which together with the name of the proprietor is expreſsly required by the ſtatute.* PER CURIAM: The queſtion now before us is not whether or not this objection would have prevailed if the defendants had demurred

murred to the declaration, but whether or not it be a good objection after verdict. It ſeems to be admitted that every fact neceſſary to be proved at the trial, in order to ſupport the declaration, muſt now be taken to have been proved. Now the act of parliament, on which the action is brought, ſays that the inventor ſhall have the monopoly for three months, to commence from the day of the publiſhing, which ſhall be truly printed with the name of the proprietor at each end. It is ſaid that, if the defendant at the trial had objected that the plaintiffs could not recover without proving that they had complied with both theſe requiſites of the act, the anſwer would have been that that was not the time to take advantage of the objection, becauſe it was an objection on the record: but no ſuch an anſwer ought to have been given, for as the declaration ſtates that within the term of three months from the firſt publiſhing, and while the plaintiffs were the proprietors, and entitled to this monopoly, the defendants invaded their right and did the act complained. Evidence ſhould have been required of the *terminus à quo* to ſhew that the monopoly was veſted in the plaintiffs; and this fact could not have been aſcertained without proving that the date was printed at each end of the cloth. And the jury would not have been directed to give a verdict for the plaintiffs, unleſs ſuch proof were given; and in point of fact it was given. Perhaps it would have been better at firſt that every declaration ſhould have contained each particular fact neceſſary to be proved: but when it is admitted in the argument that *a verdict will cure every defect of allegation*, where in order to obtain a verdict the fact muſt have been proved, there is an end of the objection made here. We are clearly of opinion that it was neceſſary for the plaintiffs, who undertook to prove an invaſion of their right during the exiſtence of this monopoly, to prove that they had printed the date on their cloth, otherwiſe they could not have obtained a verdict; and, conſequently, that the verdict has cured this ſuppoſed defect, and that the judgment ought not to be arreſted. Rule diſcharged.

The mere relation of landlord and tenant is a ſufficient conſideration for the tenant's promiſe to manage a farm in an huſband-like manner. It was moved to arreſt the judgment, on the ground that there was no conſideration in the declaration for the promiſes; for that it was not alleged that the defendant had become tenant to the plaintiff on the terms that he would cultivate the land in a good and huſband-like manner, &c. but merely "that he became and was tenant to the "plaintiff." *In conſideration* whereof, he undertook and promiſed, &c. But THE COURT ſaid that the bare relation of landlord and tenant was a ſufficient conſideration for the promiſes in the declaration; and therefore they refuſed the rule.

Powley *v.* Walker, Mic. Ter. 34 Geo. 3. B.R. 5 *Ter. Rep.* 373.

Freeland *v.* Hunt. Ea. Ter. 8 Geo. 3. C.B. 2 *Wils.* 380.

After a defence made on a writ of enquiry, the defendant is not allowed to take advantage of a miſtake in the declaration. In covenant, on a deed of aſſignment by the defendant of particular debts, and he covenants that none of thoſe debts were ſatisfied; judgment by default, and a writ of enquiry executed; *a fatal miſtake being now found out in the declaration*, it was moved that the interlocutory judgment might be forthwith entered upon record, agreeable to the declaration delivered, and the roll be brought into the proper office, and that the defendant might have four days to move in arreſt of judgment after the roll is brought in. Upon ſhewing cauſe, it appeared that the defendant attended the executing the writ of enquiry by counſel, and croſs examined the plaintiff's witneſſes. *Curia:* We lament that entries on the roll are not made at the times when they ought to be made; the rule muſt be diſcharged, becauſe the defendant did not rely on the miſtake, but has made a defence on the executing the writ of enquiry.

Bentley *v.* Donnelly and Benton, Hil. Ter. 39 Geo. 3. B.R 8 *Ter. Rep.* 127

In caſe for reſcuing a debtor taken upon meſne proceſs ſued out of the Palace court, it was holden not to be ſufficient ground for arreſting the judgment after verdict, that it was not alleged that the cauſe of action in the inferior court aroſe within the juriſdiction, or that it was not alleged that the party below did not appear at the return of the writ. In an action on the caſe for reſcuing a debtor taken upon meſne proceſs ſued out of the Palace court, the declaration ſtated that one *M. A.* on 9th December, 1796, at Weſtminſter, in the county of Middleſex, was indebted to the plaintiff in 20l. on a certain cauſe of action before then accrued to the plaintiff, and the ſaid *M. A.* being ſo indebted, the plaintiff for the recovery of his debt afterwards on the ſame day, &c. ſued and cauſed to be iſſued out of the court of our lord the now king, of his palace of Weſtminſter holden at Southwark in the county of Surrey, and within the juriſdiction of the ſaid court, a writ of *capias ad reſpondendum* againſt the ſaid *M. A.* directed to the bearers of the virge, &c. commanding them to take the ſaid *M. A.* if he ſhould be found within the juriſdiction of the ſaid court, &c. ſo that they might have his body before the judges of the ſaid court at the next court, &c. on the 16th of December then next, to be held at Southwark, &c. to anſwer the plaintiff in a plea of treſpaſs on the caſe, &c.; which writ before the delivery to be executed was duly marked for bail againſt the ſaid *M. A.* for 20l. according to the form of the ſtatute, &c.; and which writ was afterwards, and before the return thereof, *viz.* on the 13th of December, 1796, at Weſtminſter aforeſaid in the ſaid county of Middleſex, delivered to one *F. P.* one of the bearers of the virge, &c. of the ſaid court of the king, of his palace of Weſtminſter, to be executed in due form of law; by virtue of which writ, the ſaid

F. P.

F. P. as ſuch officer, &c. afterwards and before the return of the ſaid writ, *viz.* on the day and year laſt aforeſaid at Weſtminſter aforeſaid in the ſaid county of Middleſex, and within the juriſdiction of the court aforeſaid, arreſted the ſaid *M. A.* and detained him in his cuſtody at the ſuit of the plaintiff for the cauſe aforeſaid by virtue of the ſaid writ and for want of bail thereto; that the defendants well knowing the premiſes, but contriving to injure the plaintiff and deprive him of the means of recovering his ſaid debt whilſt the ſaid *M. A.* ſo remained in the cuſtody of the ſaid *F. P.* at the ſuit of the plaintiff, and before the return of the ſaid writ, to wit, on, &c. at Weſtminſter aforeſaid, with force and arms wrongfully and unlawfully reſcued the ſaid *M. A.* from and out of the cuſtody of the ſaid *F. P.* and ſet him at large, &c. the plaintiff not being then nor yet ſatisfied of his ſaid debt; by means whereof he has been delayed and prevented from recovering his ſaid debt and his coſts, &c. AFTER VERDICT for the plaintiff, a motion was made *in arreſt of judgment*; FIRST, becauſe it was not alleged that the cauſe of action aroſe within the juriſdiction of the Palace court; SECONDLY, becauſe it was not ſhewn that the party arreſted did not appear at the return of the writ; for if he did ſo appear, the plaintiff ſuſtained no damage; and *Noy.* 72. was cited. THE COURT ſaid the authorities 1 *Salk.* 201, 1 *Wilſ.* 255, & *Trevor* v. *Wall*, *ante* p. 700, warranted the plaintiff's propoſition, that it was not neceſſary in ſuch an action as the preſent to ſtate that the cauſe of action aroſe within the juriſdiction of the inferior court. That the caſe *Lucking* v. *Denning*, cited from *Salk.* 201, would not alone have induced the Court to come to this concluſion: but that the caſe of *Bull* v. *Steward*, in 1 *Wilſ.* 255, was a direct authority in point. Rule diſcharged (1).

Cauſes of demurrer.] If a declaration on a bail-bond conclude "Whereby an action hath accrued to the plaintiff to demand "and have of the *principal*" (inſtead of the bail), and ſtate non-payment by the principal; it is bad on a ſpecial demurrer. PER CUR. This is a ſlip in form; but it is always the beſt way to make the party pay for this kind of ſlip, if advantage is taken of it by ſpecial demurrer. Infinite miſchief has been produced by the facility of the courts in overlooking theſe errors: it encourages careleſſneſs, and places ignorance too much upon a footing with knowledge among thoſe who practiſe the drawing of pleadings. The averment of "often re-"queſted" is an eſtabliſhed and neceſſary form: the party, if he will not amend, but will join in demurrer, muſt pay for his blunder.

Morgan, aſſignee of the ſheriff, v. Sargent, one of the bail of Owen, Tr. Ter. 37 Geo. 3. C.B. 1 *Pul. & Bos.* 58.

(1) But ſee 1 *Rol. Abr.* 809. F. *pl.* 3; and 2 *Mod.* 197.

Dobſon v. Sir Wm. Heme, knight, and another theriff of Middleſex, Ea. Ter. 39 Geo. 3. C.B. 2 *Pul. & Bos.* 366

But the omiſſion of "and thereupon the ſaid *I. S.* complains" in the beginning of a declaration of treſpaſs on the caſe is no cauſe of ſpecial demurrer. The declaration began thus: "Sir *W. H.* knight, and *R. W.* eſq. were attached to anſwer unto *John Dobſon* in a plea of treſpaſs on the caſe, for that whereas the ſaid *J. D.* heretofore, to wit, on, &c. at, &c. did demiſe and let to one *J. P. Gaſhiot* a certain meſſuage," &c. ſtating entry and poſſeſſion by him, "and the ſaid *J. D.* further ſaith, that afterwards and during "the continuance of the ſaid demiſe," &c. proceeding to the end in the uſual form. To this there was a ſpecial demurrer, aſſigning for cauſe "that it does not appear in or by "the ſaid declaration that the ſaid *John* complains by attorney (1) or otherwiſe againſt the ſaid Sir *W. H.* and *R. W.* "of or for the premiſes therein mentioned: and alſo for that "the ſaid declaration is merely by way of recital, and does not "contain any poſitive allegation that the ſaid Sir *W. H.* and "*R. W.* committed the ſaid ſeveral ſuppoſed grievances "therein mentioned: and alſo for that the ſaid declaration is in "other reſpects uncertain, inſufficient, and informal." Joinder in demurrer. EYRE, Ch. J. The defendant's objection ſeems to be that there is no declaration: but I do not perceive that cauſe among the ſpecial cauſes of demurrer; the complaint is that the declaration fails in certain particulars, but the exiſtence of a declaration is admitted. The firſt objection, *viz.* that the complaint is not made by attorney has been abandoned. The ſecond objection, is that the declaration is merely by way of recital, and does not contain any allegation of the defendant having committed the offences there mentioned. As to this I am of opinion that the allegation is poſitive enough. The defendant's objections are not ſufficient to entitle him to judgment; but as the declaration is drawn in a ſlovenly manner, and ought not to ſtand on the records of the Court, I think that the plaintiff ſhould have leave to amend without coſts. ROOKE, J. Of the ſame opinion. Leave given to amend without coſts.

Denn on the demiſe of Wroot, v. Fenn, Hil. Ter. 40 Geo. 3, B R. 8 *Ter. Rep.* 474

Plea.] Ancient demeſne muſt be pleaded within the firſt four days of the term. This was a rule (founded on an affidavit, ſtating that the lands for which the ejectment was brought, were holden of the manor and ſoke of *Kirton*, and are ancient demeſne, and that they are pleadable by writ of right cloſe in the court of the ſaid manor, &c.) calling on the leſſor of the plaintiff to ſhew cauſe why *Mary Hutton*, the tenant in poſſeſſion, ſhould not be made defendant inſtead of the caſual ejector,

(1) The omiſſion of the attorney's chriſtian name was held to be error in *Hewſon*'s caſe. 1 *Rol.* 336.

and

and be at liberty to plead ancient demeſne. In moving for the rule, it was admitted that in *Smith* v. *Roe*, *Barn.* 331, it had been ruled that ſuch a plea could not be pleaded after the four firſt days of the term, but it was ſaid that in a ſubſequent caſe, *Roe d. Dutches of Hamilton*, v. *Robinſon*, 2 *Str.* 1120, the defendant was permitted to plead to the juriſdiction, after the firſt four days of the term, that the lands lay in the county palatine of Cheſter. On ſhewing cauſe, the rule was diſcharged. PER CURIAM: The caſe cited from *Strange* will not bear examination; it is objectionable on various grounds. However, ſome difficulties, not mentioned at the bar, have occurred to the court. But, as it is for the advancement of juſtice that this cauſe ſhould be tried in the ſuperior court, we are inclined to adopt the caſe of *Doe d. Henant* v. *Thomas*, *Barnes*, 185, where it was taken for granted that ſuch a plea muſt be pleaded within the four firſt days, and not permit the defendant now to put in this plea (1).

Riens in arrere is a good plea to an action of *debt* for *rent*. —In debt for rent, the plaintiff declared upon an indenture of leaſe for 21 years, made between *William Watts* (who at the time of the indenture was poſſeſſed of the premiſes for the reſidue of a term of 61 years, commencing in the year 1759) on the one part; and *James Gubbins* of the other part: the declaration ſtated the demiſe, the entry of *Gubbins*, *&c.* and that afterwards *Watts* ſold the reverſion to the plaintiffs. That ſubſequent to ſuch ſale of the reverſion, *all* the eſtate, *&c.* of *Gubbins* came by aſſignment to the defendant, who entered, *&c.* after which *half a year*'s rent, *viz.* 20l. became due and in arrear. The defendant pleaded that "nothing of the rent "*is* in arrear and unpaid as by the declaration is above ſup-"poſed." The plaintiffs demurred, and aſſigned for ſpecial cauſe: 1ſt, That it was not alleged that the rent was paid on the 24th of June, 1776, or *when it became due*, or *when* the ſame was paid. 2d, That it did not allege, that the rent was paid *before* or *at the time of exhibiting the bill*, or that the ſame *was not then in arrear and unpaid*. THE QUESTION was, whether in debt for rent by an aſſignee againſt an aſſignee, the plea of *riens in arrere* was a good plea? PER CURIAM: The declaration ſays, there is ſo much rent in arrear. The plea ſays, there is not. The ſaying there is nothing in arrear, is the ſame as if he had ſaid *nil debet*; and it is abſurd to ſuppoſe that it relates to the time of the plea, and not to the action. Beſides it is a more favourable plea for the plaintiff; it is an anſwer to the action. The action is in the preſent tenſe: ſo is the plea. It is the general iſſue. If the

Warner *et al.* v. Theobald, Ea. Ter. 17 Geo. 3. B.R. *Cowp.* 588.

(1) But ſee *Marſhall* v. *Allen*, *Palm.* 406, and *Latch.* 83, 84; and *Welles* v. *Trabern*. *Will. Rep.* 239.

rent

rent *was* due, and *is* not at the time of the plea; it could not have ceaſed to be due, but by the plaintiff's accepting it: and if ſo, he waves the action, though it was well brought at the time. *Per Curiam*: Withdraw the demurrer on payment of coſts.

Curling v. Innes, Mic. Ter. 35 Geo. 3. C. B. 2 *Hen. Black.* 373.

A. having privilege of parliament, owes *B.* a ſum of money, for which *B.* ſues him; in conſequence of which *C.* enters into a bond together with *A.* conditioned for the payment to *B.* of ſuch ſum as *B.* ſhall recover in the action againſt *A.* in purſuance of the ſtat. 4 *Geo.* 3. c. 33. In that action *B.* obtains judgment, and puts the bond in ſuit againſt *C.* To the action on the bond, *C.*, being under terms by a judge's order to *plead iſſuably*, may plead in bar that writ of error is depending on the judgment againſt *A.*—The plaintiff brought an action in this court for 3000l. againſt *Beckford* a trader having privilege of parliament, on his bond; in conſequence of which *Beckford*, together with the defendant *Innes* and *Keighly* entered into another joint and ſeveral bond for 6000l. in purſuance of the ſtat. 4 *Geo* 3. c. 33. conditioned for the payment to the plaintiff of ſuch ſum as he ſhould recover in that action; and judgment being afterwards entered up againſt *Beckford*, the ſecond bond was put in ſuit, when the defendant took out a ſummons for time to plead, and a judge's order was made, allowing him time for that purpoſe on the uſual terms of *pleading iſſuably*, rejoining gratis, and taking ſhort notice of trial. Under this order he pleaded, after oyer of the bond and condition, "*actio non*, becauſe that notwithſtanding the recovery a writ of error had been brought and was pending. A rule was obtained to ſhew cauſe, why this plea ſhould not be withdrawn, as not being an inſuable plea within the terms of the order, the attorney alſo making an affidavit, that he verily believed the writ of error was brought merely for delay. PER CURIAM: The ſurety cannot be liable till the money is actually recovered againſt the principal in the former action, and while the writ of error is depending, the money is not actually recovered—Rule diſcharged.

Weave v. Buſh, Mic. Ter. 39 Geo. 3. B. R. 8 *Ter. Rep.* 78.

To treſpaſs for an aſſault and battery, the defendant may plead that the plaintiff with force and arms and with a ſtrong hand endeavoured forcibly to break and enter the defendant's cloſe, whereupon the defendant reſiſted and oppoſed ſuch entrance, &c. and if any damage happened to the plaintiff it was in the defence of the poſſeſſion of the ſaid cloſe. PER CURIAM: A party may reſiſt and oppoſe force by force in defence of his poſſeſſion, if neceſſary: if the reſiſtance be exceſſive, the plaintiff may ſhew that in a new aſſignment. The general form of pleading certainly has been agreeable to the authority of *Jones* v. *Treſilian*, 1 *Mod.* 36. where *Twiſden*, J. ſaid, "You cannot juſtify the beating of a man in defence of your poſſeſſion; but you may ſay that you did *molliter manus imponere*, &c." And on this

ground, that the defendant ought not in the first instance, to begin with striking the plaintiff, but the law allows him either in defence of his person or possessions *to lay his hands on the plaintiff*, and then he may say if any further mischief ensued it was in consequence of the plaintiff's own act; so that the battery follows from the resistance. But it does not necessarily follow from any thing stated in the present plea that the defendant did more than gently lay his hands on the plaintiff in the first instance, and if not, this plea may stand consistently with all the authorities. It is true that in 2 *Lutw.* 1481. to a plea of *son assault* the plaintiff replied that he was a servant to *W. Sandys*, employed to take care of his horses, and that the defendant with a bill endeavoured to beat and wound one of the horses, when the plaintiff, in order to defend the said horse, put his hands on the defendant who thereupon beat the plaintiff, &c.; and it was holden that this replication was bad, because it did not allege that the defendant had beaten the horse before the plaintiff put his hands on the defendant. That goes the length of saying that the party cannot even plead *molliter manus imposuit* in defence of his possession, unless there has been something more than a mere attempt to beat him. *But in the way in which we consider the present plea, it may be supported consistently* with all the authorities.

When a defendant, living within the jurisdiction of the Court of Requests of Westminster, is sued in one of the superior courts for a debt under 40s. he may *plead the* 23 *Geo.* 2. c. 27. *in bar.* But if he omit to do so, the Court will not after verdict either enter a suggestion on the record that the defendant lived within the jurisdiction or stay the proceedings. The plaintiff having recovered 28 shillings on the trial of this cause, the defendant on a former day in this term obtained a rule to shew cause why he should not be at liberty to enter a suggestion on the record that, at the commencement of the action, he lived within the jurisdiction of the Court of Requests of Westminster; or why all further proceedings should not be stayed, on the 23 *Geo.* 2. c. 27. The 21st section of which enacts, "that no action for any debt, not "amounting to 40s. and recoverable in the Court of Requests. "shall be b ought against any person residing within the ju- "risdiction thereof, in any other court whatsoever." Lord KENYON, C. J.—It has been urged in support of this rule that, unless we interfere in this stage of the proceedings, the 21st section of the act will be rendered nugatory: but that is by no means the case; for the defendant might have pleaded the statute; or perhaps if the objection had been made at the trial, the plaintiff would have been nonsuited. But there are many cases where, if the party omit to take the benefit of an objection, which he is entitled to take in any particular stage of

Taylor *v.* Blair, Mic. Ter. 30 Geo. 3. B. R. 3 *Ter. Rep.* 452.

of the cauſe, he cannot take advantage of it afterwards. As in the inſtance of actions brought in an inferior court, where the cauſe of action muſt be proved to have ariſen within its juriſdiction; if the defendant make an objection on the trial for the want of ſuch proof, he is entitled to a verdict, or to inſiſt that the plaintiff ſhall be nonſuited: but if no ſuch objection be made, and the cauſe of action be laid in the declaration to ariſe within the juriſdiction, he cannot, after verdict againſt him, take advantage of its not having been proved, either by falſe judgment or a writ of error, becauſe the defect does not appear on the record. In the caſe of *Petrie* v. *White*, *ante*, vol. II. p. 476. the Court granted a rule to ſtay the proceedings, becauſe the defendant had no other remedy: but here the act of parliament has directed the manner in which the defendant was entitled to take advantage of it. The argument, that under the ſtatute of *Glouceſter* a plaintiff is entitled to coſts, where he recovers damages, in all caſes, unleſs deprived of them by ſome ſubſequent act, is unanſwerable. Different acts of parliament have preſcribed different modes by which a plaintiff may be deprived of coſts; ſome by a ſuggeſtion on the roll; others by a certificate from the Judge; and others by plea. The ſtatute in queſtion has preſcribed the latter mode; and as the defendant has not choſen to avail himſelf of that, his application is now too late. *Per Curiam.* Rule diſcharged.

Hawkins, Eſq. v. Wallis, Eſq. Tr. Ter. 3 Geo. 3. C. B. 2 *Wils.* 173.

Whoever claims an caſement muſt plead it ſpecially.—Treſpaſs for nailing trees againſt the plaintiff's wall; not guilty pleaded; verdict for the plaintiff, ſubject to the opinion of the Court upon this ſhort caſe. The facts at the trial were, that the plaintiff was poſſeſſed of a certain greenhouſe, the backwall whereof adjoined to the defendant's cloſe, and that the defendant nailed the trees growing in his cloſe to the wall of the plaintiff's greenhouſe, which was the abſolute property of the plaintiff, and that the defendant had uſed ſo to nail his trees to the ſame wall for 30 years laſt paſt, without interruption; it was inſiſted that this long uſage was a poſſeſſion of the back part of the wall in the defendant, though the property of the wall was in the plaintiff. BUT PER CURIAM: It was reſolved that this was no poſſeſſion in the defendant, but an *caſement* only, and cannot be given in evidence upon the general iſſue; for whoever claims *an eaſement* muſt plead it ſpecially; and judgment was given for the plaintiff. *Gould*, J. Suppoſe the wall falls down, it being the plaintiff's property and fence next to defendant's cloſe, the plaintiff muſt rebuild it, or the defendant might have an action againſt him.

Rouſe v. Bardin, *et al.* Hil. Ter 31 Geo. 3. C. B. 1 *Hen. Blk.* 351.

In treſpaſs, a plea of juſtification, ſtating that a public highway led from another highway (leading from *A.* to *B.*) *in, through, over, and along the locus in quo* to a certain other high-

way

way (leading from C. to D.) was well ſupported by evidence proving that the way in queſtion led from the *terminos a quo*, viz. the way leading from A. to B., over the *locus in quo*, to a different way called E., and *along that way* into the way leading from C. to D., the *terminus ad quem*. In pleading a public highway, it is not neceſſary to ſtate any *termini*.—This caſe aroſe on pleadings of conſiderable length, ſtating, that the treſpaſs was committed in a place called Brompton-Heath, with ſeveral variations in point of deſcription. The defendants ſay, that from time whereof the memory of man is not to the contrary, *there has been a common public highway, for all the liege ſubjects of this kingdom, to paſs and repaſs on foot, from a certain other common public highway, leading from Knightſbridge to Earl's-Court, in, through, over, and upon the ſaid cloſe called Brompton-Heath*, UNTO A CERTAIN OTHER COMMON HIGHWAY LEADING FROM *London to Fulham, and back again, in, through, and over the* locus in quo. THE EVIDENCE at the trial was, that the way in diſpute led over Brompton-Heath INTO A FOOTWAY CALLED THE CHURCH LANE, AT THE WEST SIDE, AND ALONG THAT FOOTWAY, *into the road leading from London to Fulham*.—Lord LOUGHBOROUGH, who tried the cauſe, thought the plea was not ſupported by the evidence, inaſmuch as there was a variance with reſpect to the *terminus ad quem*, and directed the jury to find a verdict for the plaintiff. A new trial was moved for.—GOULD, J. In caſes of this ſort, *the intermediate ſpaces, either before the entrance into a field, or at the exit out of it*, before you reach the *terminus ad quem*, are immaterial. This is the caſe of a common public highway, and there have been very conſiderable doubts, whether, in a common highway, any *termini* at all need be ſet forth. There was a caſe mentioned at the bar, of an indictment for ſtopping a highway at Kenſington; in which it was holden, that the way was ſufficiently deſcribed, without ſtating from what place, to what place it led; and among other things, a reaſon was given for that opinion, becauſe a highway runs from the ſea acroſs the whole iſland. But, nevertheleſs, if a defendant will ſtate the *termini* in his juſtification, he is bound to prove them. There are many inſtances which muſt occur to every one, where things are not neceſſary to be alleged in pleading; yet, if they be alleged, they muſt be proved. Such as the deſcription of a public act of parliament; the day when the ſeſſions were holden; and the like. So, where an officer juſtifies under proceſs of execution out of a court, it is unneceſſary for him to ſtate a judgment; yet, if he will ſtate it, he is bound to prove it as deſcribed. Theſe are common caſes, and many more might be adduced. The queſtion then, in the preſent caſe is, What the terms of this plea require to be proved, and whether they neceſſarily import that the way in diſpute was *adjoining*

ing to the Fulham road? Now, that is not the caſe; the way is deſcribed to go, *in*, *through*, *over*, and *along* Brompton-Heath, *unto* the Fulham road. But there is an intervening ſpace between that and the Fulham road. If it had been deſcribed to be *adjoining* to the Fulham road, I have already given my opinion as to the proof. But it is ſtated, to lead *unto* the Fulham road; which, in my apprehenſion, is nothing more than this; a common highway, which is one entire thing, leads over this field to the Fulham road; and ſo it does, notwithſtanding there is an intervening piece of ground. The caſe, cited at the bar from 1 *Ventris* 13. comprehends this idea. It is there ſaid to be ſufficient to ſtate the places from which, and to which the way leads, though the meſne paſſages ſhould be miſtaken. It will be material to advert to ancient pleadings in juſtification. I find in *Raſtall's Entries*, 617. *b.* a right of way pleaded as follows: A man was ſeiſed of a meſſuage in S. and preſcribed for a way for all thoſe whoſe eſtate, &c. both for horſe and foot "*from the meſſuage to the pariſh church of E. and the market town of M.* with all his carriages *ultrà clauſum prædictum.*" Now it would be productive of infinite uncertainty, to require an exact deſcription of the line of the way, to ſay that it went ſo many yards to the north, then turned to the weſt, and then to the eaſt, in that irregular manner. Such juſtifications as theſe would then be clogged with inſuperable difficulties in point of proof. And, I think, it would be totally unneceſſary; the uſage defines the way. I mention this as occurring to me from the books and pleadings: and, with regard to experience, I have always underſtood that the intermediate ſpaces are diſregarded, both as to the approach to a field and the quitting it. It is ſufficient to anſwer the treſpaſs, and juſtify under a right to paſs over the cloſe. I, therefore, think, this is not a material variance from the plea.—WILSON, J. of the ſame opinion. Where the way is a public highway, it is in no ſort neceſſary to ſtate either the *terminus à quo*, or the *terminus ad quem*; where it is a private way, it is neceſſary to ſtate them, becauſe private ways are given for particular purpoſes, and the juſtification muſt ſhew that they were uſed for thoſe purpoſes. But it is different with regard to a public highway, becauſe all his majeſty's ſubjects have a right to uſe that way, for all purpoſes, and at all times. The reaſon given in the ancient caſes, why a highway muſt be particularly deſcribed, is not a very good one; namely, that it muſt be ſtated to lead to a market-town, in order to ſhew that it is a highway. Lord *Hale* ſays, whether it be a highway or not, depends much on reputation. I am, therefore, of opinion, that in juſtifying a treſpaſs, becauſe the place in queſtion is a highway, it is not neceſſary to ſtate the places to which, and from which it leads. If that be ſo, the next queſtion is, Whether thoſe places, being ſtated in the plea, they are ſufficiently proved? With reſpect

reſpect to that, the way in diſpute is ſtated to be a highway leading from one highway to another highway. I think it cannot be doubted, but that this is a ſufficient deſcription.—But it is impoſſible to ſtate the ſpecific line of the road under that deſcription, which can only be, that it leads from one point to another. What the line is, on which the highway paſſes, muſt be a matter of evidence. The objection in this caſe is, that the way is ſtated to lead to the Fulham road; but that before it reaches the Fulham road, it goes for a little ſpace on another highway. But I do not conceive that to be a material variance. I underſtand the allegation to import no more than this, namely, that there is a highway over the cloſe, on which you may go from the Fulham road to the Kenſington road; but not that the Fulham road joins to the cloſe over which the highway leads. But even if that were the import of the allegation, I ſhould have conſiderable doubts whether this were a variance. But clearly the allegation means no more than this, there is a highway over the cloſe, leading from the Fulham road to the Kenſington road, which, I think, was ſufficiently proved by the evidence.—Lord LOUGHBOROUGH: My brother *Heath* has informed me, that he is of the ſame opinion with my brothers *Gould* and *Wilſon*. I therefore certainly feel, that the authority of the Court ought to govern my opinion. But, on the beſt conſideration I have given the queſtion, I have not been able to bring myſelf to agree with them. I ſtill retain the opinion I firſt had at the trial, and think, that in all caſes, where a real difference in opinion exiſts, it is right to avow it, and ſtate the grounds on which we differ. His lordſhip then ſtated the grounds on which he differed in opinion.—Rule abſolute.

It is ſufficient, in pleading a public highway, to allege, that it is a common public highway, without ſhewing *how* it became ſo, or that it has been ſo *time immemorial*.—To an action of treſpaſs for breaking and entering the plaintiff's cloſe, the defendant juſtified under a right of way. The plea ſtated, "that before, and at the ſame time when, &c. there was, and "of right ought to have been, a certain common public high-"way leading, &c. for all the liege ſubjects, &c. to go, return, "paſs, and repaſs, on foot and on horſeback, and with their "cattle and carriages, at all times of the year," &c.; without alleging that it had been an highway *from time immemorial*. To this there was a general demurrer, and joinder.—*Per Curiam:* It is ſufficient to ſtate, in a compendious way, that it is an highway. All the precedents in *Tremaine*, are in that general form, without ſetting forth when it became an highway. Great inconveniences would follow, if it were otherwiſe; for ſtrangers, paſſing along the ſtreets of London, could not aſcertain when they firſt became highways. And the inſtance

Aſpindall *v.* Brown, Ea. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 265.

ſtance of indictments is deciſive on this queſtion.—Judgment for the defendant.

Clark *v.* King *et al* Hil. Ter. 29 Geo. 3. B.R. 3 *Ter. Rep.* 147.

A plea of preſcription for common in a que eſtate, is good after verdict, though it be not in *expreſs* terms alleged that the owners of the eſtate have uſed it from time immemorial.—This was an action of replevin, for taking cattle at Otmoor, Oxford. The defendants made cognizance as bailiffs of Lord *Abingdon*, whoſe ſoil and freehold Otmoor was; and they juſtified taking the cattle as doing damage on the moor. The plea in bar ſet forth, that long before, and at the time when, &c. *A. Croke* was ſeiſed in his demeſne as of fee, of and in a certain meſſuage, and 150 acres of land, with the appurtenances, in Studley, Bucks: "and that the ſaid *A. Croke*, and all thoſe "whoſe eſtate he then had, and now has, of and in the ſaid "meſſuage and land, with the appurtenances, have had and "uſed, and been accuſtomed to have and uſe, and of right "ought, &c. for themſelves and their farmers and tenants, oc-"cupiers of the ſaid meſſuage and land, with the appurtenances "for the time, common of paſture on Otmoor, for common-"able cattle, &c." The replication traverſed the right as ſtated in the plea in bar; and on the trial, the plaintiff had a verdict. It was now moved in arreſt of judgment, becauſe the plea in bar did not ſtate that *A. Croke*, and thoſe whoſe eſtate he had, had been *immemorially* entitled to the right of common: that it could not be ſupported as a preſcriptive right, as not been claimed *time out of mind*; and that, though the evidence might prove the right as laid, it could not enlarge it. But, *per Curiam*, although this is not accurately ſtated, yet at any rate it is ſufficient after verdict. It ſtates a right of common in all thoſe who have held that eſtate; and unleſs a preſcriptive right had been proved, the plaintiff could not have obtained a verdict.—Rule refuſed.

Morewood *v.* Wood *et al.* Hil. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 157.

If to an action of treſpaſs in the common called *A.* the defendant plead that A. and B. commons lie open to each other, and then preſcribe for a right in both commons, the plaintiff muſt traverſe the *whole* preſcription.—Treſpaſs for breaking and entering the plaintiff's cloſe, called Swanwick-Common, otherwiſe Swnwick-Delves, in the pariſh of Alfreton, Derby, and digging ſtones therein, &c. and carrying them away, &c. Plea, that there are certain waſtes or commons lying open to one another, one called Swanwick Common, otherwiſe Swanwick-Delves, being the cloſe in which, &c. the other called Swanwick-Green, in Alfreton, &c.; that one of the defendants was ſeiſed in fee, of certain tenements in Alfreton, in right of which he preſcribed for the liberty of digging ſtones in, upon, and throughout the ſaid cloſes called Swanwick-Common, otherwiſe Swanwick-Delves, and Swanwick-Green, for repairs, &c.; and that he (his tenement wanting repairs), in

in his own right, and the other defendant, as his ſervant, entered &c. for that purpoſe. Replication, traverſing the preſcription in Swanwick-Common, otherwiſe Swanwick-Delves; dropping Swanwick-Green. Rejoinder, tendering iſſue on the preſcription both in Swanwick-Common and Swanwick-Green. Special demurrer; becauſe the defendants in their rejoinder did not tender an iſſue on the fact traverſed by the plaintiff in his replication; and becauſe the iſſue tendered in the rejoinder is too large, comprehending not only the fact of the preſcription traverſed by the replication, but alſo a matter of fact not alleged, or traverſed by the replication, namely, a preſcription to dig for ſtones, &c. in Swanwick-Green; and becauſe the laſt preſcription, ſo attempted to be put in iſſue, is wholly immaterial and irrevelant in this action, &c.; joinder in demurrer.—PER CURIAM: If an action be brought for a treſpaſs in a particular cloſe, the defendant may plead that it is a part of a larger cloſe, and that he has a right over the whole. Here it is ſtated, in the plea, that the commons lie open to each other, and that the defendant has a right in both. No injury is done to the plaintiff by this mode of pleading; for the defendant, having preſcribed for the whole, muſt prove the whole preſcription, otherwiſe he muſt fail at the trial. Whereas great injuſtice might be done to the defendant, if he were not permitted to plead this preſcription over the whole: for if he were not, he would not be permitted to give evidence of acts of ownerſhip over Swanwick-Green, when, perhaps, his own convenience might have led him to exerciſe more frequent acts of ownerſhip over that part of the common than over the other part at a greater diſtance from his own home. And in very extenſive waſtes and commons, it frequently happens that particular perſons, for their own convenience, depaſture their cattle on particular ſpots, but that by no means excludes their right over the other parts; and in ſuch caſe, it would be extremely unjuſt that commoners, who are ſued for treſpaſſes upon one part of the waſte, ſhould not be permitted to preſcribe for the whole.—THE COURT, however, gave the plaintiff leave to amend.

In pleading a right to enter a common to dig for and carry away ſand and gravel for the repairs of a houſe, it is neceſſary to allege that the houſe was out of repair, that the party entered for the purpoſe of digging for and carrying away ſand and gravel for the neceſſary repairs of that houſe, and that the materials were uſed for that purpoſe.—Treſpaſs for breaking and entering the plaintiff's incloſure in Walton-upon-Thames, and breaking down gates, poſts, &c. Plea, that the *locus in quo* was formerly part of Sharp-Thorn-Common, otherwiſe Walton-Common, and within and part of the manor of Walton-upon-Thames: that four cloſes of land, called Floyſters-Roydens, are within and part of the ſame manor; that in 1789, the lords of the manor granted the ſaid four

Peppin *v.* Shakeſpear *et. al.* Tr. Ter. 36 Geo. 3. B R. 6 *Ter. Rep.* 748.

closes to the defendant, *Shakespear*, in fee, according to the custom of the manor; and that the tenants of that customary TENEMENT have immemorially been accustomed to have common of pasture on the said common, *and also the liberty and privilege of digging for and carrying away sand, loam, and gravel*, in and from the said common, for their *necessary repairs*; that the defendant, *Shakespear*, in his own right, and the other defendants as his servants, entered on the place in question, being parcel of the said common, for the purpose of digging for and carrying away sand, loam, and gravel, *for the necessary repairs of the said Shakespear*, and also put in his cattle in the declaration mentioned, &c. &c. The next special plea was similar to the first, except that it was confined to the right of pasture only. The third was like the second, except that it was confined to the right of digging for sand, loam, and gravel. There were three other similar pleas, *mutatis mutandis*, in which the rights were claimed in respect of other tenements, belonging to some of the other defendants; *and in one of them the tenement was stated to be a messuage*. Replication to those six special pleas, that the lords of the manor, in 1794, conveyed the place in question to the plaintiff in fee, to the intent that he might inclose and approve the same; that by virtue of the statute he did inclose and approve, leaving in the residue of the said common, sufficient common of pasture, and sufficient sand, loam, and gravel for the defendant, and all others having right, &c. To this replication there was a general demurrer, and joinder in demurrer. But *the Court* gave judgment for the plaintiff in this case, on account of defects in the defendant's pleas; in each of which it was stated, that the defendant entered, &c. for the purpose of digging for and carrying away, sand, &c. *for the necessary repairs of the said defendant*. They thought that no question could be made about any of the pleas, but that in which it was stated that the tenement was a messuage. And with respect to that, they said, that it ought to have been expressly alleged that the house was in want of repair, that the defendants entered for the purpose(1) of digging for, and carrying away, sand, &c. for the necessary repairs of that house, and that they used the sand, &c. for that purpose, in order that the plaintiff might have traversed these facts.—Judgment for the plaintiff.

Johns *v.* Whitley *et. al.* Ea. Ter. 10 Geo. 3. C.B. 3 *Wils.* 65.

Wherever a particular estate is pleaded it must be shewn, and derived out of, and from the fee.—This was a declaration against the defendants in trespass, *quare clausa fregerunt*, and trod down and consumed the grass and corn, and reaped, cut down, and carried away the grass and corn. Second count for mowing, reaping, and carrying away, other grass and corn.—Third count to the like effect.—PLEAS: first plea, the general issue to the whole declaration. Second

(1) On this point *Lit. Rep.* 38. was cited by the defendants.

plea

plea in bar, as to breaking the cloſes in the declaration, ſpoiling the graſs and eating up other graſs, and with carts, &c. ſpoiling the ſoil of the ſaid cloſes. Defendants ſay, that *one P. K. before the time when, &c. was entitled to ſaid cloſes for the remainder of a term of ninety-nine years*, determinable on the death of the ſaid *P. K.* who demiſed the ſame to the defendant, *Whitley*. To hold the ſame for one year, and ſo from year to year, as long as it ſhould pleaſe the ſaid *J. K.* and defendant *J. W.* and the eſtate and intereſt of ſaid *P. K* ſhould continue therein. By virtue of which demiſe, the ſaid *J.* entered and was poſſeſſed, the ſaid *P. K.* then being living, and his intereſt ſtill continuing therein. And being ſo poſſeſſed, the ſaid *J.* before the time when, &c. ploughed and ſowed the ſaid cloſes with corn. And the ſaid *P. K.*, after the ſaid *J.* had ſo ploughed and ſowed, and before he had reaped and carried away the corn, and before the end of the ſaid ninety nine years, and before the ſaid time when, &c. died. And ſo the defendants juſtify the entering into the cloſes, and reaping and carrying away the corn, and excuſe themſelves for treading, &c. a little graſs upon that occaſion. *Quæ eſt eadem tranſgreſſio.* To this there was a demurrer.—And the ſpecial cauſes of demurrer were: 1ſt, That defendants have not ſet forth the commencement of the ſaid term of ninety-nine years. 2dly, That defendants have not ſhewn that *P. K.* at the time of the demiſe to defendant *J.*, or before, was poſſeſſed of ſaid cloſes, but only that he was *intitled* thereunto. JOINDER IN DEMURRER.

For the plaintiff it was argued, 1ſt, That the plea in bar was ill, becauſe the defendants have not ſet forth therein the commencement of the term of ninety-nine years, viz. out of *what eſtate* it was derived; that it is an eſtabliſhed rule in pleading, that the commencement of all particular eſtates ought to be ſhewn in pleas, avowries, replications, &c. and the reaſon why the commencement of particular eſtates muſt be ſhewn in pleading, is, becauſe they are created, by agreement, out of the primitive eſtate; and the Court muſt judge whether the primitive eſtate and agreement be ſufficient to produce the particular eſtate claimed; and this is a fundamental rule, (*per Holt*, Chief Juſtice, in the caſe of *Scilly* v. *Dally*, 2 *Salk.* 562.) which ought not to be broken, upon fancied inconveniencies.

2dly, It was inſiſted, that the bar was ill, becauſe it ſhews no title in *P. K.* to enable him to demiſe to the defendant *W.*, whereupon a good iſſue may be taken; or which may be well traverſed by the plaintiff: but the plea only alleges, that *P. K.* was *lawfully intitled* to the ſaid cloſes, in which, &c. for the remainder of a term, which cannot be traverſed; becauſe, *whether intitled or not*, is matter of law, not fact. See 1 Ld. *Raym.* 332. 2 *Lutw.* 1232. And if the plea had alleged, that *Peter Knight* was *lawfully poſſeſſed*, it would ſtill have been ill in this caſe, according to 2 Ld. *Raym.* 332, where the title,

not the mere poſſeſſion, is the material point in queſtion. Indeed, in the caſe of a *perſonal treſpaſs*, where the title is not in queſtion, it is otherwiſe; as in the caſe of *Skevill* v. *Avery*. *Cro. Car.* 138. which was treſpaſs, aſſault, battery, and wounding: the defendant pleaded to the wounding, *not guilty*; to the aſſault and battery, he pleaded, that he was *poſſeſſed* of an houſe *for years*, that the plaintiff entered his houſe, and would have thruſt him out of poſſeſſion thereof, whereupon he *moliter manus impoſuit*, to put him out; and the harm, if any done, was in defence of his own poſſeſſion: hereupon the plaintiff demurred; and *Goldſmith*, counſel for the plaintiff, ſhewed for cauſe, that the defendant had pleaded a leaſe for years, not ſhewing who made the leaſe, nor when it was made, nor for how many years, whereas the ſame ought to have been pleaded ſpecially, and ſhewn *particulatim*; for if it be traverſed, there cannot be any good iſſue thereupon; and he relied upon *Crogat's caſe*, 8 *Rep.* 66. that *de injuria ſua propria* is no plea: but all the Court held, that the defendant had well pleaded; for ſaying that he was *poſſeſſed for years*, is but an *inducement* and conveyance to his juſtification, and not the *ſubſtance* thereof, which is, *that he offered to thruſt him out of the poſſeſſion of his houſe*; and whatſoever title he hath, it is not material; for if he was in poſſeſſion by virtue of a leaſe, at will, or any other title, *de injuria ſua propria* is a good plea: for the title or intereſt not coming in queſtion (and what was pleaded or alleged being but an inducement to the plea) it needs not to be ſo certain as where it is pleaded by way of title, to make a claim in the defendant; whereupon it was adjudged for the defendant.

IT WAS INSISTED for the defendants, that this was a good juſtification, under a bare poſſeſſion, that he who ploughs and ſows ſhall reap, and take the emblements; that it would be a great hardſhip upon under-leſſees, if they ſhould be obliged to ſet forth the original leaſe in pleading; that *K.*, the late tenant for life, is dead; and that the original leaſe being determined, is delivered up and in the hands of the plaintiff *Johns*, the owner of the inheritance, and not in the power of the defendants to ſet forth in their plea.

UPON THIS FIRST ARGUMENT, *Wilmot*, Chief Juſtice, ſpoke to this effect, viz. I would try, if it be poſſible, to ſupport this plea; for it is very hard upon under-tenants, to be obliged in pleading to ſet forth the original leaſe. Since the caſe of *Scilly* v. *Dally*, in *Salk.* and Ld. *Raym.* I am inclined to think, there have been ſome diſtinctions taken between particular eſtates *determined*, and ſuch as are *ſubſiſting*: the tenant, *Joſeph Whitley* [the defendant] has an undoubted right to the emblements, and the law gives him a licence to enter and take them. The original leaſe being determined, belongs to the leſſor [the plaintiff, *Johns*], and (probably) is delivered up

up to him by the executors of *Knight*; and now ſays the plaintiff (*Johns*), the original leſſor, you muſt ſhew the leaſe (which I have in my own power) in your plea; this matter would not ſtand one minute's debate in a court of equity; and I hope and wiſh we may be able, upon further conſideration, to make this plea good; if we cannot, but are bound by the rules of pleading to ſay it is bad, I muſt ſay that this is a very hard caſe.

In Hilary term, the reſt of the Court were much inclined to ſupport the plea if poſſible; and adjourned it for further conſideration until this preſent time.

CURIA: We were inclined, and wiſhed to ſupport this plea if poſſible; we ſaw *the inconvenience of obliging the defendant to ſet out the original leaſe which is not in his power*, and therefore, took time to conſider, whether we might not legally deviate from the general rule of pleading in the caſe before laid down; but we are of opinion, that we cannot depart from it. The caſe of *Scilly* v. *Dally* is good law, wherein this fundamental rule is laid down, that *wherever a particular eſtate is pleaded, it muſt be ſhewn, and derived out of, and from the fee:* but here it is not ſhewn or known who is ſeiſed in fee. Eſtates in fee-ſimple may be generally alleged; but the *commencement* of eſtates tail, and other particular eſtates, muſt be alleged in pleading; unleſs, in ſome caſes, where they are alleged by way of inducement. *Co. Lit.* 303. *b.* One great reaſon for this, is, that a fee may be proved by acts of ownerſhip, or long poſſeſſion; a fee may be acquired by wrong, but a particular eſtate cannot be got by wrong; ſo that no evidence can prove the exiſtence of a particular eſtate, without deriving it from the fee. He who has the fee, has a right in treſpaſs to call on any body, and ſay, "ſhew me your particular eſtate, either from me, or from ſome ſtranger;" for if a ſtranger has diſſeiſed the plaintiff, and he enters and acquires his eſtate in fee again, that deſtroys all claimers under the diſſeiſor. And he can call upon them in treſpaſs to ſhew title from the fee. The caſe in *Cro. Car.* 138. cited above, is the beſt caſe to the point in queſtion, and agreeable to the rule of *Co. Litt.* 303. *b.* There is a great difference between a treſpaſs *quare clauſum fregit*, and a perſonal treſpaſs of aſſault and battery: in the firſt, the plaintiff calls it *his cloſe*; and if the defendant will diſpute *that*, he muſt ſet up a ſeiſin in fee, or derive a title from the fee; which ſeiſin in fee may be proved by acts of ownerſhip, whereof the jury can judge, but a particular eſtate may depend upon a great variety of matters, both of law and fact; and the more you try the general rule above laid down, the more reaſon appears, that you muſt, in pleading, derive the particular eſtate from the fee.——Judgment for the plaintiff, *per totam Curiam.*

A deed may be pleaded *as loſt by time and accident*, without *profert*. Replevin. Avowry—ſtating, that one *James Brookman* Read *v.* Ann Brookman, Ea Ter. 29 Geo. 3 B.R. 3 *Ter. Rep.* 151

man being ſeiſed in fee of the premiſes, &c. in March 1697, by will *(inter alia)* deviſed them to his wife for life, remainder to his ſon *John Brookman*, and charged them with an annuity of 3cl. to his ſon *Thomas Brookman*, with power of diſtreſs. The defendant deduced her title under a ſettlement made in 1757, upon her marriage with *Thomas Brookman*, ſince deceaſed, and acknowledged the taking as a diſtreſs for arrears of the annuity. To this avowry there were ſeveral pleas in bar; but the fourth was the only one upon which any queſtion aroſe; and that ſtated, that "*T. Brookman* in "his life time, and before the making of the indenture in "1757, by his certain deed of releaſe then and there made, "and ſealed with his ſeal, *and which ſaid deed is loſt and deſ-* "*troyed by time and accident*, for the conſiderations therein "mentioned, did releaſe, acquit, and diſcharge the ſaid *John* "*Brookman*, his heirs and aſſigns for ever, of and from the "payment of the ſaid annuity or yearly rent," &c. To this there was a demurrer, alleging for cauſe that the plaintiff had not brought the ſaid ſuppoſed deed of releaſe into Court; and becauſe the defendant, in the manner the ſuppoſed deed of releaſe is above pleaded, cannot have *oyer* of it, ſo that ſhe might know whether it is or is not the deed of *T. Brookman*; and becauſe it does not appear by the plea whether the ſuppoſed deed of releaſe is actually deſtroyed, or whether it doth not ſtill exiſt, and is only loſt or miſlaid. In ſupport of the demurrer, it was inſiſted that the plea in bar was bad for want of a *profert*. PER CURIAM: (1) For theſe laſt two hundred years it has been conſidered as clear law that grants, letters patent, and records, may be preſumed from length of time. It is ſo laid down in Lord *Coke*'s time, 12 *Rep.* 5. as undoubted law at that time; and in modern times it has been adopted in its fulleſt extent. The mayor of *Kingſton upon Hull* v. *Horner*, *Cowp.* 102, in vol. V, *infra*, under title PRESUMPTION; *Powell* v. *Milbanke*, or *Milburn*, *ante*, vol. I, p. 500; and the *King* v. the Archbiſhop of *Canterbury* (2); where *Lee* Ch. J ſaid, here is an uninterrupted uſage ſince 1278, and there cannot be a ſtronger preſumption of a grant. So in *Haſſelden* v. *Bradney* (3), a jury may find a recovery on preſumption. So that there never appears to have been any doubt on this point: and if we were to ſtop here, it goes the full length of deciding the preſent queſtion. For it would be a ſtrange contradiction to ſay that the law allows a right, and yet precludes the party from taking the benefit of it. Pleading is the formal mode of alleging

(1) *Groſe J.* differed in opinion upon the ground that the authorities were the other way; but declared that for the ſake of general convenience, he was not ſorry that the reſt of the court were of a contrary opinion.

(2) *Tr.* 11 & 12 *Geo.* 2. *B. R.* (3) *Tr.* 4 *Geo.* 3. *C. B.*

that

that on the record which would be the ſupport or defence of the party on evidence. Now the law has ſaid that a grant may be preſumed from length of uſage: then if a party were permitted to give evidence on the general iſſue in ſupport of that preſumption, and were refuſed the liberty to plead it, where pleading is neceſſary, it would be the groſſeſt contradiction. Whether the evidence in each particular caſe is a ſufficient foundation for ſuch a preſumption is a queſtion that does not ariſe upon pleading, but upon the trial of the iſſue afterwards. And in ſome caſes a rule has been laid down reſpecting the length of time which ſhall be ſufficient to raiſe a preſumption. As in the caſe of *Darwin* v. *Upton* (1), where twenty years quiet and uninterrupted poſſeſſion of ancient lights was deemed a ſufficient ground from which the jury might preſume a grant, therefore the ſame rule muſt prevail whether the defence be ſet up on the plea of the general iſſue or on a ſpecial plea: and none of the authorities which have been cited impeach this doctrine. In Doctor *Leyfield*'s caſe, 10 *Co.* 92, two exceptions to the general rule are there mentioned, that a deed cannot be pleaded without a profert; from whence he infers, that no other exception can be allowed. But that is not ſo; for the rule laid down by Lord *Coke* extends to all caſes of *extreme neceſſity*; thoſe which he mentions are only put as inſtances; and wherever a ſimilar neceſſity exiſts, the ſame rule holds. With reſpect to the caſe of *Whitfield* v. *Fauſſet*, in 1 *Vezey* 387, it is not an authority againſt this pleading. Lord *Hardwicke* begins with ſaying, that the loſs of a deed is not in all caſes a ground for an application to equity for relief: and then he ſays "Courts "of Law admit evidence of the loſs of a deed, proving the "exiſtence of it, and the contents, juſt as a Court of Equity "does." That then is an admiſſion of this doctrine. Beſides it is to be remembered that the queſtion in that caſe was, whether relief ſhould be given in equity, and therefore every thing which paſſed there muſt be underſtood as referable to that. Lord *Hardwicke* was merely aſſigning his reaſons for not turning the party round to ſeek his remedy in another court; and if the queſtion were only doubtful, that was ſufficient to retain it in a court of equity. And as to his obſervation, reſpecting Lord *King*'s having ſaid that, if a perſon pleaded a deed with a *profert*, he would give relief on motion on an affidavit of its being loſt, that "he could not conceive "what Lord *King* meant by it, for that would be a plain er"ror on the record:" with great deference to Lord *Hardwicke*, he certainly miſtook the matter, by not conſidering the

(1) *Mich.* 26 *Geo.* 3. *B. R.* on a motion for a new trial. See alſo *Oſtwald* v. *Legh*, *ante*, vol. I, p. 347.

mode in which the courts of law give relief: for we have in many inſtances diſpenſed with the neceſſity of giving *oyer*, as where an original leaſe is loſt, and an application is made that a copy of the counterpart may be good *oyer* (1); and if it be once ordered that a copy be deemed a compliance with the rule demanding *oyer*, no error can appear on the record, becauſe it does not there appear whether the *oyer* was given from the original deed or a copy. Then it was ſaid, that the plaintiff was not without remedy, for that a court of equity would give him relief. But that argument is no anſwer in a court of law. We are not to conſider what a court of equity in the plenitude of its power may do: the queſtion here is, whether in a court of law a party may not avail himſelf by pleading a deed of long ſtanding which is loſt. No authority is againſt this mode of pleading: but on the contrary it has the ſanction of modern practice, which in a caſe like this has great weight. And this does not admit of the anſwer which was given at the bar, that this was only the reſult of ſpeculations of gentlemen of the profeſſion in their private chambers on what might be done: for the pleadings are always entered on the record, and copies are delivered to the adverſe parties, who are ever ready to take advantage of any defect. Now if

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(1) *Totty* v. *Neſbitt*. *Tr.* 24 *Geo.* 3 *B. R.* It was moved for a rule to ſhew cauſe why the defendant ſhould not wave his demand of *oyer* and plead. This was an action on a bond. The plaintiff had before filed a bill in the Exchequer for a diſcovery, and the defendant in his anſwer admitted that he had executed ſuch a bond, and that he had deſtroyed it. *Buller*, J.—You have declared with a *profert*; and after that the Court cannot ſay that the defendant ſhall not have *oyer*. You ſhould have declared that the bond was deſtroyed, and then it would have appeared on the record that the defendant was not entitled to *oyer*. All we can do for you is to order that the production of a copy ſhall be *oyer*. But the plaintiff having no copy of the bond, and only the ſubſtance of it being ſtated in the bill in the Exchequer, a rule was afterwards obtained to ſhew cauſe why the declaration ſhould not be amended.

Matiſon v. *Atkinſon*, *E.* 27 *G.* 3, *B.R.*—A rule had been obtained to ſhew cauſe why giving *oyer* of a copy of the bond ſhould not be deemed good compliance with the defendant's demand of *oyer* of the bond. The facts which induced this rule were theſe; ſeveral actions having been depending between theſe parties, they were referred to an arbitrator, who awarded that the bond in queſtion ſhould be delivered up to the defendant to be cancelled. The bond was accordingly delivered up, and cancelled, the plaintiff's attorney keeping only a copy: and the award was afterwards ſet aſide for partiality. *Aſhhurſt*, J.—I do not ſay that this Court cannot in any inſtance grant ſuch an application as the preſent; but the better way will be for the plaintiff to amend his declaration, and ſtate the circumſtances to excuſe the *profert*. As there is another way open, there is no reaſon why it ſhould not be taken. AFTERWARDS the Court granted a rule to ſhew cauſe why the bond ſhould not be delivered up, and why the defendant ſhould not pay the coſts of both the applications; becauſe, on the award being ſet aſide, the defendant ought to have returned the bond.

this

this form of pleading has obtained for ſo many years, and no objection has ever been made to it, it is a ſtrong argument to ſhew what the law is; for pleadings are always evidence of the law. But even without this argument, if a deed may be preſumed by a jury from length of uſage, it follows from neceſſity that this plea ought to be allowed.

So in this caſe, where in ſetting forth a conveyance it was ſtated that a releaſe was *cancelled by the ſeal of the releaſor being taken off and deſtroyed*, and that *part of the deed was deſtroyed or loſt*, with a profert of the reſidue, it was holden to be good pleading. In this *quare impedit*, brought to recover the preſentation to the vicarage of Aſkham in the county of Weſtmorland, the declaration after deducing a title in fee, through a variety of conveyances to one *Joſeph Fielding*, proceeded thus "And the ſaid *Joſeph Fielding* being ſo ſeiſed of the ſaid advowſon, with the appurtenances, afterwards to wit on the "20th day of June in the year of our Lord 1791, at the pariſh aforeſaid, by a certain other indenture of bargain and "ſale, therein mentioned to be made between the ſaid *Joſeph* "*Fielding*, one *Robinſon Shuttleworth*, and one *Elizabeth* "*Tatham*, ſpinſter, of the one part, and the ſaid plaintiff of "the other part (one part of which ſaid laſt mentioned indenture, ſealed with the ſeal of the ſaid *Joſeph Fielding*, the "ſaid plaintiff brings here into court, the date whereof the "ſame day and year laſt aforeſaid, the ſaid *Joſeph Fielding for* "*the conſiderations therein mentioned*, did bargain and ſell unto the ſaid plaintiff (among other things) the ſaid advowſon "with the appurtenances, to hold the ſame unto the ſaid "plaintiff, from the day next before the day of the date of the "ſame indenture, for one whole year then next following, as "by the ſaid laſt mentioned indenture, relation being thereunto had, more fully appears. By virtue of which ſaid laſt "mentioned bargain and ſale, and by force of the ſtatute for "transferring uſes into poſſeſſion, the ſaid plaintiff became "and was poſſeſſed of the ſaid advowſon with the appurtenances for the term of one year; and the ſaid plaintiff being "thereof ſo poſſeſſed, afterwards to wit, on the 21ſt day of "June in the year laſt aforeſaid, at the pariſh aforeſaid, by a "certain other indenture then and there ſealed with the ſeal "of the ſaid *Joſeph Fielding*, and bearing date the day and year "laſt aforeſaid, and therein mentioned to be made between "the ſaid *Joſeph Fielding* of the firſt part, the ſaid *Robinſon* "*Shuttleworth* of the ſecond part, the ſaid *Elizabeth Tatham*, "ſpinſter, of the third part, *John Hankinſon* of the fourth "part, and the ſaid plaintiff of the fifth part, (*which ſaid laſt*-"*mentioned indenture*, ſo ſealed with the ſeal of the ſaid *Joſeph Fielding* as aforeſaid, afterwards, to wit on the firſt day "of July in the year laſt aforeſaid at the pariſh aforeſaid, *was* "*cancelled by the ſaid ſeal of the ſaid Joſeph Fielding thereto* "*being*,

Bolton v. the Biſhop of Carliſle, the Earl of Lonſdale, and Smith Clerk, Mich. Ter. 34 Geo. 3. B.R. 2 *Hen. Black.* 259

" *being then and there taken off from the ſame, and deſtroyed* " *or loſt, and the reſidue thereof the ſaid plaintiff now brings* " *here into court*) the ſaid *Joſeph Fielding* for the conſidera- " tions therein mentioned, did releaſe unto the ſaid plaintiff " and his aſſigns (among other things), the ſaid advowſon " with the appurtenances, to hold to the ſaid plaintiff his heirs " and aſſigns for ever to the uſe of the ſaid plaintiff his heirs " and aſſigns for ever." &c. &c. The avoidance was then ſtated, by the death of *John Cantley*, the laſt incumbent, &c. The biſhop pleaded the uſual plea of diſclaimer, and the other defendants demurred ſpecially to the declaration, " For that it " is not ſtated or alledged, nor does it appear in or by the " ſaid declaration, for what reaſon, or on what account the " ſaid ſuppoſed indenture of releaſe therein lately mentioned " was cancelled, or that the ſame was re-executed before the " ſaid vicarage became void by the death of the ſaid *John* " *Cantley*, or that the ſame hath at any time hitherto been re- " executed, &c." In ſupport of the demurrer, it was argued, beſides the cauſe of demurrer aſſigned, that the declaration was bad, becauſe it ſet forth a bargain and ſale, without ſtating the conſideration of it. [HEATH, J. This ought to have been aſſigned as a cauſe of ſpecial demurrer, for it would have been cured by a verdict. A title defectively ſet forth is good after verdict, but not a defective title: here it is defectively ſet forth.] That with reſpect to the cauſe of demurrer aſſigned, the plaintiff ought to have ſtated how it happened that the deed of releaſe was cancelled by the ſeal being taken off, in order to excuſe the omiſſion of a profert. [HEATH, J. A profert is not neceſſary of a conveyance deriving its effect from the ſtatute of uſes. *Dyer* 277, *Cro. Jac.* 217, *Read* v. *Brookman*, *ante* 741.] Lord Ch. J. EYRE. I have no doubt on either point made in the argument; the firſt inſiſted upon is a matter of form, and ought to have been aſſigned as a cauſe of ſpecial demurrer, but cannot be taken advantage of, on a general demurrer. As to the ſecond, I hold clearly that *the cancelling a deed will not diveſt property which has once veſted by tranſmutation of poſſeſſion*; and I would go farther, and ſay that *the law is the ſame with reſpect to things which lie in grant*. In pleading a grant, the allegation is that the party at ſuch a time " *did grant*," but *if by accident the deed be loſt*, there are authorities enough to ſhew, that other proof may be admitted: the queſtion in that caſe is *whether the party did grant*; to prove this, the beſt evidence muſt be produced, which is the deed; but if that be deſtroyed, other evidence may be received to ſhew that the thing was once granted: *for God forbid, that a man ſhould loſe his eſtate by loſing his title deeds*. When I ſat in the court of exchequer, queſtions frequently aroſe on real compoſitions, in which it was contended, that according to the old opinions, the

the original deed muſt be ſhewn; but though the old books ſay that a real compoſition muſt be by deed, I always held that the production of the deed was not neceſſary, and that the party might ſhew that it originally commenced by deed, if the deed were loſt. GOULD, J. A title defectively ſet forth, is a ground of ſpecial demurrer; and as to the cancelling the deed, a man's title to his eſtate is not deſtroyed by the deſtruction of his deeds: the caſe where the ſeal was eat off by rats, muſt be in the recollection of every one. It was properly ſaid by brother *Lawrence*, that the defendant ſhould have pleaded, that the party did not releaſe, upon which an iſſue might have been taken, and then if the deed had been cancelled by conſent of both parties, that perhaps might have been given in evidence, though I much doubt whether even that would have helped him. But in the preſent caſe there is a circumſtance, which plainly ſhews that the deed was not cancelled by *Bolton*, or the perſon under whom he claims, with a view to prevent the operation of it, for it is averred that the plaintiff brings the remaining part of the deed into court. HEATH, J. I have already given my opinion, in the courſe of the argument, on the firſt point. With reſpect to the ſecond, as this is a conveyance deriving its effect from the ſtatute of uſes, all that is averred about the deed being deſtroyed, is mere ſurpluſage; but if it were neceſſary, ſurely no one will ſay, that if deeds ſhould happen to be ſtolen, therefore that the owner ſhall loſe his eſtate. ROOKE, J. As to the firſt point, I am of the ſame opinion. With regard to the ſecond, I think the defendant ought to have pleaded, and then an iſſue might have been taken. The caſe cited from 3 *Bulſt.* 70. as it is there reported, is ſcarcely intelligible, and is very differently ſtated 1 *Roll. Rep.* 188, where it is as follows: "The deed of a ſtranger was pleaded, "and the defendant pleaded that the ſeal was ſevered from "the deed, and ſo *non eſt factum*. *Germin* moved the court "to compel the defendant to alter the iſſue, on an affidavit "that it was melted with fire by accident, and cited Dr. *Ley-*"*field*'s caſe. And by *Coke* and *Houghton*, this is no cauſe "to compel the defendant to alter the iſſue: and here this "ſtranger to the deed, cannot plead this ſpecial *non eſt factum*, "but ought to plead that nothing paſſed by the deed." But I agree that a right once veſted, is not diveſted by merely cancelling the deed. Judgment for the plaintiff.

To an action brought by the aſſignees of an inſolvent debtor, to recover money owing to him before his inſolvency, in which the plaintiffs declared that in conſideration of the money being due to the inſolvent, the defendant promiſed to pay it to them as aſſignees, the defendant pleaded, 1ſt, the general iſſue. 2dly, "That the cauſe of action firſt accrued to "the inſolvent before the plaintiffs became aſſignees, and that "fix

Kinder and another v. Paris, Mic. Ter. 36 Geo 3. C.B. 2 *Hen. Black.* 561.

" six years had elapsed after the cause of action first accrued to " the insolvent, and before the suing out the writ of the plain- " tiffs." In support of the demurrer, *Heywood*, serjt. argued that the plea was no answer to the declaration. In all the counts the promise is stated to have been made to the plaintiffs, and as a breach of promise is the cause of action in *assumpsit*, no cause of action at all could have accrued to the insolvent. *Non assumpsit infra sex annos* to a bankrupt is no plea to *assumpsit* by the assignees, 6 *Mod.* 131, *Parkins* v. *Wollaston*. 2 *Stra.* 919; *Skinner* v. *Rebow*. But if the original debt to the insolvent be taken as the cause of action mentioned in the plea, yet there might have been an *express* promise to the plaintiff, as stated in the declaration, to which allegation there is no answer in the plea. On the other side, it was contended that the demurrer admitted that the cause of action accrued to the insolvent, and more than six years before the action brought; an express promise therefore ought not now to be insisted on, when if the parties had gone to trial, they would have had nothing to rest on but an implied promise, raised on a consideration which is admitted to be within the statute of limitations. If it were allowed the plaintiffs now to insist on an express promise, they would succeed on demurrer, by supposing an express promise, and at the trial by supposing an implied one, when in fact there was neither, and the defendant clearly entitled to the benefit of the statute. Instead of demurring, they ought to have replied an *express* (1) promise within six years, on which fact the parties might have gone to trial. Lord Ch. Just. EYRE suggested that the defendant might have pleaded that the debt was first due to the insolvent more than six years before the action was brought, and that he had made no *express* promise to the

(1) But *Qr.* whether this notion of replying that there was an *express* promise, can be reconciled with the technical precision required in framing the language of a record? Every executory agreement is in itself a promise. *Slade's case*, 4 *Co.* 92. *b. Plowd.* 182. *Yelv.* 20. *Moore* 668. And when it is said, that in a general *indebitatus assumpsit* the law raises the promise, the true meaning of the phrase is, that from the antecedent debt or duty the law presumes that the defendant did *in fact* promise to pay, which presumption he can only repel by shewing something in his defence which negatives the duty. That this presumed promise is in contemplation of law a matter of fact, appears from the *averment* in the declaration, " that being so indebted, &c. he promised " to pay," and also from the form of the general issue *non assumpsit*: and according to Lord *Holt*, " there is no such thing as a promise *in law*," 6 *Mod.* 131. If this be so, with what propriety can the record make a distinction between a promise in *fact* and a promise *express*? After stating in the declaration that the defendant *promised*, would it not be tautology to say in the replication that he *expressly* promised? 2 *Hen. Black.* 63.

plaintiffs,

plaintiffs, within six years. BULLER, J. seemed to think the plaintiffs must prove an *express* promise at the trial. Judgment for the plaintiffs.

A judgment for the defendant in trover is not pleadable in bar of an action on the case for the value of the same goods.—This was an action of *assumpsit*, for 2500l. by the assignees of *Richard Anderson*, a bankrupt, for money had and received. The defendant pleads, 1. The general issue. 2. That the money in question arose from the sale of certain goods, heretofore the property of the bankrupt; for which an action of trover was brought in this court, in *Hil.* 10 *Geo.* 3. against the now defendant and one *Thornton*; and, on not guilty pleaded, a verdict was found for the defendants, and judgment thereupon entered. 3. That, on an action in the King's bench in Easter term. 10 *Geo.* 3, the plaintiff recovered 862l. 10s. upon the same identical promise, upon which this action is brought. On the first of these pleas, issue is joined. To the second, the plaintiff demurs generally, and the defendant joins in demurrer. To the third, he replies, that the promises in the two actions were different; on which also issue is joined. It was argued for the plaintiffs, to support the demurrer, that this was quite a new attempt; to set up a judgment in *trover* against *two*, in bar of an action in *case* against *one*. On the other hand, the defendant insisted, that, as the goods were averred to be the same in both, which is confessed by the general demurrer; this was a sufficient bar. BUT THE WHOLE COURT were clearly of opinion, that such doctrine would produce infinite litigation and mischief; and that a judgment for the defendant in this case in trover, was no bar to an action for money had and received by the defendant for the use of the plaintiff. Judgment for the plaintiff.

Hitchin and others assignees *v.* Campbell, Tr. Ter. 11 Geo. 3. C.B. 2 *Black.* 779. 3 *Wills.* 240.

A supersedeas obtained *after judgment* cannot be pleaded in bar to an action on such judgment.—This was debt on a judgment. The defendant pleaded that he the said defendant, before and at the time of the reddition of the judgment aforesaid, in the said court of our said lord the king, before the king himself, was and remained a prisoner in the custody of the marshal of the Marshalsea of our said lord the king, before the king himself, at the suit of the said plaintiff in the said action. And the said defendant in fact further saith that *after the reddition of the last mentioned judgment*, to wit, on the 16th day of May, 1786, he the said *defendant was superseded and discharged out of such custody* by the said court of our said lord the king, before the king himself, to wit, at Westminster in the county of Middlesex aforesaid; and this he the said defendant is ready to verify; wherefore he prays judgment if the said *plaintiff ought to have execution upon any judgment to be recovered in this action against the person of him* the said defendant, &c. To this plea there was a general demurrer, and joinder

Topping *v.* Ryan, Tr. Ter. 26 Geo. 3. B.R. 5 *Ter. Rep.* 273.

is, becauſe all theſe facts lie within the knowledge of the party (1). Now in the preſent caſe, if this plea were to be ſuffered, it would be to allow any perſon to libel another more on the records of the Court than he could do in a public newſpaper. If the plaintiff has been guilty of any acts of ſwindling, the defendant muſt be taken to know them. He could not prove the juſtification, as he has pleaded it by general evidence; but he has no juſtification, unleſs he can prove the ſpecial inſtances; and, knowing them, he ought to put them on the record that the plaintiff might be prepared to anſwer them. It has been ſaid, that this caſe is different from that of *Newman* v. *Bailey*, *Hil. Ter.* 16 *Geo.* 3 B. R. becauſe that was a ſpecific charge. But that is not ſo; for there the plaintiff was charged with pocketing *all the fines*, &c. which was as general as poſſible. And there the Court ſaid it was neceſſary to ſpecify the particular acts. The caſes of indictments, which were cited, do not apply here. As to that of barratry, it has always been ſtated as an exception to the general rule, I have not been to diſcover how that exception was firſt eſtabliſhed; but it is of ancient date. But in that caſe ſomething more is required than is ſtated in the preſent caſe; for though the indictment is good in a general form yet it has always been held that the proſecutor muſt give the defendant notice before the trial of the particular inſtances that are meant to be proved, ſo that even there the inconvenience of allowing a general charge is guarded againſt. With reſpect to the caſe of an indictment for keeping a common bawdy-houſe; there more certainty in the indictment is required than is ſtated here; for it muſt ſtate the place where the houſe is ſituate and the time; the crime therefore is particularly ſtated in that caſe, for the offence is the *keeping* of the houſe: And it is not neceſſary to prove who frequents the houſe, for that may be impoſſible; but if any unknown perſons are proved to be there behaving diſorderly, it is ſufficient to ſupport the indictment. So in the caſe of a common ſcold, it is not neceſſary to prove the particular expreſſions uſed; it is ſufficient to prove generally that ſhe is always ſcolding. Therefore in all theſe inſtances, the party is ſufficiently appriſed of the nature of the charge which is intended to be proved againſt him. It is not true, as was contended, that the general character of the plaintiff is put in iſſue; for the evidence to ſupport the defendant's plea muſt be ſpecial. Where it is permitted to the party to give general evidence of character, as in the caſe of the priſoner, he cannot enter into particular inſtances: but where, as in the preſent caſe, the whole defence ariſes from the proof of particular facts, the general character is not in iſſue. Then

(1) *Cro. El.* 749.

as to the declaration itſelf, it contains as libellous a charge as can well be imagined. Judgment reverſed.

The defendant, after a verdict againſt him, obtained a rule for a new trial, which after argument on a ſubſequent day was diſcharged: he then pleaded a plea *puis darrein continuance*, *entitled of the term generally*; and the Court refuſed to order a ſpecial memorandum of the day when it was filed under theſe circumſtances.—This was an action of aſſumpſit on four bills of exchange; on the trial, the plaintiff obtained a verdict. In *Michaelmas* term laſt, a rule was obtained to ſhew cauſe why there ſhould not be a new trial, which on the 17th of November was, after argument, diſcharged. On the 19th of November the defendant pleaded the bankruptcy of the plaintiff between the trial and the day in bank, as a plea *puis darrein continuance*: but though it was filed on that day, it was entitled generally of Michaelmas term. Afterwards, in the ſame term, a rule was obtained to ſhew cauſe either why the plea ſhould not be entitled as of the day on which it was filed; or why the plea itſelf ſhould not be ſet aſide; againſt this cauſe was ſhewn: and THE COURT enlarged the latter branch of the rule till the next term, and diſcharged the former part of it. They ſaid that as there was a rule depending at the beginning of the term to ſhew cauſe why there ſhould not be a new trial, it would have been idle to file this plea pending that rule, becauſe in one event it might have become unneceſſary to have pleaded ſuch a plea at all. Therefore they would ſuffer the general rule to operate in this inſtance, namely, that the plea, being entitled generally of the term, might have relation back to the firſt day of it. For though a fiction of law ought not to be permitted to prevail where it would work injuſtice, yet here the Court would not interfere to prevent the operation of it when ſuch a fiction was in furtherance of juſtice. Afterwards the latter part of the rule coming on again, Lord KENYON, Ch. J. ſaid (after cauſe ſhewn)—The Court very properly diſcharged one part of the rule in the laſt Term under the ſpecial circumſtances of the caſe; and in ſo doing they acted by analogy to the common practice of the Court, where in a variety of inſtances they give a party permiſſion to plead *nunc pro tunc* under particular circumſtances. And as to this part of the rule, I think we are bound to diſcharge this alſo, on the authority of the caſe of *Paris* v. *Salkeld* (*ante*, vol. I. p. 10, and vol. II. p. 286); where the Court, after great conſideration, held, that it was not diſcretionary in them to receive a plea *puis darrein continuance*, but that they were bound to receive it; and the opinion of *Wilmot*, Ch. J. is conveyed in language peculiarly forcible. *Per Curiam*: Rule diſcharged.

Lovell v. Beſtaff, Hil. Ter. 30 Geo. 3. B. R. 3 *Ter. Rep.* 554.

Where in an action of *aſſumpſit* on a bill of exchange with the uſual money counts, the defendant pleads *nil debet* to the count

Harvey v. Richards, Tr. Ter. 31 Geo. 3. C. B. 1 *Hen. Black.* 644.

count on the bill, but does not plead at all to the other counts, after a verdict for the plaintiff, the defendant ſhall not take advantage of his own miſ-pleading in arreſt of judgment.—*Aſſumpſit* by the indorſee againſt the acceptor of a bill of exchange for 49*l.* 16*s.* 9*d.* the ſecond count was for money lent and advanced; the third for money paid, laid out and expended; the fourth for money had and received; and the fifth, on an account ſtated. Plea, that the defendant, "*does not owe* to the ſaid *John* (the plaintiff) the ſaid "ſum of 49*l.* 16*s.* 9*d.* above demanded, *by virtue of the ſaid* "*bill of exchange* or any part thereof, in manner and form as "the ſaid *John* hath above thereof complained againſt him, "and of this he puts himſelf upon the country, *&c.*" but no notice was taken of the other counts. On this plea, the plaintiff joined iſſue and gained a verdict. AND it was now moved that the judgment might be arreſted, on the ground that the plea of *nil debet* to the firſt count was bad, and that as there was no plea to the other counts, there was a diſcontinuance. BUT *the Court* held, that the defect was cured by the verdict; for the defendant ſhould not take advantage of his own miſ-pleading, to defeat the plaintiff's ſuit, when the jury had found that he owed the debt due on the bill of exchange. Rule diſcharged.

Weſton v. Maſon, and Weſton v. Chapman, Tr. Ter. 5 Geo. 3. B.R. 3 *Burr.* 1725.

The Court will, after verdict, over-rule an objection, which they would have liſtened to, upon demurrer.—The defendants moved in arreſt of judgment; a verdict having been found for the plaintiff. It was an action of debt on bond, brought againſt the ſureties of a ſheriff's bailiff. Oyer was prayed of its condition. The condition recites, "That the "ſheriff has appointed this perſon a bailiff for the hundred of "*Eaſt Gotſon:*" if therefore he ſhall duly execute his office, &c. within that hundred; and ſhall duly execute all warrants directed to him, and make due and ſufficient return thereof, &c.; then the bond to be void. Performance of the condition was pleaded. To which plea the plaintiff replied, and aſſigned a particular breach. The breach aſſigned by the plaintiff was, "That this bailiff had not made a due return "to a particular warrant directed to him." The defendant rejoins "That he had." The objection was, "That this "man is only appointed bailiff of a particular hundred; and "the warrants to which he was obliged to make returns are "confined to the particular hundred of which he was bailiff: "and it does not appear, that the warrant which he is "charged not to have returned, was directed to him as bailiff "of the hundred. And if not, he was not obliged to return "it." Lord MANSFIELD—The condition of this bond appearing upon oyer, the plea alleges a performance of it, by the bailiff's having duly executed, and made due and ſufficient returns to all warrants directed to him. The plaintiff replies

replies, and ſpecifies a particular warrant which he did not duly return. The defendant does not demur; but takes iſſue upon the fact. It does not appear that this warrant was directed to him as bailiff of the hundred. Therefore it is ſaid, "That he was not obliged to execute it:" and a caſe is cited out of *Aleyn* 10, and *Style* 18, *Stoughton* v. *Day*, as in point. But the caſe out of *Aleyn* was upon a demurrer. If it ſtood upon the conſtruction of the bond, I ſhould have deſired to conſider of it: but this being in arreſt of judgment *after a verdict, and not on demurrer*; it does not appear, that it was not directed to him as bailiff of the hundred. WILMOT, J. if it had ſtood upon a demurrer, I ſhould have thought the caſe in *Aleyn* to have been in point. If it had ſtood upon the whole, and upon the conſtruction of the bond, I ſhould rather think, "That, in general, he had an au-"thority, as to executing proceſs, all over the county:" but I give no opinion as to this. But, upon this record, we can not take the warrant to be directed to him otherwiſe than as bailiff of the hundred. And by joining iſſue on the fact of returning it, he admits "That it was not directed to him generally." And ſince he has admitted the execution of it, we can not intend that it was not directed to him as bailiff of the hundred, in order to arreſt a judgment. YATES, J. the caſe in *Aleyn* was determined on a *demurrer*; (a general demurrer indeed; but it was before the ſtatute of 4, 5 *Ann*, c. 16. § 1. concerning *ſpecial* demurrers). Therefore that caſe does not affect this. A verdict will aid a title defectively ſet forth; though not a total defect of title. But here, it was ſufficient for the plaintiff to purſue the words of the condition of the bond: and it lay upon the defendant, to ſhew "That this was not ſuch a warrant as was within the "condition." Whereas he admits, that the bailiff returned this warrant: which is an admiſſion of its being a proper one. And the Court will not intend it to be otherwiſe, in order to overturn a verdict. I am therefore clear, that the plaintiff is entitled to his verdict. The defendant has not choſen to take the opportunity of ſhewing what he might have done, if true. Therefore there is no ground for arreſting the judgment. ASTON, J. concurred; and joined likewiſe in obſerving that the defendant might have taken the proper method of ſtating the particular fact to his advantage, by a rejoinder, if his caſe would have born it; whereas he has declined that, and taken iſſue upon the fact generally aſſigned. *Per Cur. Poſtea* to the plaintiff.

Alſo, after a demurrer to a declaration of two counts againſt two defendants, becauſe one of them was not named in the laſt count, the plaintiff cannot enter a *nolle proſequi* on that count, and proceed on the other. In this caſe, however they gave him leave to amend on payment of coſts. Drummond v. Dorant *et al.* Tr. Ter. 31 Geo. 3. B.R. 4 *Ter. Rep.* 860.

Tippet *et al.* v. May *et al.* Ea. Ter. 39 Geo. 3. C.P. 1 *Pul. et Bos.* 411.

Declaration in *assumpsit* against three. Two of the defendants pleaded a debt of record by way of set-off, without taking any notice of the third. The plaintiffs replied *nul tiel record*, and gave a day to produce the record to the two defendants, who pleaded, but entered no suggestion on the roll respecting the third. To this there was a general demurrer, and joinder. PER CURIAM. There is no rule in pleading more certain than that if a party can trace back the vices in the pleadings to the first fault, he has a right to take advantage of it on demurrer. But he cannot ask the judgment of the Court unless he appear on the record to be capable of demanding judgment (1). Now in this case the plaintiffs, having replied to a plea by two of the defendants without taking notice of the third, against whom they declared, have made a discontinuance; the cause therefore being discontinued, judgment must be given against the plaintiffs, for they are not in a situation to take advantage of the badness of the defendants' plea. *Per Curiam*: Leave given to amend on payment of costs (2).

Howell *et al.* v. Mac Ivers *et al.* Ea. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 690.

It is no cause for a demurrer that an assignment of a chose in action is not by deed.—This was *assumpsit* on a contract by three. Plea, the bankruptcy of one of them before the action brought. Replication, that before his bankruptcy *he assigned his interest* in the contract to the other two. To which there was a general demurrer. PER CURIAM: It is not necessary that an assignment of a chose in action should be by deed, and therefore it is no ground of demurrer that it is not so stated. But leave was given to the defendant to withdraw the demurrer, and take issue on the assignment.

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(1) So, "When plaintiff makes replication, sur-rejoinder, &c. and "thereby it appeareth that upon the whole matter, and record, the "plaintiff hath no cause of action, he shall never have judgment, al-"though that the bar or rejoinder be insufficient in matter; for the "Court ought to judge upon the whole record." Doctor *Bonham's* case, 8 *Co.* 120. *b.* See also in confirmation of this, *Rageway's* case, 3 *Co.* 52. *b.* and *Turner's* case, 8 *Co.* 133. *b.*

(2) Had the demurrer been of the same term with the record, it seems the plaintiff would have been entitled *de jure* to enter a suggestion after demurrer joined. Thus in *Woodward* v. *Robinson*, 1 *Str.* 302. where the defendant having pleaded a bad plea to the 1st count, and in his 2d plea pleaded to part only of the other counts, the plaintiff in his replication merely tendered issue, and the defendant demurred; the Court held that though there was a discontinuance, yet the pleading being of the same term, the plaintiff might still take judgment by *nihil dicit* for so much as was uncovered by the plea. Accordingly the case was adjourned, and the plaintiff having set the matter right, had judgment on the demurrer. To the same effect is *Vincent* v. *Beston*, 1 *Ld. Raym.* 716. But it is to be observed, that in those cases the plaintiffs were not allowed to have judgment until the discontinuances were done away, although the defendants had committed the first fault upon the record. *Vid. etiam Middleton* v. *Chesseman*, *Yelv.* 65.

After

The King on the Profecution of W. E. Dillon *v.* The Mayor and Burgeſſes of Grampound, Tr. Ter. 38 Geo. 3. B.R. 7 *Term Rep.* 699.

After verdict on a traverſe to a return to a mandamus made by a corporation, the Court would not allow the defendants to amend the return, by ſetting forth a different conſtitution. To a mandamus, commanding the defendants to reſtore *W. E. Dillon* to the office of a capital burgeſs of *Grampond*, the defendants returned (inter alia) that the borough of *Grampond* was an immemorial borough and corporation; that [1] [the borough] hath immemorially [2] [conſiſted of] a mayor, [3] [recorder], eight [4] [capital] burgeſſes, [5] [ ] inhabiting and reſiding within the borough, to adviſe the mayor touching the good rule and government of the borough and the adminiſtration of juſtice, [6] [a town clerk], and an indefinite number of freemen or free burgeſſes: that the capital burgeſſes have immemorially been uſed and accuſtomed to reſide and inhabit and of right ought to have reſided and ſtill of right ought to reſide and inhabit within the ſaid borough for the purpoſe of attending and executing the ſeveral duties of the ſaid office; that *Dillon*, who was in *October*, 1792, elected and ſworn into the office of a capital burgeſs, had not ſince his election inhabited or reſided within the borough; that at a meeting holden on the 16th of *April*, 1796, at which the mayor, the capital burgeſſes to the number of eight (including the ſaid *W. E. Dillon*), and a majority of freemen or burgeſſes, attended, in anſwer to a charge againſt *Dillon* for not reſiding within the borough, and neglecting the duty and execution of his office of which he had received previous notice, *Dillon* admitted that he had not reſided within the borough, which he had been prevented doing by not having been able to find a houſe for the accommodation of himſelf and his family, but inſiſted that he had never neglected the duty and execution of his office, but had always diſcharged the ſame; that at that meeting the mayor and burgeſſes ſo aſſembled, having heard the charge and the defence and taken the whole into their conſideration, adjudged that *Dillon* had been guilty of non-reſidence, and removed him from his office of a capital burgeſs for ſuch non-reſidence. The proſecutor traverſed the cuſtom for the capital burgeſſes to reſide within the borough, on which iſſue was joined. At the trial the jury found a verdict for the defendants, eſtabliſhing the cuſtom ſet out in the return. A RULE WAS AFTERWARDS OBTAINED calling on the defendants to ſhew cauſe why there ſhould not be a new trial, on the ground that the verdict given was againſt the weight of evidence, or in caſe the Court ſhould refuſe to grant a new trial why a peremptory writ of mandamus ſhould not iſſue, commanding the defendants to reſtore the proſecutor to the office of a capital burgeſs, on the ground of the inſufficiency of the return to the mandamus: the former

branch of the rule was, after argument at the bar, discharged. The latter part of the rule came on to be argued in the last term, when the Court during the argument intimating an opinion that the return was insufficient in not stating that the removal had been made by the whole corporation, the recorder not having been present at the meeting when *Dillon* was removed, another rule was obtained by the defendants calling on the prosecutor to shew cause why the return should not be amended in several particulars. The proposed amendments were in the parts (1) included within the six parentheses in the return; to substitute for the words "the [1] borough" the words "in the borough aforesaid there have;" to insert "been" for "consisted [2] of;" to omit "recorder," [3] and insert the word "and" instead; to insert the words "of the" instead of "capital [4];" to add "of the borough [5] aforesaid elected in manner hereinafter-mentioned;" and to strike out "a town clerk," [6] inserting instead "who during all the time aforesaid have been and still are called capital burgesses of the said borough." Lord KENYON Ch. J. I wish that that could be attained that Lord *Hardwicke* in a case before him lamented could not be done, namely, "that these amendments were reducible to some certain rules (2):" but there being no such rule, each particular case must be left to the sound discretion of the Court. And the best principle seems to be that on which Lord *Hardwicke* relied in the same case, that an amendment shall or shall not be permitted to be made as it will best tend to the furtherance of justice. Amendments of this kind are not made under the statutes of jeofails, but under the general authority of the Court. That the Courts formerly had great reluctance in allowing amendments to be made appears clear from the case of the *King* v. *the Mayor of Chester*, 1 *Shower* 273. But the decision in that case, as well as that in *R.* v. *Lyme Regis*, *Doug.* 135 (*ante*, vol. I. p. 587.) and *R.* v. *Ellames*(2) proceeded on the ground mentioned by Lord *Hardwicke*, that the amendments in those cases were in the furtherance of justice. In the latter case if the title of *Ellames*, as mayor, had been holden to be defective, many derivative titles might have been disturbed, because the record

(1) *Sup.* 757.

(2) *R.* v. *Ellames*, Rep. Temp. *Hard.* 42. the amendments were permitted to be made, after a demurrer; and Lord *Hardwicke*, Ch. J. said "It was anciently the rule not to suffer any of those amendments to be made after the matter was on record: but the number of cases now cited shew that of late, in furtherance of justice and in order to obtain the right between the parties, these amendments have been much extended."

of

of the judgment of ouſter againſt him would have been evidence againſt thoſe who derived title under him. But it does not appear that this caſe involves in it the title of any other perſon. So in the caſe of *Bearecroft v. Burnham* and *Stove* in 3 *Lev.* 347, the ground on which the Court proceeded was this, "Seeing that the time limited by the ſtatute for bringing the action was elapſed, and ſo the action loſt if it were not amended," the Court ruled it ſhould be amended. And in the caſe of *R. v. Philips*, 1 *Burr.* 292, the amendment granted was in the nature of a repleader; and a repleader is granted when the iſſue is wholly unimportant: but here the facts to be introduced by the propoſed amendment are of great importance. Conſider what this caſe is; the proſecutor, who had attended all corporate meetings and had in fact diſcharged all the duties of his office, was removed from his office of capital burgeſs for not reſiding within the limits of the borough; it ſeems therefore to be a harſh proceeding againſt him. We are not acquainted with the motives and reaſons for removing the proſecutor: but perhaps it might have been convenient to ſome of the parties that the recorder ſhould appear to be an integral part of the corporation, and that this return ſtating that the corporation conſiſted of a mayor, recorder, eight capital burgeſſes, and a town clerk, ſhould be on the files of the court; probably this was an experiment to try whether or not that could be found by a jury; and now that they find that that averment bears againſt them in another point of view, they wiſh to have it altered. On reviewing the caſes, it is manifeſt that the Court has ſeldom indulged the parties by permitting amendments to be made in a return to a mandamus after the mandamus has been filed. The ground on which my opinion is formed in this caſe is, that the amendments propoſed are not for the furtherance of juſtice, and it is an attempt to carry the rule of amendment farther than it has ever been extended in any other caſe. If the corporation are ſtill pertinacious, they may remove the proſecutor again, and then they will have an opportunity of putting ſuch a conſtitution of the corporation on record as they will abide by: but I cannot aſſent to this rule.—The other judges agreed. Rule diſcharged.

Judgment ſhall not be arreſted on behalf of the defendant becauſe in joining iſſue the plaintiff ſays *the defendant likewiſe* inſtead of the plaintiff likewiſe. Harvey v. Peake, Mic. Ter. 6 Geo. 3. B.R. 3 *Burr.* 1793.

If oyer is granted of any inſtrument of record, and it is ſet forth, although the party was not entitled to ſuch oyer, yet he ſhall be thereby entitled to take the whole inſtrument as part of his adverſary's plea. Treſpaſs for taking cattle; *Plea*, that they were taken damage feaſant; *Replication*, a right of common; *Rejoinder*, ſtating, by way of inducement, part of a private act of parliament for incloſing the common, and an allotment, by the commiſſioners, of the *locus in quo* to Jeffery v. White, Mic. Ter. 21 Geo. 3. B.R. 2 *Doug.* 475.

the defendant, and traverſing the right of common; *Oyer* praved of the act, and granted; the whole act ſet forth; and then, *Demurrer* to the rejoinder; and cauſe aſſigned, that it was not ſhewn by the rejoinder that the alliotment had been made according to the directions of the act as ſet forth; *Joinder* in demurrer. It was argued, that although oyer could not be compelled of an act of Parliament; yet, as it had been in fact granted, the party who had demanded it was entitled to conſider the whole of what was ſet forth as making part of his adverſary's plea: and the Court being of this opinion, there was judgment for the plaintiff. See 6 *Mod.* 27. 1 *Saund.* 316, 317.

Chandler *v.* Roberts *et al.* Bail of White, Hil. Ter. 19 Geo. 3. B.R. 3 *Doug.* 58.

REPLICATION.] To a plea to *a ſci. fa.* againſt bail, that the principal died before the return of any *ca. ſa.* a replication ſtating a particular *ca. ſa.* and that the principal was alive at the return of that *ca. ſa.* ought to conclude to the court. A *ſcire facias* on a recognizance of bail. The defendants *plead*, that the principal, before the iſſuing of the ſaid writ of *ſcire facias*, and before the return of any *capias ad ſatisfaciendum*, to wit, on the firſt day of *May*, 1778, at *Weſtminſter* aforeſaid, died. *Replication*—That the ſeveral promiſes and undertakings mentioned in the ſaid declaration whereon the judgment aforeſaid was recovered, were, in the ſaid declaration, alleged to be made in *Middleſex*, and that, after the recovery of the ſaid judgment in the ſaid writ of *ſcire facias* mentioned, againſt the ſaid *John White*, and before the ſuing forth the ſaid writ of *ſcire facias*, to wit, on the 6th day of *May*, in the eighteenth year of the reign of our Lord the now King, the plaintiff ſued and proſecuted out of the court of our Lord the now King, before the King himſelf, the ſaid court then and ſtill being held at *Weſtminſter* in the county of *Middleſex*, a certain writ of our ſaid Lord the now King, of *capias ad ſatisfaciendum*, of and upon the ſaid judgment, directed to the then ſheriff of *Middleſex*, by which ſaid writ, our ſaid Lord the King commanded the ſaid then ſheriff of *Middleſex*, that he ſhould take the ſaid *John*, if he ſhould be found in his bailiwick, and him ſafely keep, ſo that he might have his body before our ſaid Lord the King at *Weſtminſter*, on *Wedneſday* next, after one month from the day of *Eaſter*, then next coming, to ſatisfy the ſaid plaintiff, the ſaid 30*l.* the damages, coſts, and charges aforeſaid, in form aforeſaid recovered, and that the ſaid then ſheriff ſhould have there then that writ, which ſaid writ, afterwards, and before the return thereof, to wit, on the 10th day of *May*, in the eighteenth year aforeſaid, at *Weſtminſter* aforeſaid, was delivered to *Robert Peckham* and *Rickard Clarke*, ſo being ſheriff of *Middleſex* aforeſaid to be executed in due form of law, at which day, before the ſaid Lord the King at *Weſtminſter*, came the ſaid plaintiff, in his proper perſon, and the aforeſaid then ſheriff of *Middleſex*, to wit, the ſaid *Robert Peckham* and *Richard*

Richard Clarke, returned on the ſaid writ, to our Lord the King at *Weſtminſter* aforeſaid, that the ſaid *John* was not found in his bailiwick, *as by the ſaid writ, and the return thereof, duly filed and remaining of record* in the ſaid court of our ſaid Lord the now King, before the King himſelf at *Weſtminſter* aforeſaid, more fully appears; and the ſaid plaintiff further ſays, that the ſaid *John*, at the reſpective times of the ſuing out of the ſaid writ of *capias ad ſatisfaciendum*, and of the return, and of filing the ſame, was and ſtill is living, and in full life, to wit, at *Weſtminſter* aforeſaid, and this he is ready to verify, wherefore he prays judgment, &c. To this replication, the defendants *demur* ſpecially, "becauſe the ſaid "replication concludes with a verification, and not to the "country." PER CURIAM: Till 1771, this was thought the proper form, and there has yet been no deciſion to the contrary. In pleading, *via trita via tuta*. It always was the rule, that two affirmatives cannot make an iſſue; 1 *Leo.* 78. 39 *H.* 6. 49. 32 *H.* 6. 23. In *Mathers* v. *Cormick*, Tr. 11 *Geo.* 3.; *Brian* v. *Thorn*, Mic. 14 *Geo.* 3.; and *Hanna* v. *Briſtow*, Hil. 17 *Geo.* 3. the replication was in the negative—"That the defendant did not die," *&c.*;—and thoſe caſes were attempts to alter the eſtabliſhed form. It is alſo an eſtabliſhed rule, that wherever new matter is introduced, the pleading muſt conclude with an averment; *Carth.* 337. *Moore* 286. 3 *Leo.* 165. 1 *Lutwyche* 101. 1 *Saund.* 103. The caſe of *Filewood* v. *Popplewell*, 2 *Wilſ.* 65. is exactly in point, and *Carth.* 4. ſhews that the particular writ muſt be ſtated in the replication. The defendants here might have had either of two defences; *nul tiel record*; or, that the principal died before the return of the *capias ad ſatisfaciendum* ſet forth in the replication. If the plaintiff had concluded to the country, and the defendants had only meant to make uſe of the firſt of thoſe defences, an iſſue would have been ſent down, without any fact for a jury to try. In the caſe in 10 *Modern* 256 the writ was admitted. The account of that caſe, is but a looſe note; the book is of little authority; it is not in any other reporter, and is there ſtated only as the argument of counſel. If the caſes referred to in it applied, then that caſe was not applicable to the preſent. If they did not, it was decided without reaſon or authority. This is the ancient form of replications, and while it is adhered to no difficulties will ariſe.—Leave was given to withdraw the demurrer without coſts.

To a plea of *ſcire facias* againſt bail, that the principal died before the return of any *ca. ſa.* the replication ſtated a particular *ca. ſa.* and that the principal was alive at the return of that *ca. ſa.* concluding, and this he is ready to verify. To this there was a ſpecial demurrer; becauſe the replication concluded with a verification, whereas it ought to have concluded

Henderſon *v.* Withy *et al.* Tr. Ter. 28 Geo. 3. B.R. 2 *Ter. Rep.* 576.

cluded to the country. Joinder in demurrer. *The Court* being clearly of opinion that this point had been expreſsly determined in *Filewood* v. *Popplewell* (1), and *Chandler* v. *Roberts* (2), gave judgment for the plaintiff, without hearing any argument. And *Buller* J. ſaid, The *co. ſa.* in the replication is new matter; and by the rules of pleading, whenever new matter is introduced, the other party muſt have an opportunity of anſwering it. Judgment for the plaintiff.

Boyce v. Whitaker. Fil. Ter. 19 Geo. 3. B. R. 1 *Doug.* 94.

If the replication, denying the whole ſubſtance of the plea, conclude with a verification, it will be bad, upon ſpecial demurrer.——This was an action of debt on a bail-bond, brought by the plaintiff, as aſſignee of the ſheriff of *Kent*. The defendant prayed oyer of the bond and condition, and ſet forth the condition, which was in the uſual form, and then pleaded, "That, before the making of the writing "obligatory aforeſaid, to wit, by a certain act made in a "parliament of the ſaid *Henry* the 6th, held at *Weſtmin-*"*ſter*, in the county of *Middleſex*, on the 25th day of *Fe-*"*bruary*, in the 23d year of his reign, it was, among other "things, enacted, by the authority of the ſame parliament, "that no ſheriff, under-ſheriff, ſheriff's clerk, ſteward, or "bailiff of franchiſe, ſervant of bailiff, or coroner, ſhould "take any thing by colour of his office, by him, nor by any "other perſon, to the uſe of any perſon, for the making of "any return, or panel, and for the copy of any panel, but "four pence. And that the ſaid ſheriffs, and all other officers "and miniſters aforeſaid, ſhould let out of priſon all manner "of perſons, by them, or any of them, arreſted or being in "their cuſtody, by force of any writ, bill, or warrant, in any "action perſonal, or by reaſon of indictment by treſpaſs, "upon reaſonable ſureties of ſufficient perſons having ſuffi-"cient within the counties where ſuch perſons be let to bail, "or mainprize, to keep their days in ſuch place as the ſaid "writ, bills, or warrants, ſhould require; ſuch perſon or "perſons which were or ſhould be in their ward by con-"demnation, execution, *capias utlagatum* or *excommunicatum*, "ſurety of the peace, and all ſuch perſons which were or "ſhould be committed to ward by ſpecial commandment "of any juſtices, and vagabonds refuſing to ſerve accord-"ing to the form of the ſtatute of labourers, only excepted. "And that no ſheriff, nor any of the officers or miniſters "aforeſaid, ſhould take, or cauſe to be taken, or make "any obligation, for any cauſe aforeſaid, or by colour of "their office, but only to themſelves, of any perſon which "ſhould be in their ward by the courſe of the law, but "by the name of their offices, and upon condition writ-"ten, that the ſaid priſoners ſhould appear at the day con-

(1) 2 *Wilſ.* 65. (2) *Ante*, p. 760.

"tained

" tained in the ſaid writ, bill, or warrant, and in ſuch places " as the ſaid writs, bills, or warrants, ſhould require. And if " any of the ſaid ſheriffs, or other officers or miniſters above- " ſaid, take any obligation in other form, by colour of their " office, that it ſhould be void, as by the ſame act, among " other things, more fully appeared." That the defendant was arreſted at the ſaid time of making the ſaid writing obligatory (6th of July, 1778) by the ſheriff of Kent, on a *plures latitat*, returnable on Wedneſday next, after three weeks of the Holy Trinity (1778); and that the ſheriff, upon that arreſt, took bail, the writing obligatory aforeſaid, with the condition aforeſaid, for *eaſe and favour* to the ſaid defendant of his impriſonment by the ſaid ſheriff ſhewn, and to have and obtain his deliverance therefrom; which ſaid writing obligatory the ſaid ſheriff took by *colour of his office*, againſt the form of the ſtatute *aforeſaid*. The plaintiff replied, that the defendant, before the return of the writ in the declaration mentioned, to wit, on the day of the date of the bond, viz. 4th July, 1778, as bail for his appearance at the return of the writ, ſealed; and, as his act and deed, delivered the bond, in the manner in the declaration mentioned, *without this*, that the ſaid ſheriff, upon the arreſt of the defendant in the plea mentioned, took bail, the writing obligatory aforeſaid, with the condition aforeſaid, for *eaſe and favour* to the defendant of his impriſonment, by the ſaid ſheriff ſhewn, in manner and form, &c. and " *this the* " *ſaid defendant is ready to verify.*" To this replication the defendant demurred; and ſhewed for cauſe, " that the repli- " cation, denying the whole ſubſtance of the plea, concluded " with a verification, and to the court; whereas it ought to " have concluded to the country." Lord MANSFIELD ſaid, that if the defendant had unneceſſarily ſet out the act of parliament, which it ſeemed to him he had, he would hold him to half a letter(1); and that, as to the other objection to the plea, a bond taken for the defendant's appearance at the return of the writ, could not be for eaſe and favour; and, therefore, the condition and averment in the plea were inconſiſtent.—BUL-

(1) Lord *Mansfield* aſked, if there was any doubt whether the ſtatute was a public act, and *Davenport*, as *amicus curiæ*, ſaid it had been doubted, and was therefore always ſet out. It is recited in the caſe of *Lenival* v. *Coke*, and alſo in *Dove* v. *Manington*, *Plowd* 60. But in *Samuel* v. *Evans*, *ante*, vol. I. p. 782, the Court held clearly, that it is a public act, and therefore ſaid, that they would take notice of it though not pleaded. Qu. Whether the ſame act may not be public as to ſome clauſes, and private as to others? *Vide Rex* v. *London*, *T.* 3. *W.* & *M. Skinn.* 293, 294.

Vide S. P. ruled as to the ſtatute of *Scandalum Magnatum*, 2 *Ric.* 2. *cap.* 5. in Lord *Cromwell's* caſe, *B. R. T.* 20 *Eliz.* 4 *Co.* 12. *b.* and *Viſcount Say and Seale* v. *Stephens*, *B. R. M.* 4 *Car.* 1. *Cro. Car.* 135. and, as to this very ſtatute of 23 *Hen.* 6. in *Truſſel* v. *Aſton*, *B. R. M.* 30 *El. Cro. El.* 108. *Vide* alſo *Holly* v. *Bray*, *B. R. H.* 19 & 20 *Car.* 2. 1 *Sid.* 356.

LER,

LER. J. thought there was no doubt but the concluſion to the replication was bad, as the whole ſubſtance of the plea was denied; but that it was unneceſſary to look beyond the plea, which was clearly bad. He ſaid, there were many caſes where the word "aforeſaid" had been held to tie the party up to an exact recital, and the plea here concluded, that the bond was taken "againſt the form of the ſtatute aforeſaid."—Judgment for the plaintiff.

Hedges v. Sandon, Ea. Ter. 28 Geo 3. B.R. 2 *Ter. Rep.* 439.

If a defendant plead to debt on bond, that the plaintiff won money of him at cards, and that the bond was given for ſecuring payment of it, to which the plaintiff replies, that it was given for ſecuring the payment of money juſtly due, and not for ſecuring the payment of money won; the replication may either conclude to the country, or with an averment.—PER CURIAM: *Aſhhurſt*, J. The general rule is this; where a replication denies the whole ſubſtance of the defendant's plea, there the plaintiff may tender iſſue, and conclude to the country. But where he ſelects one out of ſeveral facts, he may traverſe that one, and conclude with a verification. Now, here the replication does negative the whole ſubſtance of the plea; for it ſays, that the bond was given for a fair and juſt debt, and not for an unjuſt one.—*Buller*, J. The general rule is that which has been ſtated. If the replication put the whole ſubſtance of the defendant's plea in iſſue, he may conclude to the country. At the ſame time, there are exceptions to that rule; and there are many caſes in which the concluſion is good either way. I expreſſed a doubt in the caſe of *Mulliner* v. *Wilkes*, Ea. 23 *Geo.* 3. whether what was ſaid by *Denniſon*, J. of *Baynham* v. *Matthews*, 2 *Strange*, 871, namely, that the concluſion is proper either way, was correct: but I am now ſatisfied that what he there ſaid was right. The court of common pleas went on this ground in the caſe of *Sandford* v. *Rogers*(1). That was *aſſumpſit* for goods ſold. Plea, judgment recovered in *K. B.* for the ſame promiſes. Replication, *nul tiel record, et hoc paratus eſt verificare.* Demurrer, and ſpecial cauſe ſhewn, that by the replication the iſſue upon the ſaid plea in bar is complete, and the plaintiff ought not to have concluded his replication by a general averment only. After argument, judgment was given for the plaintiff by the Court. They thought that the iſſue was completely joined, and therefore the concluſion might have been otherwiſe; but inaſmuch as the precedents were of concluſions with an averment, they were for ſupporting it. They ſaid there was no general rule to be laid down as to theſe things. Practice had, in many inſtances, allowed ſpecial pleas, which amount to the general iſſue; ſo concluſions with an averment, where it may be to the coun-

(1) 2 *Wilſ.* 113. But this was read by Mr. Juſtice *Buller* from a MS. note.

try.

try. And they ſaid, that in *Gardiner* and *Fiſher*, *Mich.* 1 *G.* 1. the defendant pleaded another action pending: the plaintiff replied, that the cauſe of action was different, *abſque hoc*, that the cauſe of action in this and the former were the ſame as alleged in the plea; and *hoc paratus eſt*, *&c.*: ſpecial demurrer, becauſe the replication ſhould have concluded to the country: but judgment was given to anſwer over, becauſe the traverſe makes the point more certain. Sir *T. Raym.* 199.—1 *Vent.* 101.—2 *Keb.* 692. *S. P.* But they concluded with ſaying it may be either way. So are all the caſes, except that of *Mulliner* v. *Wilkes*, which was paſſed over without much notice. Therefore, I am of opinion, that in ſuch caſes the concluſion may be either way. GROSE, J. agreed.—Judgment for the plaintiff.

Praed, adminiſtrator of Blackwell, *v.* the Ducheſs of Cumberland, executrix of the Duke of Cumberland, Ea. Ter. 32 Geo. 3. B.R. 4 *Ter. Rep.* 553.

IN DEBT, on an annuity bond, defendant pleaded *no ſuch memorial as the ſtatute requires*, to which plaintiff replied, that there was a memorial which contained the names of the parties, &c. *and the conſideration for which the annuity was granted*, and the defendant rejoined that the conſideration is untruly alleged by the memorial to have been paid to both obligors, for that one of them did not receive any part of it.—To this there was a ſpecial demurrer; and joinder in demurrer. In ſupport of the demurrer, it was contended, that the rejoinder was bad on two grounds: 1ST, That it was a departure from the plea; 2DLY, That it alleged no matter inconſiſtent with the allegations in the memorial. PER CURIAM: The rejoinder is clearly a departure from the plea in bar. A memorial was inrolled, which, upon the face of it, was a good one; and if the defendant wiſhed to impeach it, ſhe ſhould have pleaded it, and ſhewn in what particular it was defective, and thus have compelled the plaintiff to take iſſue upon that fact. But, having in her plea in bar alleged that there was no memorial, ſhe ought not afterwards to be permitted to admit in her rejoinder that there was one, and then deny the validity of it. Nothing is clearer than that this is a departure: the defendant's argument goes to admit it.—The whole queſtion turns on the word "ſuch." Now, what is the meaning of the plea in this caſe; or of the plea of no award, or that of no *capias ad ſatisfaciendum*? they tender iſſues in fact, and not in law. We are not to require, under the allegation "*of no ſuch memorial*," every thing that is required by the act of parliament: it is merely an iſſue in fact. So in the caſe of an award; if there be an award in fact, the party cannot, on the trial of an iſſue of no award, go into objections to the award in point of law. It has, however, been ſaid, that the plaintiff might have replied that there was *no ſuch memorial*, *&c.* in order to have let in the objections which ariſe under the act of parliament: but that word cannot make any

any difference; it is ſtill but an iſſue in fact; for otherwiſe, it would be ſending down an iſſue in law to be tried by a jury: and it might be as well contended, that on the trial of an iſſue, "*nul tiel record*," the parties might, at *niſi prius*, ſhew errors on the record. The other ground alſo fails the defendant.—In her rejoinder ſhe has averred a fact ſuppoſed to be contradictory to the memorial, which is not ſo. It appears, by the memorial, that the conſideration money was paid to the Duke of *Cumberland* and Mr. *Lutterell*; which, the defendant has attempted to ſay, is not true; but the reaſon ſhe has given why it is not true, does not ſupport the propoſition; becauſe, though the money were not paid into the hands of the Duke of *Cumberland*, it might have been paid to ſome third perſon under a joint authority from the Duke of *Cumberland* and Mr. *Lutterell*, or to Mr. *Lutterell*, for himſelf and the duke. This memorial, therefore, is conformable to the directions of the annuity act, for any thing that appears to the contrary upon the record.—Judgment for the plaintiff.

The Ducheſs Dowager of Cumberland, executrix of the Duke of Cumberland, *v.* Praed, adminiſtrator of Blackwell in the Ex. Ch. in error, 2 *Hen. Black.* 280.

Judgment having been given as above, by the Court of King's-Bench, in favour of the plaintiff, a writ of error was brought, and the common errors aſſigned. AND, *on the part of the plaintiff* in error, it was contended; FIRST, that the rejoinder was not a departure from the plea; and SECONDLY, that the rejoinder did, in ſubſtance, negative the allegation in the replication, and was therefore inconſiſtent with it. 1. The plea ſtates, that no *ſuch* memorial of the bond, as is required by the ſtatute, was inrolled in the court of Chancery; which is ſaying, in other words, that there was no memorial inrolled containing the day of the month, and the year when the bond bears date, the names of the parties, &c. and the conſideration of granting the annuity, according to the requiſites of the ſtatute. The replication is, that a memorial complying with thoſe requiſites, and ſtating the conſideration of granting the annuity, was inrolled. The rejoinder alleges, that the conſideration ſtated in the memorial was not the true one, which ſupports, inſtead of departing from the allegation in the plea; namely, that there was no memorial inrolled containing the conſideration of granting the annuity. 2. The replication ſtates, that the memorial contained the conſideration of granting the annuity; the rejoinder alleges, that the memorial ſets forth, that the annuity was granted in conſideration of a ſum of money jointly to *Temple Lutterell* and the Duke of *Cumberland*, but that in truth no part of the money was paid to the duke at the time of executing the bond: now this is in effect, a denial of what is ſtated in the replication, viz. that the memorial contained the conſideration of granting the annuity. PER CURIAM: The objection taken goes properly to the deed, and not to the memorial. By the third ſection of the

the ſtatute it is enacted, "that in every deed, inſtrument, or other aſſurance, whereby any annuity ſhall be granted, the conſideration really and *bonâ fide* (which ſhall be in money only), and alſo the name or names of the perſon or perſons by whom, and on whoſe behalf the ſaid conſideration, or any part thereof, ſhall be advanced, ſhall be *fully and truly* ſet forth and deſcribed in words at length," and by the firſt, "that every memorial ſhall contain the day of the month and the year when the deed, bond, inſtrument, or other aſſurance, bears date, and the names of all the parties, and for whom any of them are truſtees, and of all the witneſſes; and ſhall ſet forth the annual ſum or ſums to be paid, and the name of the perſon or perſons, for whoſe life or lives the annuity is granted, and the *conſideration or conſiderations* of granting the ſame" Now the uſe of the memorial being to notify to the world, that ſuch a deed exiſts; when it has done that, generally ſpeaking, it has done its office, perhaps with the ſingle exception of a ſecret truſt, under the words "*for whom any of them are truſtees.*" The true conſtruction of the act, therefore, ſeems to be, that the deed ſhall fully and truly expreſs the conſideration, &c. and that the memorial ſhall truly ſet forth what is contained in the deed(1). And this will be clear, if the third ſection be tranſpoſed and read in the place of the firſt.—THEN THE QUESTION IS, Whether the matter ſtated in the rejoinder, be not a departure from the plea? That it is a departure is clear beyond a doubt, upon every principle of pleading. The plea in effect ſtates, that there was no memorial; the replication alleges a memorial, containing the requiſites which the law requires; and then the rejoinder introduces a fact, which goes to vitiate the deed, but not the memorial. As the firſt point, therefore, is ſo plainly in favour of the defendant in error, it is unneceſſary to diſcuſs the ſecond, on which we give no opinion.—Judgment affirmed.

INDICTMENT.] In an indictment againſt a receiver of ſtolen goods for a miſdemeanor, it is not neceſſary to aver that the principal has not been convicted.—This was an indictment founded on the ſtat. 22 *Geo.* 3. c. 58. ſ. 1. which enacts "that where any goods (except lead, &c.) ſhall have been feloniouſly taken or ſtolen, whether the offence of the perſon ſo taking or ſtealing the ſame ſhall amount to grand larceny, or ſome greater offence, or to petty larceny only (except where the perſon actually committing the felony ſhall have been already convicted of grand larceny, or of ſome greater offence), every perſon who ſhall buy or receive any ſuch goods or chattels, knowing the ſame to have been ſo taken or ſtolen, ſhall be held and deemed guilty of, and may be proſecuted for, a miſdemeanor, and ſhall be puniſhed by fine, im-

The King v. J. Baxter, Mic. Ter. 33 Geo. 3. B. R. 5 *Ter. Rep.* 83.

(1) But ſee *the Duke of Bolton* v. *Williams*, 4 *Brown's Caſ. Chan.* 297.

priſonment,

priſonment, or whipping, &c.; although the principal felon be not before convicted of the ſaid felony, and whether he be amenable to juſtice or not." This indictment conſiſted of two counts: the firſt ſtated, that goods of the value of 5s. were feloniouſly ſtolen *by ſome perſon or perſons unknown*, and that the defendant afterwards unlawfully received them, knowing them to have been ſtolen; this count, therefore, ſtated the offence in taking the goods to be a grand larceny. But the ſecond count alleged the goods to be of the value of 6d., which was only petty larceny in the perſon ſtealing them. A MOTION in arreſt of judgment was made, on the ground, that the indictment was defective in not ſtating negatively that the perſon or perſons who had ſtolen the goods had not been convicted. After argument, ALL THE JUDGES were conſulted upon the ſubject, and they were unanimouſly of opinion that there was no foundation for the objection, as applied to either of the counts. As to the ſecond count, the exception in the ſtatute, as to perſons convicted, only mentions the inſtance of perſons convicted of *grand larceny or of ſome greater offence*, which does not apply to the caſe of petty larceny. The firſt count has alſo been conſidered; and, on two grounds, we think it may be ſupported. Firſt, on account of the particular manner in which this indictment is drawn, which alleges, that the goods were ſtolen *by ſome perſon or perſons unknown*. This we think is equivalent to ſaying that thoſe perſons had not been convicted. But the other ground, on which we are of opinion that this count is good, is, that it is not neceſſary in ſuch an indictment againſt the receiver to aver that the principal has not been before convicted. If it were, it would merely be ſtating a negative averment, which need not be proved by the proſecutor. Such a fact is matter of evidence to be proved by the defendant; and which, when proved by him, would entitle him to an acquittal. This opinion is warranted by the caſe of *R.* v. *Pollard*, 2 Lord *Raym.* 1370: that was an indictment on the ſtatute of 5 *Ann.* c. 31. ſ. 5, 6. and the objection was, that the proſecutor had not averred that the principal could not be taken; but the Court held, that that averment was not neceſſary. And the principle of it is to be found in an older authority, 1 *Sid.* 303. and alſo in 2 *Hawk.* b. 2. c. 25. ſ. 112; where it is ſtated, that if there be any deſcription in the negative, the affirmative of which would be an excuſe for the defendant, the proof of it lies on him, and it need not be ſtated in the indictment.—Rule to arreſt the judgment diſcharged.

The King v. Robert Powell, Mic. Ter. 12 Geo. 3. 2 *Black. Rep.* 787.

As follows, is a ſufficient averment of the tenor of a forged receipt, in an indictment: and it is only neceſſary to aver a general intent to defraud *A. B.* without ſetting out the manner in which that fraud was to be effected.—*Powell* was capitally convicted, at the laſt May ſeſſions, at the Old-Bailey, on the ſtatute

ſtatute 2 *Geo.* 2. c. 25. for "falſely making, forging, and "counterfeiting, a certain receipt for money, *as follows*, that "is to ſay: Received, &c. with intent to defraud one *Joſeph* "*Sykes*, againſt the form of the ſtatute, &c." A ſecond count, for uttering ſaid receipt, with intent to defraud ſaid *Sykes*. Third and fourth counts, for forging, and for uttering, the ſaid receipt, with intent to defraud *Taylor Barrow*. The fact was, that *Powell* had perſonated *Barrow*, in the ſale of 400l. Eaſt-India ſtock to *Sykes*; and had ſigned, in his name, the uſual receipt upon the transfer, for 798l.; ſtock then being at 199½ per cent. It was moved in arreſt of judgment, the laſt day of the ſeſſions, before the recorder, that the words, "*as follows, that is to ſay*," do not ſufficiently expreſs, that the receipt is ſet forth in the words, figures, and letters of it. Alſo, ſecondly, that *the manner, how the fraud was to be committed, was not ſet forth*; nor the facts, which were neceſſary to ſhew how the receipt was to operate, ſo as to defraud either *Sykes* or *Barrow*; but merely the intent to defraud, in general. THE UNANIMOUS OPINION OF THE JUDGES, upon theſe points, were: that there was no weight in either of theſe objections: a certain receipt, *as follows, that is to ſay*, being altogether as certain, as if it had been ſaid, *in the words and figures following, that is to ſay, &c.* And it is ſufficient to aver a general intention, to defraud a certain perſon; which intention muſt be made out, by facts in evidence, at the trial.

In an indictment, the words, "in *manner and form following*, "*that is to ſay*," do not bind the party to recite the inſtrument, &c. *verbatim*, nor render mere formal omiſſions or miſtakes fatal. And if a clerk of the peace, in drawing an indictment, introduce unneceſſary recitals, the Court will order him to pay the expence thereby incurred.—It was moved for a rule to ſhew cauſe why the verdict, on an indictment for perjury, ſhould not be ſet aſide, and judgment of acquittal entered, upon the following ground: the original indictment, in ſtating the injury which the defendant (then the proſecutor) had received, ſaid, "*where-* "*by his life was greatly deſpaired of.*" The preſent indictment, after mentioning that there had been an indictment preferred by the defendant, went on thus; "*which indictment was* "*preſented in manner and form following, that is to ſay.*" Then the indictment was ſet forth in *hæc verba*, but, in the paſſage above mentioned, the word, "*deſpaired*," was omitted. It was admitted, not to have been *neceſſary* that the former indictment ſhould be recited; but it was contended, that the proſecutor, by the words, "*manner and form following, that is* "*to ſay*," had undertaken to recite it, and that having done ſo, he was bound to ſet it forth verbatim. This objection had been made at the trial, but was over-ruled by the judge; who ſaid, that the word, "*tenor*," had ſo ſtrict and technical a meaning

The King v. May, Ea. Ter. 19 Geo. 3. B.R. 1 *Doug.* 193.

a meaning as to make it neceſſary to recite *verbatim*, but that, by the expreſſion in this caſe, nothing more than a *ſubſtantial* recital was requiſite, and that the variance here was only matter of *form*; and he mentioned the caſe of *Rex* v. *Beach*, where the variance was "*undertood*" in the recital of an *affidavit*, in an indictment, inſtead of "*underſtood*," in which, on a motion for a new trial, although the introductory words were "*tenor and effect*," the Court determined, that *the variance was not fatal.* A rule to ſhew cauſe was granted, but afterwards dropped, and the defendant was called upon his recognizance, in order that judgment might be pronounced againſt him. The indictment, which had been removed by *certiorari*, from the quarter ſeſſions for Middleſex, appearing to be of an exorbitant length, ſtating all the continuances on the former proſecution, *&c.* which is rendered unneceſſary by the expreſs words of the ſtatute of 23 *Geo.* 2. c. 11. § 1. the Court ordered, that it ſhould be referred to the maſter to ſee what part of the record was unneceſſary, and that the clerk of the peace ſhould pay the expence incurred by ſuch unneceſſary part.

Rex *v* Beach, Mic. Ter. 15 Geo. 3. B R. *Comp.* 229.

Variance in the word under*t*ood for under*ſt*ood, was held not material. The defendant had been convicted of perjury in an affidavit. And it was objected on a rule to ſhew cauſe why the judgment ſhould not be arreſted, that there appeared a material variance between the indictment and the affidavit; for in the affidavit the defendant ſwore, that "he underſtood and "believed, *&c.*" whereas the aſſignment of the perjury in the indictment was, "that he had falſely ſworn, that he underſtood "and believed, *&c.*" omitting the letter *ſ*; and *Queen* v. *Drake*, 2 *Salk.* 660.—*Hutton* 56. *Cro. Jac.* 133. 5 *Rep.* 45. 2 Lord *Raym.* 1224. were cited in ſupport of the exception. PER CURIAM: We have looked into all the caſes upon the ſubject; ſome of which go to a great degree of nicety indeed; particularly the caſe in *Hutton* 56, where the word *indicari* was written for *indictari*; whereas it ſhould have been written with an abbreviation *indicāri*: but that caſe is ſhaken by the doctrine laid down in 2 *Hawk.* 239. The true diſtinction ſeems to be taken in the caſe of the *Queen* v. *Drake*, 2 *Salk.* 660. which is this; that *where the omiſſion or addition of a letter does not charge the word, ſo as to make it another word, the variance is not material.* To be ſure, a greater ſtrictneſs is required in criminal proſecutions than in civil caſes; and in the former a defendant is allowed to take advantage of nicer exceptions. But this is a caſe where the matter has been fairly tried, and where the omiſſion of the letter *ſ* certainly does not change the word. Therefore we are all of opinion, that the jury were very right in reading it "underſtood." Rule for arreſting the judgment diſcharged.

Poſt.

Poſt-Horſes.

THE letting of a horſe to hire for the purpoſe of going upon buſineſs from one town to another, and back again, in the compaſs of a day's journey, is not ſuch a letting to hire as ſubjects the owner of the horſe to the penalty impoſed by the 25 *Geo.* 3. c. 51. ſ. 4. though he has not the licence which perſons letting horſes to hire for the purpoſe of travelling poſt are required to take out by that ſtatute; for the words *travelling poſt* in that act are to be conſtrued according to the popular acceptation of them. The defendant, who had been convicted in the penalty of 5l. under the 25 *Geo.* 3. c. 51, for letting to hire a horſe to *Richard Gee*, for the purpoſe of travelling poſt by the ſtage, to wit, from Totneſs to Aſhburton, Devon, and back again, not having a licence ſo to do from the commiſſioners of the ſtamp-office, appealed to the laſt ſeſſions at Exeter; where the conviction was quaſhed, ſubject to the opinion of this Court on the following caſe: On the 4th of October, 1788, *Richard Gee*, an apparitor of the ſpiritual court of the archdeaconry of Totneſs in the dioceſe of Exeter, went to the appellant, who is a butcher of the town of Totneſs, and hired a horſe of him to go from thence to Aſhburton in the ſaid county and back again; the price to be paid to the appellant for ſuch hire amounted to one ſhilling and ſixpence, and *Richard Gee* was to return with the horſe to Totneſs the ſame day; and it alſo appeared that the appellant was not a perſon licenſed to let horſes for travelling poſt. By the 25 *Geo.* 3. c. 51. ſ. 4. Every poſt-maſter, inn-keeper, or other perſon who ſhall let to hire any horſe *for the purpoſe of travelling poſt* by the mile, or from ſtage to ſtage, ſhall pay annually 5s. for a licence for that purpoſe. By the 5th ſection the duties are put under the management of the commiſſioners of the ſtamp duties. And by the 42d ſection every horſe, hired by the mile or ſtage, ſhall be deemed to be hired to travel poſt within the meaning of the act, although the perſon hiring the ſame do not go or travel ſeveral ſtages upon a poſt road, or change horſes: and although at the ſtage or place, at or to which ſuch horſes ſhall be hired, there ſhall not be any poſt-houſe; and although there ſhall not be any poſt ſettled or eſtabliſhed on the road, upon which ſuch horſes ſhall be hired to go. PER CURIAM: If the act had ſtopped at the words "that every horſe hired by the mile, or "ſtage, ſhall be deemed to be hired to travel poſt," the argument againſt the order of ſeſſions would have been well founded. For if the legiſlature had only intended to ſubject every horſe ſo hired to the duty, they would not have ſubſequently added ſo many nugatory words: but the act goes on

The King v. Andrew Tooley, Hil. Ter. 29 Geo 3. B. R. 3 *Ter. Rep.* 69.

to ſay "that ſuch ſhall be travelling poſt within the meaning of the act, *although the perſon hiring the ſame do not travel ſeveral ſtages*, or change horſes, and *although there be not any poſt-houſe, or eſtabliſhed poſt-road*. This proviſo is adapted to caſes which exiſt in various parts of the kingdom, and particularly in the road from Cheſter to Bath, great part of which is not that which is termed a poſt road; there perſons do not travel from poſt-houſe to poſt-houſe; but they travel *quaſi* poſt. If a perſon be, *in the popular ſenſe of the words*, travelling poſt, he is then within the meaning of the act of parliament. The popular ſenſe of the words is to be retained; and when that is ſatisfied, the 42d ſection provides that the circumſtances there mentioned ſhall not exempt the perſon from paying the duty. But the perſon in this caſe going on his buſineſs to a market-town and back again, cannot poſſibly be ſaid to be travelling poſt either within the ſpirit or the words of this act of parliament, which was evidently not intended to extend to every caſe of hiring a horſe; and unleſs it did, this caſe is not within it. Order of ſeſſions confirmed.

The King *v.* John Webber, Hil. Ter. 29 Geo. 3 B R. 3 *Term Rep.* 72.

But a perſon, who lets a horſe to hire to carry a private expreſs, muſt take out a licence under the 25 *Geo.* 3. c. 51. ſ. 4. which impoſes a tax on horſes let to hire for the purpoſe of travelling poſt. Upon an appeal againſt a conviction on the 25 *Geo.* 3. c. 51. ſ. 4. for levying a tax upon horſes let to hire, for the purpoſe of travelling poſt by the mile or ſtage, the ſeſſions quaſhed the conviction, and ſtated a caſe for the opinion of this Court; wherein it appeared upon the evidence of *Jonathan Green*, who was deputed poſtmaſter for the city of Exeter, that when any expreſſes have been delivered to him to be forwarded to London, he has uniformly cauſed them to be conveyed from Exeter to Honiton, being the firſt ſtage from thence, and ſixteen miles diſtant, by the defendant, who lets horſes for that purpoſe. Such expreſſes have been in every inſtance within the knowledge of the ſaid defendant carried on horſeback by a boy and a horſe provided by the defendant: and *Green* hath always paid the defendant three pence a mile, and ſix pence for the boy; in the whole 4s. 6d. The defendant may ſend whom he pleaſes, or go himſelf with the expreſſes. On the 25th of February laſt, a waiter from the Oxford-inn brought an expreſs to *Green*, directed to the duke of Northumberland, to be immediately forwarded to London. *Green* incloſed it in another cover directed to the poſtmaſter general in London, which is done in the caſe of all expreſſes, and ſent it to the defendant *Webber*, who either came himſelf or immediately ſent his ſervant to the poſt-office. The ſaid *Jonathan Green* delivered to *Webber*'s boy the expreſs which he ſo received, with directions to forward it immediately to Honiton. He thinks he has ſeen ſome expreſſes with *government ſervice* written on the cover, but he does

does not remember that this was written on the present. He has since paid *Webber* 4s. 6d. for conveying this express to Honiton. It is his duty to forward expresses in the most expeditious way, and he thinks the most expeditious way is by a man and a horse. He is allowed two hours and a quarter for conveying an express from Exeter to Honiton. The horse upon which the boy rode in carrying this express was the property of the defendant. *Green* pays the defendant once a quarter for carrying expresses; and he was paid the said 4s. 6d. in the last account settled at Lady-day. Lord KENYON, Ch. J.—It is true that under the act every letting to hire is not a letting to hire for the purpose of travelling post. Now it has been argued here that this defendant did not let a horse for the purpose of travelling post, according to the popular sense of those words: but I think that a horse, let to carry a letter by express, is in common parlance let for the purpose of travelling post. And if we look back to the history of former times, we find that this mode of conveyance was called, not an express, but *flying post*. Perhaps, if this had appeared to be an express sent by the orders of government on public (1) service, it might have been otherwise: but I give no opinion on that question. However, as it is not stated in this case that it was a government express, it is impossible to entertain the least doubt on this question. Then it was objected that the defendant was not bound to pay this duty, because the horse was ridden by his own servant: but that would equally apply to almost all cases of travelling post, where the driver is the servant of the owner of the horses. ASHHURST, J.—It has been argued that we must presume that this express was sent on the account of government: but it is incumbent on the party, who claims the exemption, to prove that he comes within it. Therefore we cannot presume it from the facts here stated; and the reverse of it appears. This case then falls within the words of the act of parliament: and if we consider that this was a tax on accommodation and luxury, and that every person sending expresses is supposed to be of ability to pay it, it comes also within the meaning of the statute; for it is in the popular sense a travelling post. GROSE, J.—Of the same opinion. Rule absolute for quashing the order of sessions.

But the post-horse duty imposed by 25 *Geo.* 3, c. 51. is not to be paid for horses employed in forwarding *public expresses* on the service of government. Lord KENYON, Ch. J.—Generally speaking in the construction of acts of parliament, the

The King *v.* James Cook, Hil. Ter. 30 Geo. 3. B.R. 3 *Ter. Rep.* 519.

(1) It was afterward held, in the case *R.* v. *J. Cook*, immediately following the present, that public expresses, on the service of government, are exempt from this duty.

king in his royal character is not included, unleſs there be words to that effect. This has been likened to ſeveral caſes to which I cannot by any means aſſimilate it: it has been ſaid that if the duty be not paid for ſuch an expreſs as the preſent, becauſe it related to public buſineſs, the exciſe duties will not be paid at the public offices: but exciſable commodities are things *promiſcui uſus*, on which the duty is payable before it is known by whom they are to be conſumed. It was very properly decided in *R.* v. *Webber* that a conveyance by expreſs is not exempt from the payment of the duties impoſed by this act of parliament, if there be an immediate ſubject on whom the tax will fall. But this is the caſe of a public expreſs on the ſervice of government. The ſtat. 25 *Geo.* 3. c. 51. ſ. 4. enacts that "for and in reſpect of every horſe hired by "the mile or ſtage, to be uſed in travelling poſt, there ſhall "be charged a duty of 1½d. for every mile ſuch horſe ſhall be "hired to travel poſt;" and the 15th ſection enacts, "that the "poſt-maſter ſhall aſk, demand, and receive of and from the "*perſon or perſons hiring the ſame* the ſum of 1½d per mile," *&c.* Now in this caſe who can be ſaid to be the perſon hiring the horſe? The packet was ſent for the uſe of government; and it paſſed through the hands of the different poſt-maſters, who forwarded the expreſs in conſequence of an official duty incumbent on them. But they cannot be ſaid to be the perſons hiring the horſes within the meaning of the act. My opinion proceeds on the ground that this was on the ſervice of government; and the caſe ſtates in expreſs terms that the packet contained a letter directed to one of the principal ſecretaries of ſtate, *and that it was not on any private buſineſs whatever, but wholly related to the public concerns of this kingdom.* Now although there is no ſpecial exemption of the king in this act of parliament, yet I am of opinion that he is exempted by virtue of his prerogative, in the ſame manner as he is virtually exempted from the 43d *Eliz.* and every other act impoſing a duty or tax on the ſubjects. And I underſtand that the horſes, carrying the mail, were never deemed liable to the poſt-horſe duty. The three other judges concurred.

Radford *qui tam* v. [illegible]. Ea. Ter. 30 Geo. 3 B.R. 3 *Ter. Rep.* 632.

In an action for penalties on the poſt-horſe act brought by the farmer of the tax, it is not neceſſary for the plaintiff to give in evidence his appointment by the Lords of the Treaſury, or the commiſſioners of the ſtamp duties authorized by them. Proof that the defendant has accounted with him, as farmer, for the duties, is ſufficient. This was an action on the ſtatute 27 *Geo.* 3. c. 26. brought by the farmer of the poſt-horſe tax to recover certain penalties, laying the offence to have been *committed with intent to defraud the plaintiff*, (the farmer), at the trial a licence to let poſt-horſes was produced in evidence, granted by the plaintiff to the defendant; but it did not appear on the inſtrument whether this licence

was

was granted by the plaintiff in the character of collector of the duties, or of *farmer-general*. But at the bottom of it was a memorandum, ſignifying that application muſt be made to the *farmer-general* of the duties to renew this licence annually; and on this piece of paper ſeveral entries were made by the defendant. It was alſo proved that the defendant had on ſeveral occaſions accounted with the plaintiff for the duties collected under this act, but had omitted in this inſtance the ſums ſtated in the firſt and fifth counts, though inſtead of having let *eight* horſes, as alleged in the fifth count, he had only let *five*. No grant of the duties to the plaintiff was produced either from the Lords of the Treaſury, or from the commiſſioners of the ſtamp-office as duly authorized by them [*vid.* 27 *Geo.* 3. c. 26. ſ. 1. (1)]; but the plaintiff relied on an appointment by the commiſſioners of the ſtamp duties, who had only a general commiſſion under the great ſeal, granted to them before the paſſing of this act of parliament. IT WAS FIRST OBJECTED on the part of the defendant that the plaintiff who ſued as farmer-general had not proved himſelf to be ſo, becauſe a legal appointment could only be made either by the Lords of the Treaſury, or by the commiſſioners of the ſtamp duties duly and ſpecially empowered by them; and, 2dly, that the evidence on the fifth count did not correſpond with the declaration; for it was ſtated that the defendant had let to hire *eight* horſes, whereas the plaintiff only proved a letting of *five*; and this being a contract of hire, it ought to have been ſet out correctly. A verdict was taken for the plaintiff for two penalties, on the firſt and fifth counts; with liberty to the defendant to move to enter a non-ſuit, if the firſt objection were well founded; or to enter a verdict for the defendant on the fifth count, if he were right on the ſecond objection. Lord KENYON, Ch. J.—In penal actions on the 2 & 3 *Ed.* 6. c. 13. ſ. 2., which enables the owners of tithes to recover double the value, in caſe they are withdrawn, it has always been held ſufficient proof againſt the defendant that the party ſuing is in the act of receiving the tithes from him. So in this caſe, the defendant has admitted that the plaintiff ſtood in the relation of farmer-general of the duties by accounting with him as ſuch. BULLER, J.—It appears that the defendant has treated with the plaintiff in the character of farmer-general. Then this comes within the claſs of caſes mentioned by my Lord, and other inſtances of

(1) Which enacts that it ſhall be lawful for the lord high treaſurer, or the commiſſioners of the treaſury, either by themſelves, or by his majeſty's commiſſioners for managing the duties on ſtamped vellum, &c. thereunto duly authorized for that purpoſe under the hand and ſeal of the lord high treaſurer, or under the hands and ſeals of the commiſſioners of the treaſury, to let to farm the duties, &c.

actions for non-reſidence, where it is ſufficient to prove the defendant in poſſeſſion of the church, without proving preſentation, inſtitution, and induction; as was held in *Bevan qui tam* v. *Williams* (under title Reſidence). THE COURT diſcharged this rule. A *motion was then made to arreſt the judgment*; AND IT WAS OBJECTED, 1ſt, that the offence was charged to have been committed *with an intent to defraud the farmer-general*, whereas it ſhould have been laid with intent to defraud *his majeſty*; and, 2dly, that no offence within the act of parliament was ſtated in the declaration, becauſe the defendant is charged with having made falſe accounts, *in not inſerting in the account the ſums of money received by him*; whereas the act of parliament only requires that the account ſhall contain the number of horſes, and of miles, and the names of the drivers. *The Court* ſeemed to be of opinion that the firſt objection was ill founded; but ſaid that the judgment muſt be arreſted on the ſecond. They obſerved that the ſtatute 25 *Geo.* 3. only requires the poſt-maſters, *&c.* in making up their accounts, to inſert therein the number of horſes let, and the number of miles, *&c.* but does not require the amount of the duties received to be ſpecified. There is indeed a ſchedule mentioned in the twelfth ſection, but no penalty is given by that clauſe; and the ſubſequent ſection, which creates the penalty, does not require that the ſums received ſhould be inſerted in the account, but only the materials which furniſh the amount of the ſums. It may be true therefore that the defendant has neglected to do that which is imputed to him, and yet have complied with all the requiſites of the act. Whether or not it would have been ſufficient to ſtate generally that the defendant had been guilty of delivering in a falſe account, without ſpecifying in what particular inſtance it was ſo, the Court declined giving any opinion, though they ſeemed to doubt whether ſuch a general allegation would be ſufficient even after verdict: but they ſaid that the plaintiff in this caſe, after having alleged generally that the defendant had been guilty of making falſe accounts, proceeded to ſtate in what the falſity of the account conſiſted; and, as that particular charge did not conſtitute any offence within the act of parliament, the plaintiff could not avail himſelf of the general allegation, even if it were ſufficiently deſcriptive of an offence. *Per Curiam*, Rule abſolute.

Radford *qui tam* v. Briggs, Ea. Ter. 30 Geo 3. B.R. 3 *Ter. Rep.* 637.

This was an action ſimilar to the laſt; at the trial of which it was objected that it was not proved that the defendant was licenſed, becauſe the licence itſelf was not produced; on which the plaintiff was nonſuited. But, on a motion to ſet aſide that nonſuit—BULLER J. now ſaid that he was convinced that there was no weight in the objection; that it was not neceſſary to prove a licence having been granted in

act,

fact, for that other evidence would be ſufficient againſt the defendant, as that he had written up over the door "Licenſed to let poſt horſes." But there was the ſame objection to this declaration as to the laſt.

In an action againſt a perſon who farms the poſt horſe duties under the ſtatute 27 *Geo.* 3. c. 26. for a neglect of duty, it is neceſſary to aver that he is the farmer appointed under and by virtue of that act. Alleging that he is the collector of the rates and duties recited in that act is not ſufficient. This was an action upon the caſe. The firſt count of the declaration ſtated that the plaintiff was licenſed to let to hire horſes for the purpoſe of travelling poſt, &c. and lived in *St. Mary's Lambeth, Surrey*; that the defendant "was a collector of the rates and duties *recited* in a certain act of parliament made and paſſed in the 27th year of his preſent majeſty, entitled an act, &c. [27 *Geo.* 3. c. 26.] that is to ſay a collector of the ſaid rates and duties in and for the county of *Surrey*, and as ſuch collector of the ſaid rates and duties it was his buſineſs and duty to furniſh and ſupply the plaintiff from time to time, &c." with notes or certificates, having the words "hired for two or more days," engraven or printed thereon, &c.; that the plaintiff had occaſion for ſome, and that the defendant refuſed to ſupply him with them; whereby many perſons were prevented hiring horſes of the plaintiff, &c. The ſecond count was for refuſing to paſs the plaintiff's ſtamp office weekly accounts as a perſon licenſed; and it ſet forth that the defendant, ſo being a collector of the ſaid duties, but diſregarding the duties of his office, "under colour of his office," on, &c. wilfully and injuriouſly refuſed to paſs the plaintiff's accounts, &c. unleſs the plaintiff would pay to him as ſuch collector, 1*s.* 9*d.* for every horſe let to hire by the plaintiff with notes or certificates; "by means whereof the plaintiff was obliged to pay him as ſuch collector of the ſaid duties *divers ſums*, amounting in the whole to 10*l.*" The third count was for exacting "under colour of his office" 1*s.* 9*d.* for every horſe let to hire by the plaintiff with ſuch notes, &c. The fourth count ſtated that the plaintiff, being ſo licenſed, &c. had agreed to let to hire a certain horſe and chaiſe on a yearly job to *A. B.* &c. and that the defendant, ſo being a collector, &c diſregarding the duties of his office, refuſed to paſs the plaintiff's ſtamp office weekly accounts, unleſs the plaintiff would pay him, as ſuch collector, divers ſums of money amounting in the whole to 20*l.*; and that the plaintiff was obliged to pay him that ſum. The fifth count ſtated that the plaintiff, being ſo licenſed, &c. had agreed to let to hire a certain other horſe and chaiſe, &c. yet that the defendant ſo being ſuch collector, &c. exacted and took of the plaintiff under colour of his office divers ſums of money amounting to 20*l.* for and in reſpect of the

Short *v.* Fraen, Hil. Ter. 35 Geo. 3. K.B. 6 *Ter. Rep.* 163.

the laſt horſe and chaiſe, &c. A verdict having been given for the plaintiff, the defendant moved to arreſt the judgment on three grounds; 1ST (which applies to the whole declaration), That it was not alleged with ſufficient certainty that the defendant was appointed collector of the duties under and by virtue of the ſtat. 27 *Geo.* 3. c. 26.; and conſequently that it did not appear that it was his duty to do any of the acts, the omiſſion to perform which was charged as the foundation of the action; 2DLY (applying to the 2d and 4th counts), That even if the defendant were collector under the 27 *Geo.* 3. c. 26. it was not his duty to paſs the weekly accounts; 3DLY (applying to the 2d, 4th, and 5th counts), That the charge was too general, in ſtating that the defendant *under colour of his office* took from the plaintiff *divers ſums of money* amounting to ſo much, without ſpecifying the ſums. AFTER ARGUMENT, THE COURT were ſatisfied that the firſt objection was fatal without diſcuſſing the other points. Lord KENYON, Ch. J. When the ſtat. 25 *Geo.* 3. was paſſed, it does not appear that the Legiſlature had it in view to farm theſe duties, but the collection of them was to be under the management of the commiſſioners of the ſtamps, under whom certain officers were to be appointed. Then came the other act, 27 *Geo.* 3. empowering the commiſſioners of the treaſury or the commiſſioners of the ſtamps to let the duties to farm to any perſons willing to take them: but if they could not agree as to the terms on which the duties were to be let, then the collection of the duties was to go on as under the former act, and the ſame officers were to be continued. When thoſe duties are farmed under the laſt act, the perſon contracting for them is compoſed of two characters, the farmer and collector; and on that joint character certain obligations, which before belonged to the commiſſioners of the ſtamps, are thrown. But in an action which is brought againſt ſuch a perſon for not performing his duty, it is not ſufficient to ſhew that he was a collector of the duties in fact; the plaintiff ſhould aver ſpecifically that the defendant is that perſon, appointed under and by virtue of the act of parliament of the 27 *Geo.* 3., on whom the duty is thrown. Whereas here it is only alleged that the defendant is a collector of the rates and duties *recited* in a certain act, &c. And notwithſtanding this objection ariſes after verdict, it muſt equally prevail; it is not cured by the verdict. The rule is that a title defectively ſet out may be cured by verdict, but that a defect of title cannot be ſupplied; and here the plaintiff has failed in ſetting out a title. Rule abſolute.

North *qui tam v.* Smart, Tr. Ter. 37 Geo. 3. C. B. 1 *Pul. et Boſ.* 51.

In compounding a penal action on the poſt-horſe act (which gives coſts to the proſecutor), the proſecutor was allowed to receive the deficient duties (not amounting to 40*s.*) and full coſts of ſuit, though together exceeding the 40*s.* paid to

to the Crown. A *qui tam* action having been brought on the 20 *Geo.* 3. c. 51. for ſending in falſe accounts to the farmers of the duties on poſt-horſes; it was moved for leave to compound on payment of 40*s.* to the Crown, and ſuch duties as were deficient in conſequence of the fraud (which did not amount to 40*s.*) together with the coſts of the action to the proſecutor. And, the Court gave leave to compound, and ſaid that as the act was made for the benefit of the farmers of the poſt-horſe duties, it was not unreaſonable that they ſhould make the compoſition on their own terms. Beſides, with reſpect to coſts, this was not like other popular actions.

Poſt-Office.

THE ſtat. 9 *An.* c. 10. ſ. 40, which inflicts a penalty of 20*l.* on perſons who willingly open, or detain, letters, after they have been delivered at the poſt-office, only extends to perſons in the employment of the poſt-office. This was an action of debt to recover a penalty of 20*l.* for not delivering a letter, directed to the plaintiff, under the ſtat. 9 *An.* c. 10. ſ. 40.; which enacts that, "no perſon or perſons ſhall willingly or knowingly open, detain, or delay, any letter after the ſame is delivered into the general or other poſt-office, or into the hands of any perſon or perſons employed for the receiving or carrying poſt letters, and before delivery to the perſons, to whom they are directed, or for their uſe," under a penalty of 20*l.*; "and that the perſon or perſons ſo offending ſhall, over and above ſuch penalty, be for ever incapable of having, exerciſing, or enjoying, any office, truſt, or employment, in or relating to the poſt-office, or any branch thereof." At the trial the following ſpecial caſe was reſerved in ſubſtance as follows, the plaintiff and defendant both reſide at *Beckington*, a ſmall village three miles from *Froome* in *Somerſetſhire*, which is the neareſt poſt town. There is no poſtmaſter at *Beckington*; nor is it a poſt town or ſtage, nor a place where any poſt mark is put on letters. The poſt maſter of *Froome* went to *Beckington*, and there agreed with the defendant, in the preſence of ſome inhabitants of *Beckington*, that the letters for the inhabitants of *Beckington* ſhould be left at the defendant's houſe for him to deliver them to the inhabitants; the defendant's ſervant being to be paid one halfpenny per letter for delivery, and the poſt boy, leaving the letter at the defendant's houſe, the other halfpenny. The letters for the inhabitants of *Beckington* have for four or five years laſt been thus brought to *Beckington*, and delivered by the defendant's ſervant. And either the inhabitants of *Beckington*, or the poſt maſter at *Froome*, can put an

Martin *v.* Ford, Hil. Ter. 33 Geo. 3. B.R. 5 *Ter. Rep.* 101.

end

end to this mode of conveyance and delivery at their pleaſure. The letter in queſtion was on the 11th of May, 1792, brought to the defendant's houſe; the poſtage was 5d. and 1d. for the delivery. The defendant's boy in his way to the plaintiff's houſe met the plaintiff's wife, and offered her the letter; ſhe took it in her hand, and aſked what was to be paid; he ſaid 6d. which ſhe tendered to him: he ſaid there was 6d. due before for a former letter, and that he was not to part with the letter unleſs that was alſo paid: this ſhe refuſed to pay; and returned the letter to the boy, who carried it back to the defendant. The plaintiff on the ſame day went to the defendant's houſe, tendered 6d. and demanded the letter; the defendant refuſed it, unleſs he paid alſo the 6d. which the defendant alleged to be due for a former letter; this the plaintiff refuſed to pay, alleging that nothing was due. The defendant upon this detained the letter. PER CURIAM: The act itſelf profeſſes to be an act for the eſtabliſhment of the poſt-office; and there are words at the end of the clauſe, creating the forfeiture, which ſhew that the legiſlature intended to reſtrain the operation of the general words "no perſon, or perſons," to thoſe employed by the poſt-office: for it proceeds to enact that "over and above ſuch penalty as aforeſaid, every ſuch perſon or perſons ſo offending as aforeſaid ſhall be for ever incapable of having, uſing, exerciſing, or enjoying any office, truſt, or employment, in or relating to the poſt-office, or any branch thereof." But the defendant had no employment under the poſt-office; he was merely a ſpecial meſſenger employed by the inhabitants of *Beckington* for their convenience. The plaintiff's argument would extend the clauſe to all private gentlemen's ſervants, who were ſent to the poſt-office for their maſter's letters. But, conſidering the general purview of the act, and the particular expreſſions in the clauſe on which this action is brought, the penalty can only attach on thoſe perſons employed by the poſt-office, who, in violation of their public duty, wilfully detain letters. *Poſtea* to the defendant.

The King *v.* Shaw, Mic. Ter. 12 Geo. 3. 2 *Black. Rep.* 789.

A priſoner acquitted on a charge of felony committed as a forter and charger of letters, cannot be convicted on another count charging him generally as a perſon employed in the poſt-office, under the ſtatute 7 *Geo.* 3. The priſoner was tried, at the Old Bailey ſeſſions, May, 1771, on the ſtatute 7 *Geo.* 3. "For that, being a *clerk employed in ſorting and* "*charging letters in the poſt-office;* he did feloniouſly ſecrete, "embezzle, and deſtroy, a certain letter, containing a bank "note of 20*l.* 2. That, being *a perſon employed in the buſineſs* "*relating to the general poſt-office;* he did feloniouſly ſecrete, "*&c.* 3. That, being a *clerk employed in ſorting and charg-*"*ing letters in the poſt-office;* he feloniouſly did ſteal and "take, out of a letter, a bank note of 20*l.* 4. That, being "a *perſon*

"a *perſon employed in the buſineſs relating to the general poſt-office*; he did felonioufly ſteal, &c." It appeared in evidence, that the priſoner was only a ſorter, and not a charger, of letters: whereupon the recorder, who tried him, directed the jury (the proof of the fact being very plain) to convict him, which they did, on the ſecond and fourth counts only. And it being then moved in arreſt of judgment, that, as he had been acquitted on the counts which charged him as a ſorter and charger, and did not appear to be a perſon employed, by the poſt-office, in any other buſineſs but that of ſorting, which is one of the employments particularly ſpecified in ſtatute 7 *Geo.* 3. which ſays, that "if any perſon employed in receiving, ſtamping, "ſorting, charging, &c. or in any other buſineſs relating to the "poſt-office, ſhall, &c." he could not be convicted on the third and fourth counts. This being adjourned to Serjeant's-Inn, was this term argued before eleven of the judges, who unanimouſly agreed, that judgment ſhould be arreſted for the cauſe above alleged; but inclined to think the jury might have convicted the priſoner on the firſt and third counts, by a ſpecial finding that he was a ſorter only.

The ſtatute 9 *Ann.* c. 10. which erected the penny poſt-office, confines the limits of its delivery to "the cities of "London and Weſtminſter, the borough of Southwark, *and* "*the parts adjacent.*" In proceſs of time, the inhabitants of towns and villages within the compaſs of ten miles of London (*not perſons reſident in the contiguous ſtreets and buildings*), wiſhing to partake of the benefit of this mode of conveyance, made application to the penny poſt-office, requeſting it might be extended to them; and, as an inducement to the poſt-office to comply with their requeſt, offered to pay an additional penny a letter, towards defraying the expence of horſe-hire, neceſſary on account of the diſtance. The poſt-office indulged them in it. After this it became a doubt, whether the receipt of this additional penny, for letters thus carried and delivered in the country, could be authorized, conſiſtent with the general proviſions contained in the ſtat. 9 *Ann.* c. 10: and, therefore, the ſtat. 4 *Geo.* 2. c. 33. was paſſed, making it lawful to take an additional penny for the delivery of any letter, to any perſon *out* of the cities of London and Weſtminſter, the borough of Southwark, and the *reſpective ſuburbs* thereof.—In this caſe, the plaintiff, who reſided in Old-ſtreet, in the county of Middleſex (which ſtreet, before the ſtat. 9 *Ann.* was adjoined to London by contiguous buildings, but is out of the *liberties* of the city of London), having been charged an extra penny upon the delivery of a letter, brought a ſpecial action on the caſe, for money had and received; and, on a caſe reſerved on the trial, it became a queſtion, what is meant by "ſuburbs."—Lord MANSFIELD, Ch. J. This is a queſtion of conſtruction upon the act of parliament. At the trial it

Jones v. Walker, Tr. Ter. 17 Geo. 3. B.R. *Coup.* 624.

was

was contended, by the counſel for the penny poſt-office, that *ſuburbs* mean *liberties*, and have relation to the franchiſes of the city. It was roundly aſſerted by *both* parties, that the uſage and practice was with *them*. Serjeant *Walker*, for the defendant, inſiſted, that the additional penny had always been paid by the inhabitants of Old-ſtreet. Mr. *Dunning*, for the plaintiff, that it had not: but no evidence to the fact was produced; the witneſſes on both ſides being out of the way. I thought, and it was acquieſced in, and agreed on all hands, that it being clear and certain, that Old-ſtreet was connected to London by a ſtreet of *contiguous* building *before* the ſtat. 9 *Ann.* c. 10. the uſage could be of no avail in explaining the ſtatute. If the uſage had been, that a *ſingle* penny only had been taken in one part of the ſtreet, and the additional penny in another, it might have been material to ſhew, that the one part was anciently contiguous to London, and the other originally in the country. The queſtion then, is a mere queſtion of conſtruction, whether the word "ſuburbs," in the act, means the liberties of the city, or contiguous buildings. In all dictionaries, "ſuburbs" are defined to be, "buildings adjoining to a great city, *without the walls*." I thought, at the trial, and think now, there is not a colour for ſaying that ſuburbs mean liberties. Liberties are a *corporate* denomination: ſuburbs, a *natural* denomination. In *Fellows* v. *Jeacock*, which was the caſe of the Hampſtead waterworks, the Court were of opinion, that ſuburbs did not mean liberties: and to prove the place in queſtion there, a contiguous building, evidence was given of there being ancient pipes, &c.—Whether the place in queſtion was or was not a contiguous building at the time of the act, is, as has been ſaid, a matter of *fact:* but when once it is proved to have been a contiguous building, it is a queſtion of conſtruction upon the act. The franchiſes of the city can have nothing to do with the additional trouble of the penny poſt-man: whether a houſe ſtood on this ſide or that ſide of Temple-bar, within or without the liberty of the city, could make no difference to him. The only matter for his conſideration was, whether it ſtood amongſt other houſes contiguous to the city, or *without* it, ſo as to occaſion his taking a horſe, the original conſideration for allowing the additional penny.—*Aſton*, J. The uſe is not material in this caſe. I think, that upon the words of the ſtat. 9 *Ann.* c. 10. which ſays, "parts adjacent," it is clear, that the inhabitants of Old-ſtreet would be entitled to have the letters delivered for *one penny* only. The confuſion that has ariſen, was introduced by the latter ſtatute, the 4 *Geo.* 2. c. 33. changing the words, and uſing "ſuburbs" inſtead of "parts adjacent." It alſo departs from the diſtance mentioned in the ſtat. 9 *Ann.* c. 10. of "ten miles from the general letter office in London," and ſays, "within the compaſs of ten miles *round* the city of London,"

" don," which ſeems to me, to include ten miles beyond the city, and the places adjacent, where the *old* penny was taken. I think, that *before* the ſtat. 9 *Anne* one penny only could have been taken in Old-ſtreet; and, therefore, that the poſt-office cannot take an additional penny now. *Willes* and *Aſhhurſt*, Juſtices, agreed.—Poſtea to the plaintiff.

Pound.

A HORSE connot be diſtrained, *damage feaſant*, and led to pound, if there be a rider upon him, notwithſtanding the authority in *Gilbert*'s Law of Diſtreſs, p. 43, is to the contrary.—This was decided in an action of treſpaſs for an aſſault and falſe impriſonment, and *for ſeizing and leading away the plaintiff's horſe, upon which he was riding*. To which the defendant had pleaded, that as to the ſeizing and taking of the horſe, *they deſtrained him damage feaſant*, in the defendant *Robinſon*'s ground, and impounded him; to which plea there was a demurrer. PER CURIAM: This diſtreſs cannot be ſupported: if it were permitted to a party to diſtrain a horſe while any perſon is riding him, it would perpetually lead to a breach of the peace.

Storey *v.* Robinſon *et al.* Hil. Ter. 35 Geo. 3. B.R. 6 *Ter. Rep.* 138.

Power.

How raiſed.] A POWER of the jointreſs to make leaſes, not being expreſſed, cannot be implied under a private act of parliament.—Lands had been ſettled by a *private act of parliament* in 27 *H.* 8. upon the anceſtors of the preſent Duke of *Bolton*, with a clauſe to reſtrain alienations, except for the *jointures of wives for term of life, &c.* On a long ſpecial verdict, and argument upon it, at the bar, the queſtion was no more than " Whether the Ducheſs of *Bolton* could " leaſe the lands ſettled upon her for life, under the power " given by the exception in the ſaid act, for *three lives*, or " years determinable upon *three* lives; that being the uſual " manner of leaſing in the country where thoſe lands lay, and " the uſual manner in which they had been leaſed." THE COURT was clear " that ſuch power not having been given " to jointreſſes, by the ſaid act of parliament, could not be " implied."

Roe, ex dimiſſ' Duke of Bolton, *v.* Grantham, Mic. Ter. 2 Geo. 3. B.R. 3 *Burr.* 1259.

How it ſhall be executed.] Power exceeded.—This was a caſe out of Chancery, for the opinion of this Court, ſtating, in ſubſtance, as follows: That *Francis Freeman* died inteſtate *before* the year 1758, leaving two daughters, his only children and coheirs at law, viz. *Frances*, afterwards the wife of *Shute Adams*, and *Catherine*, the wife of Sir *Oneſiphorus Paul*, and ſeiſed

Adams *v* Adams *et al.* Mic. Ter. 18 Geo. 3. B.R. *Cowp.* 651.

ſeiſed in fee of the eſtate in queſtion, and of other real eſtates. 1758, November 3.—By indenture between the ſaid Sir *Oneſiphorus Paul* and *Catherine* his wife, and *Shute Adams* and *Frances* his wife, of the one part, and *Joſeph Bliſſet* and *John Taylor* of the other part, the ſaid Sir *Oneſiphorus Paul* and *Shute Adams* did covenant, that they and their ſaid wives ſhould levy three or more fines (and which were accordingly levied) of all the ſaid eſtates, to the following uſes (that is to ſay): "As to one undivided moiety to the uſe of ſuch perſon or perſons, for ſuch eſtate or eſtates, and to ſuch uſes as the ſaid Sir *Oneſiphorus Paul* and *Catherine* his wife ſhould, by any deed or writing, jointly limit or appoint; and, in default of appointment, to particular uſes therein mentioned. And as to the other half part, to the uſe of ſuch perſon or perſons, for ſuch eſtate or eſtates, as the ſaid *Shute Adams* and *Frances* his wife, by any deed or writing to be by them jointly executed in the preſence of two witneſſes, ſhould from time to time direct and appoint; and for want of ſuch direction and appointment, to the uſe of the ſaid *Shute Adams for life*, remainder to ſaid *Frances for life*, remainder to *Joſeph Bliſſet* and *John Taylor* and their heirs, for the life of the ſurvivor of *Shute Adams* and *Frances* his wife, *in truſt* to preſerve contingent remainders; remainder, to the uſe of ſuch child or children, by the ſaid *Shute Adams*, on the body of the ſaid *Frances*, begotten or to be begotten, and for ſuch eſtate or eſtates as they ſhould jointly, or as the ſurvivor, in caſe of no joint appointment, ſhould, by deed or writing, or as the ſurvivor ſhould by will, atteſted by three witneſſes, limit, direct, or appoint, give or deviſe the ſame; and for want of ſuch direction or appointment, gift or deviſe, to the uſe of the firſt, and every other ſon of the ſaid *Shute Adams* and *Frances* his wife, ſeverally and ſucceſſively in tail; remainder, to all the daughters of the ſaid *Shute Adams* and *Frances* his wife in tail, as tenants in common. Remainder, to ſuch perſon or perſons as the ſaid *Frances Adams*, whether covert or ſole, by any deed or deeds, ſhould releaſe, direct, or appoint; and in default of ſuch appointment, to the right heirs of the ſaid *Frances*.

1758, November 29th.—By deed, poll, under the hands and ſeals of *Shute Adams* and *Frances* his wife, atteſted by two witneſſes, reciting the ſaid firſtmentioned power of appointment in the deed of the 3d of November, 1758, the ſaid *Shute Adams* and *Frances* his wife, did direct and appoint the ſaid undivided moiety of the ſaid eſtates and premiſes, to the uſe of the ſaid *Shute Adams for life*, remainder to *Frances*, his wife, *for life*; remainder to *Joſeph Bliſſet* and *John Taylor*, and their heirs, to ſupport contingent remainders; remainder to the uſe of ſuch child or children of the ſaid *Shute Adams*, on the body of the ſaid *Frances*, begotten or to be begotten, and for ſuch eſtate or eſtates as they ſhould jointly, by deed or writing,

ing, atteſted by two witneſſes, or as the ſurvivor, in caſe of no joint appointment, ſhould, by deed atteſted by two witneſſes, or will atteſted by three witneſſes, grant, releaſe, limit, or appoint, give or deviſe the ſame: and in default of ſuch appointment, to all ſuch children living at the death of the ſurvivor of ſaid *Shute Adams* and *Frances* his wife, equally as tenants in common in tail with croſs remainders amongſt them; remainder, to the uſe of ſaid *Shute Adams* and *Frances* his wife, and the ſurvivor, and the heirs and aſſigns of the ſurvivor for ever—with a power in *Shute Adams* and *Frances* his wife, jointly by deed with two witneſſes, to revoke the above uſes, and to limit any other uſes by deed, executed in the preſence of two witneſſes. And a power in the ſurvivor to join in a partition of the premiſes, or to ſell the ſaid undivided moiety, inveſting the money in other lands, to be ſettled to the ſame uſes.

1764, September 24th.—By articles of agreement, between Sir *Oneſiphorus Paul* and dame *Catherine* his wife, of the firſt part, and *Shute Adams* and *Frances* his wife, of the other part, reciting as therein it was recited, it was agreed, and the ſaid Sir *Oneſiphorus Paul* and *Catherine* his wife, *Shute Adams* and *Frances* his wife, did thereby ſeverally and reſpectively limit, order, direct, and appoint, that all the premiſes in Clifton and Weſtbury-upon-Trym, ſhould be, and remain to, and for ſuch and the like uſes, truſts, intents, and purpoſes as were mentioned with reſpect to them, the ſaid *Shute Adams* and *Frances* his wife, concerning their, or the ſaid *Frances*'s, undivided moiety of the whole of Mr. *Freeman*'s eſtate, by the ſaid indenture, dated the third day of November, 1758, made between the ſaid Sir *Oneſiphorus Paul* and his wife, and the ſaid *Shute Adams* and his wife, of the one part, and the ſaid *Joſeph Bliſſet* and *John Taylor* of the other part. And it was alſo agreed, that the other eſtates ſhould be limited, &c. to the ſame uſes as were mentioned with reſpect to the ſaid Sir *Oneſiphorus Paul* and dame *Catherine* his wife, concerning their ſhare of the ſaid eſtates, by the ſaid deed, dated the 3d day of November, 1758. And that a proper deed or deeds, for dividing and allotting the ſaid eſtates, agreeable to the intention of the ſaid parties, ſhould be forthwith prepared and executed by the ſaid parties: neither of the deeds of 3d of November and 29th of November, 1758, was recited in theſe articles, or mentioned therein otherwiſe than as aforeſaid.

1761, October 20th.—By indenture between Sir *Oneſiphorus Paul* and dame *Catherine* his wife, and *Shute Adams*, eſq. and *Frances* his wife, of the one part, and *Joſeph Bliſſet* of the other part, reciting the indenture of the 3d of November, 1758 (but not the indenture of the 29th of November, 1758). And alſo reciting the ſaid diviſion of the premiſes; *Oneſiphorus Paul* and dame *Catherine*, in conſideration of five ſhillings

paid by the ſaid *Shute Adams* and wife, and of five ſhillings paid by *Joſeph Bliſſet*, by virtue of all powers in the ſaid indenture of the 3d of November, 1758, and of all other powers, did, by conſent, direction, and appointment of the ſaid *Shute Adams* and wife, limit, direct, and appoint unto the ſaid *Joſeph Bliſſet*, his heirs and aſſigns, "all the undivided moiety of them, the ſaid *Oneſiphorus Paul* and dame *Catherine* his wife, of and in the eſtate at Clifton and Weſtbury-upon-Trym, to hold unto the ſaid *Joſeph Bliſſet*, his heirs and aſſigns, for ever, to the ſeveral uſes following, viz. to the uſe of ſuch perſon or perſons, and for ſuch eſtate or eſtates, as the ſaid *Shute Adams* and *Frances* his wife ſhould, by any deed or writing, from time to time, releaſe or appoint; and in default of ſuch joint appointment, which was the caſe, to the uſe of the ſaid *Shute Adams*, for his life. Remainder to *Frances* his wife, for her life. Remainder to *Joſeph Bliſſet* and his heirs, to preſerve contingent remainders. Remainder to the uſe of ſuch child or children of the ſaid *Shute Adams*, begotten or to be begotten, on the body of the ſaid *Frances* his wife, and for ſuch eſtate or eſtates as they, by deed or writing, under both their hand and ſeals, or as the ſurvivor of them, in caſe of no joint appointment, by deed or writing, under the hand and ſeal of ſuch ſurvivor, atteſted by two witneſſes, or as ſuch ſurvivor by will ſhould limit or appoint; and if no appointment, then to their firſt and other ſons in tail. Remainder to the daughters, as tenants in common in tail, with croſs remainders. Remainder to the uſe of ſuch perſons as the ſaid *Frances*, whether covert or ſole, ſhould appoint. Remainder to the right heirs of the ſaid *Frances Adams*. Soon after this, *Shute Adams* died, leaving three children, and no more, by the ſaid *Frances* his wife; namely, *Francis* their only ſon, and *Mary Shute Adams*, and *Catherine Adams*.

4th July, 1767.—By indenture of three parts, between the ſaid *Frances Adams*, the widow of the ſaid *Shute Adams*, of the firſt part, *Joſeph Bliſſet* of the ſecond part, and the ſaid *Frances Adams*, *Mary Shute Adams*, and *Catherine Adams*, of the third part, and duly executed by the ſaid *Frances*, in the preſence of, and atteſted by, two witneſſes; reciting the deed of the third of November, 1758; and the indenture dated 20th of October, 1764; and alſo, that by the ſaid deed poll, dated 29th of November, 1758, the premiſes there ſtood limited, &c.; and that *Shute Adams* was dead, and that no other appointment had been executed: the ſaid *Frances Adams*, in purſuance of the power to her reſerved by the ſaid ſeveral recited indentures and deed poll, and of all other powers, did grant, limit, direct, and appoint the ſaid two ſeveral moieties, or half parts of the ſaid eſtates at Clifton and Weſtbury-upon-Trym, to the uſe of the ſaid *Mary Shute Adams* and *Catherine Adams*, the daughters, for 500 years, to commence from the death

death of the ſaid *Francis Adams*, ſubject to the proviſo after mentioned. Remainder to the uſe of her ſon, the ſaid *Francis Adams*, his heirs and aſſigns for ever. *Proviſo*, if the ſon ſhould pay the daughters 3000l. each, or 6000l. to the ſurvivor, the ſaid term to ceaſe. With the following power reſerved to the ſaid *Frances Adams*, to revoke that appointment. Provided, laſtly, and the ſaid *Frances Adams* doth hereby reſerve to herſelf full power and authority to revoke theſe preſents, and to limit all and ſingular the premiſes to, or between, the ſaid children, or any or either of them, in ſuch manner, and for ſuch eſtate or eſtates, as ſhe ſhall think fit.

25th October, 1771.—By indenture of three parts, between ſaid *Frances Adams*, widow, of the firſt part; *John Freeman*, junior, and the Reverend *George Wilkins*, of the ſecond part; and ſaid *Mary Shute Adams*, and *Catherine Adams*, of the 3d part, and executed by the ſaid *Frances Adams*, in the preſence of, and atteſted by, two witneſſes;—reciting the deeds of the 3d of November, 1758, 20th of October, 1764, deed poll of 29th of November, 1758, and the indenture of 4th of July, 1767, and the proviſo in the laſt deed to revoke, ſhe, the ſaid *Frances Adams*, in purſuance of the power reſerved to her by the ſaid recited indenture and deed poll, and all other authorities, did grant and appoint the premiſes, ſubject to her own eſtate for life, and the proviſo after mentioned, as to one moiety, to the uſe of the ſaid *Mary Shute Adams*, her eldeſt daughter, for life. Remainder to their truſtees and the heirs to preſerve remainders. Remainder to the firſt and other ſons of the ſaid *Mary Shute Adams*, in tail male. Remainder to the daughters of the ſaid *Mary Shute Adams*, in tail general, as tenants in common, with croſs remainders. Remainder to the ſaid *Catherine Adams*, the youngeſt daughter, for her life. Remainder to the truſtees to preſerve remainders. Remainder to her ſons and daughters in the ſame manner. Remainder to the uſe of the right heirs of the ſaid *Frances* for ever. And as to the other moiety, to the uſe of the ſaid *Catherine Adams* for life. Remainder to truſtees to preſerve remainders. Remainder to her firſt and other ſons in tail. Remainder to her daughters in tail general, as tenants in common, with croſs remainders, with remainder to the ſaid *Mary Shute Adams*, the eldeſt daughter for life; and afterwards, to her ſons and daughters, in manner aforeſaid, with a laſt remainder to the right heirs of the ſaid *Francis Adams*, in the ſame manner as the firſt limited moiety. In this deed alſo, power was reſerved to Mrs. *Adams*, the mother, to revoke and appoint anew; but ſhe never executed ſuch power.

In January, 1775, Mrs. *Adams* died inteſtate, leaving her ſaid three children ſurviving her. The ſon and one of the daughters have already attained the age of 21 years; and the youngeſt daughter is of age within a few months.—The queſ-

tion was, Whether the plaintiff, *Francis Adams*, took any and what eſtate, in the premiſes in queſtion, under the ſeveral deeds and inſtruments, and deeds of appointment, or any of them?

THE COURT, after having heard counſel on both ſides, certified as follows: We are of opinion, that the deed of the 29th of November, 1758, is revoked by the ſubſequent inſtruments of the 24th of September, and the 20th of October, 1764. And we think, that the appointment made by *Frances Adams* the widow, who ſurvived her huſband, dated the 4th of July, 1767, is revoked by the deed of the 25th of October, 1771, And as to the laſtmentioned deed, though we are of opinion that ſhe has thereby *exceeded* her power, which was confined to *child* or *children*, by limiting eſtates to her *grand-children*, yet we think, that the ſame ought to prevail ſo far as her power extended; and that the limitation to her daughters for life is good: but, that the diſpoſition of the inheritance to their child or children is void. Therefore, we are of opinion, that as there is no appointment of the inheritance of the premiſes, that the ſon *Francis Adams* took an eſtate tail therein, ſubject to the eſtates for life to his ſiſters, with remainders over, under the deeds of the 24th of September, and the 20th of October, 1764; and which limitations ſeem agreeable to the intention of the parties when they executed the firſt deed of the 3d of November, 1758.

Robinſon *v.* Hardcaſtle *et al.* Hil. Ter. 28 Geo. 3. B. R. 2 *Ter. Rep.* 241, 380, 781.

Every execution of a power muſt have a reference to the original inſtrument creating that power: and whoever claims under the execution muſt make title under the power itſelf.

A caſe was ſent by the lord chancellor, for the opinion of this court, in ſubſtance as follows? By ſettlement on the marriage of *James Dunn*, the plaintiff's father, with *Dorothy Wright*, *Robert Dunn*, plaintiff's late grand-father, and ſaid *James Dunn* conveyed to truſtees, among other eſtates, an eſtate at Great Chilton, to hold, after the marriage, and after a limitation to the uſe of *James Dunn* for life, and other limitations not affecting the preſent queſtion, to the uſe of the truſtees, their heirs and aſſigns for ever, in truſt for ſuch child or children of the body of the ſaid *James Dunn* on the body of the ſaid *Dorothy Wright* to be begotten, and for ſuch eſtates and in ſuch proportions as the ſaid *James Dunn* ſhould during his life by any deed in writing, or laſt will under his hand and ſeal to be executed in the preſence of two or more credible witneſſes, direct, limit, or appoint, and in default of ſuch appointment, or as the uſes, eſtates, and truſts to be appointed ſhould determine, in truſt for the ſon of ſaid *James Dunn* by the ſaid *Dorothy*, and the heirs of the body of ſuch firſt ſon, and for default of ſuch iſſue, in truſt for the ſecond and all other the ſons of ſaid *James Dunn* by ſaid *Dorothy*, and the heirs of the body of ſuch ſecond and other ſons ſucceſſively, and in default of

of such issue, in trust to raise portions for daughters, and subject thereto, in trust for said *James Dunn*, and the heirs of his body, and in default of such issue, in trust for said *James Dunn* in fee. The marriage took place, and the issue of that marriage were one son, *James*, and four daughters, *Margaret*, *Elizabeth*, the plaintiff *Ann*, and *Catherine*. *Margaret* married the defendant *Wright*; *Elizabeth* married *Christopher Robinson*, who is dead; *Ann* married the defendant *Michael Hardcastle*; and *Catherine* is unmarried. *Robert Dunn*, and *Dorothy* the wife of said *James Dunn* the father, died in his life. The said *James Dunn* the father, by his will dated 9th June, 1761, properly attested, devised the estate at Great Chilton and Dalton Piercy, charged with his debts, and two annuities, one of 12l. to his daughter *Margaret*, another of 30l. to his daughter *Catherine*, and all other his real estates to the said *Robinson*, *Wright*, and *Hardcastle*, to the use of *James Dunn* the son, for life, without impeachment of waste, remainder to trustees to support contingent remainders, remainder to the first and other sons of the said *James Dunn* the son, in tail general, remainder to daughters, and the heirs of their bodies respectively, as tenants in common; and for default of such issue, then as to all that part of his estate at Great Chilton which lies on the east side of the post road leading from Rushy Ford to Ferryhill, and all that farm at Dalton Piercy, called the Out Farm, to the use of the plaintiff in fee, and as to that part which lies on the west-side, and all that part of the farm at Dalton Piercy, called the Town Farm, to the use of *Ann*, in fee; but nevertheless with power to the said *James Dunn* the son, to charge the said estates with an annuity by way of jointure for any woman he should marry, and to appoint any part of the said estates to younger children, as a provision for them, or to charge the same for their portions, maintenance, and education; and also to grant leases under certain restrictions. The testator gave the residue of his personal estate to his son *James Dunn*; and the said *Robinson*, *Wright*, and *Hardcastle*, were also appointed executors, in trust for *James Dunn* the son; but the testator afterwards by a codicil revoked that part of the will, and made the said *James Dunn* the son his sole executor. *Ann Hardcastle* died in the life-time of *James Dunn* the father. *James Dunn* the father died on or about the 3d of September, 1767; upon his death, *James Dunn* the son proved the will, entered upon the estates at Great Chilton, and in 1769 suffered a recovery of them to the use of himself in fee, and afterwards by will devised them to the defendant *John Hardcastle*, son of defendant *Michael Hardcastle*, in fee, charged with an annuity, and also subject to the annuities before mentioned. The said *James Dunn*, the son, died 19th of April, 1779, leaving *Margaret Wright*, *Elizabeth Robinson*, the plaintiffs, and the defendants *John*

Hardcaſtle, and *Catherine Dunn*, his heirs at law. The ſaid *John Hardcaſtle*, claiming under the will of ſaid *James Dunn* the ſon, entered upon the ſaid eſtate at Great Chilton. The plaintiff claiming all that part of the eſtate at Great Chilton under the ſettlement in July, 1713, and under her father's will, in Michaelmas term, 1782, filed her bill againſt defendants, praying that *John Hardcaſtle* might deliver up to her the poſſeſſion of that part of the eſtate at Great Chilton, deviſed to her, and the title deeds, and account for rents ſince the death of *James Dunn* the ſon; or if the appointment of *James Dunn* the father ſhould be deemed void, then that an account of the value of the eſtate ſo deviſed to her might be taken, and that ſhe might have a ſatisfaction out of the reſt of the real and perſonal eſtates of *James Dunn* the father, which came to *James Dunn* the ſon, by virtue of the will of *James Dunn* the father. The queſtion ſent for the opinion of the Court is, Whether the plaintiff, *Elizabeth Robinſon*, took any, and what eſtate or intereſt under the ſaid indentures of leaſe and releaſe and ſettlement of the 13th and 14th of July, 1713, and the ſaid will of the ſaid *James Dunn* her father, in that part of the eſtate at Great Chilton, compriſed in the ſaid ſettlement, which lies on the eaſt ſide of the poſt road, leading from Ruſhy Ford to Ferry-hill.

This caſe was twice argued. And BULLER, J. upon the firſt argument obſerved: 1ſt. That if a ſubſequent limitation depended upon a prior eſtate, which was void, the ſubſequent one muſt fall together with it. If indeed the ſubſequent limitation was not dependent upon the other, it might then take place notwithſtanding the firſt was bad. Then, as to the legality of the appointment of an eſtate for life to *James Dunn* the ſon, under the power reſerved in the ſettlement; *every execution of a power muſt be coupled with the power itſelf, ſo that thoſe who claim under the execution muſt derive their title from the power.* Now ſuppoſe in the original ſettlement which contains the power, the eſtate had been limited in the ſame manner that it is in the will to *James Dunn* the ſon for life, it would have been void; for there was no ſuch perſon *in eſſe* at the time. Then *can any eſtate or uſe which is limited by the execution, be good, which would have been void, if inſerted in the original power?* In the caſe of the Duke of Marlborough againſt Lord *Godolphin*, in *Canc. Tr.* 33 *Geo.* 2. there was a clauſe inſerted in the will, that certain truſtees and their heirs, on the birth of each ſon of the tenants for life, ſhould revoke the uſes limited in tail male, and limit the premiſes to them for life, with remainder to their ſons in tail male. Lord *Northington* there ſaid, "This is a clauſe ſo new "as not to have acquired a name. It is a wonder that it ſhould

ſhould be a queſtion in a court of equity, which is a juriſdiction of reaſon, Whether, though the Duke of Marlborough could not lock up his property in this manner himſelf, yet might he not deliver up the keys to another, and empower him to do it? that is to ſay, in other words, *non poteſt facere per ſe, ſed poteſt per alium; non per directum, ſed per obliquum.* If theſe innovating modifications are to be allowed, as the law is a ſyſtem of wiſdom, it would allow it by direct limitation; but to ſay this cannot be done by direct limitation, and yet to ſay that the thing may be done by I know not what magic, would make it a ſyſtem of puerility and jargon." AFTER THE SECOND ARGUMENT, BULLER, J. ſaid, that as it had not been unuſual of late years to ſtate the reaſons on which the Court certified to the chancellor, he ſhould deliver his opinion immediately in open court, as he had no doubt upon the queſtion.

It is material to conſider what are the limitations in the ſettlement, and the words of the execution; becauſe it ſeems to me that there is a ground which has not been mentioned in the argument, which would render the execution void. After ſtating the power and the execution, he proceeded; *I take it to be a clear rule of law on the execution of a power,* THAT THE EXECUTION MUST HAVE A REFERENCE TO THE POWER ITSELF: *and that a perſon claiming under the execution, takes under the deed by which the power is created*; and therefore that the uſes limited by the power muſt be ſuch as would have been good, if limited by the original deed. If that rule be law, it puts an end to the caſe. There are many authorities which ſeem to eſtabliſh this rule, though none in which it is expreſsly laid down in terms. A diſtinction has always been made in the court of chancery between articles of marriage, and deeds limiting the eſtate to preſent uſes. Where the whole reſts in convenant, the court of chancery will direct the execution as ſtrictly according to the intention as they can conſiſtently with the rules of law. It is impoſſible that the caſe of *Cuſack* and *Cuſack* (1) could have been determined on any other ground than that which I have ſtated. That was a covenant in marriage articles, that lands ſhould be ſettled on the heirs-male of the marriage in ſuch manner as counſel ſhould adviſe. There could be no doubt but that on ſuch a covenant, the court of chancery would have decreed a ſtrict execution of the power according to the intention: there was no execution of it, but the Houſe of Lords decreed an eſtate-tail to the ſon, becauſe he not being *in eſſe* at the time, he could not have taken an eſtate for life. Next, the caſe of the Duke of Marlborough is decisive.

(1) *Dom. Proc.* 1714. 1 *Bro. P.C.* 470.

There, though the ſame objection did not hold to the truſtees themſelves for their life-eſtates, becauſe they were all in being, yet as the object of the truſt was to correct the eſtates-tail by means of the truſtees, and change them into life-eſtates as ſoon as the objects came in being, the whole was held void. In 2 *Wilſ.* 337, there is an able opinion of *Wilmot* on this point, who ſaid that he had known a caſe where there had been only one child, that that child under ſuch a power as this had been made tenant for life, with a remainder in tail to its iſſue, but he much doubted whether it could be legally done; manifeſtly pointing out, that if a child to whom an eſtate is limited under a power, is not born at the time that the power is created, he can only take an eſtate of inheritance. The caſe of the duke of Devonſhire and Cavendiſh, *Hil.* 22 *Geo.* 3. (1) does not apply, for there, all the children were living when the power was created. And reaſoning on that point, it is neceſſary to conſider how far the court of Chancery go in caſes of marriage-articles. In *Alexander* and *Alexander*, 2 *Vez.* 644, the maſter of the rolls thought that if the power had been executed by the mother on the advancement of the daughter in marriage, it might have been ſupported as an execution in ſtrict ſettlement, which muſt have been on account of the conſideration and the mutual conſent of the mother and daughter; and conſidering it as a gift of the money abſolutely from the mother to the daughter; and the ſettlement of that money by the daughter; but as ſhe had not purſued that line, it could not be good as an appointment by will.

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(1) In this caſe the duke of Devonſhire, under a power to appoint to children, deviſed one moiety to his ſon Lord *Richard* for life, remainder to truſtees to preſerve contingent remainders, remainder to his firſt and other ſons in tail male, remainder to his ſon Lord *George*, for life, remainder to truſtees, &c. remainder to his firſt and other ſons in tail male, remainder to his eldeſt ſon Lord *William* in fee; and as to the other moiety, to his ſon Lord *George*, in the ſame manner, and with the ſame limitations, as were before limited to Lord *Richard*, *mutatis mutandis*. The duke of Devonſhire left four children, Lord *William* the preſent duke, *Dorothy* ducheſs of *Portland*, Lord *Richard*, and Lord *George*. On the death of Lord *Richard*, without iſſue, an ejectment was brought by the duke of Devonſhire and the ducheſs of Portland for Lord *Richard*'s moiety; the Court inclined to think that the appointment might poſſibly be good in its fulleſt extent under the particular circumſtances of that caſe: but they gave no deciſive opinion upon that point, it being a ſufficient anſwer to the claim of the leſſor of the plaintiff, that they were not entitled to recover immediately. Lord *Mansfield* there ſaid, "The next ground, and which is ſufficient to defeat the plaintiff's claim, "is this: even if the ſubſequent limitations in the will to the firſt and "other ſons in tail were void, yet as the appointment to Lord *George* "for life as to one moiety originally, and as to the other moiety after the "death of Lord *Richard*, was good, he is now become entitled for life "to this moiety alſo; and that alone is a ſufficient anſwer in this eject-"ment."

The

The ſecond ground on which the plaintiff's title has been reſted is, that if the immediate limitations in ſtrict ſettlement to the ſon are void, it ſhall accelerate the plaintiff's remainder in fee. But the caſe of *Alexander* and *Alexander* is decidedly againſt it; for the maſter of the rolls there ſaid, that though the children could not take, yet they ſhould prevent the limitation over. When this caſe was directed to be ſent here, the lord chancellor very properly obſerved, that, to ſupport this argument, the teſtator muſt be conſidered as intending that if the firſt uſe was bad, the ſubſequent limitation ſhould take place, though this ſeemed an extraordinary attempt to attribute to him. It would be extraordinary indeed, for then it muſt be ſaid, that though the teſtator has expreſſed an intention in his will to provide for his ſon and his iſſue, the grandchild ſhould be diſinherited: which muſt be the conſequence if the plaintiff's remainder ſhould be accelerated. The caſe of *Adams* and *Adams*, *ante* p. 783, does not apply here; for there the eſtate was limited to daughters in being; and it is material to conſider how that eſtate was divided. It was divided into moieties, one moiety to one daughter for life, remainder to her iſſue; the other moiety to the ſecond daughter, remainder to her iſſue, with croſs remainders. The Court there ſay, that the diſpoſition of the inheritance to the children was void, but that the eſtates for life were good; that is, the eſtates for life to each of the ſiſters in their reſpective moieties, *reddendo ſingula ſingulis*. Here, if the remainder cannot be accelerated, it becomes immaterial whether the appointment under the power be void or not. If void, the ſon took an eſtate-tail under the ſettlement, barred the entail by the recovery, and deviſed to the defendant: if not void, he took an eſtate-tail under the will, in order to give effect to the general intent of the teſtator. The queſtion whether or not the ſon took an eſtate-tail under the will, depends very much on the caſes of *Chapman* and *Brown*, *ante*, vol. III. p. 110, and *Pitt* and *Jackſon*, 2 *Brow. Cha. Cus.* 51. The ground on which the maſter of the rolls ſeems evidently to have gone in this latter caſe are deciſive, although the expreſſion attributed to him in the report is not accurately taken, namely, that the whole appointment to *Mary Smith* by the will was void, and yet that ſhe took an eſtate-tail under it. That determination muſt have been on this principle, that where there is a general and a particular intent, and the particular one cannot take effect, the words ſhall be ſo conſtrued as to give effect to the general intent. The doctrine of *cy pres* goes on that principle. The maſter of the rolls grounded his opinion on the caſe of *Chapman* and *Brown*, where the Court ſaid, that as the will could not operate ſo as to give an eſtate for life to the unborn ſon of *Reginald*, with an eſtate-tail to his iſſue, therefore that unborn ſon ſhould take an eſtate-tail. There is another

objection

objection here which perhaps may render the whole execution of the power void; for *James Dunn* the father has given the eſtate charged with the payment of his debts, which he had no authority to do. But I am clearly of opinion that *James Dunn* the ſon took an eſtate-tail, either under the ſettlement, or under the will.

Robinſon *v.* Hardcaſtle, 2 *Ter. Rep.* 781.

The certificate which was ultimately ſent to the lord chancellor (1) was in the following terms: Having heard counſel on the caſe referred to us, we are of opinion that the plaintiff *Elizabeth Robinſon is not entitled* to any eſtate or intereſt under the indentures of leaſe and releaſe, and ſettlement of the 13th and 14th July, 1713, or the will of *James Dunn* her father, in that part of the eſtate at Great Chilton comprized in the ſettlement, which lies on the eaſt ſide of the poſt road leading from Ruſhy Ford to Ferry-hill.

Zouch, ex dimiſſ. Woolſton, *v.* Woolſton *et al.* Ea. Ter. 1 Geo. 3. B R. 2 *Burr.* 1136, 1 *Black. Rep.* 281.

A power to make a life eſtate to the wife, may be executed at different times. This was a caſe upon a ſpecial verdict in ejectment as follows:—*Chriſtopher Woolſton* being ſeiſed in fee on the 11th of Auguſt 1707, of the lands, &c. in the declaration deſcribed, in the pariſhes of Staverton, Broadhempſton, and Weſtogell, in the county of Devon, and of other lands in Tor-Newton and Tor-Bryan, did, by will of that date, deviſe to his wife *Mary*, *Benjamin Abraham*, and *John Pope*, and their heirs, all his meſſuages, &c. in thoſe pariſhes, to the following uſes. As to the lands in Tor-Bryan, to the uſe of the ſaid truſtees, for 40 years after his deceaſe: and as to the meſſuages, &c. in Staverton, Broadhempſton, and Weſtogell, to the uſe of his eldeſt ſon *James*, for life; remainder to truſtees, to preſerve contingent remainders; remainder to the firſt and every other ſon of *James*, in tail male; and in default of ſuch iſſue, the like limitations to his (the teſtator's) ſon *John*, &c.; remainder to the daughters of *James*, in tail; with like remainders to the daughters of *John*, and the like to the teſtator's own daughters; remainder, as to Weſtogell, to the uſe of his own right heirs; and as to Staverton and Broadhempſton, to his couſin —— *Woolſton* in tail, with remainder to his own right heirs. And as to the lands, meſſuages, &c. in Tor-Newton and Tor-Bryan, ſubject to the term of 40 years, he limited them, firſt to his ſon *John*, and then to his ſon *James*, firſt for life, and then with limitations over (like to the preceding ones); with remainder to his own right heirs: and the truſt of the term was declared to be, to raiſe 1000l. out of the rents and profits of the premiſes in Tor-Bryan, for his daughter *Elizabeth*; payable, one moiety at her marriage, and the reſidue within 3 months after; and, in the mean time, 30l. a year for maintenance;

(1) The certificate given in 2 *Ter. Rep.* 380, was inſerted prematurely.

and

and then the term to ceaſe. THEN COMES THIS PROVISO, *viz.* "PROVIDED ALWAYS, and it is my will, intent, and "meaning, That the ſaid *James Woolſton* and *John Woolſton*, "ſeverally and reſpectively, when they, or either of them, "ſhall have an eſtate in poſſeſſion, to his or their reſpective "proper uſe or uſes, of and in the aforeſaid meſſuages, lands, "tenements, and hereditaments, for his or their life or lives, "by virtue of the ſeveral limitations herein before mentioned, "ſhall have full power, liberty, and authority, FROM TIME "TO TIME, during his or their reſpective life or lives, by "deed OR DEEDS, writing OR WRITINGS, to be by him or "them reſpectively ſubſcribed and ſealed in the preſence of "two or more credible witneſſes, TO ASSIGN, LIMIT, OR "APPOINT, to, or to the uſe of, or in truſt, for any WO-"MAN OR WOMEN THAT SHALL BE HIS OR THEIR RE-"SPECTIVE WIFE OR WIVES, for and during the natural life "and lives of ſuch woman or women, for, or in the name, or "in lieu, of their jointure or jointures, ALL, OR ANY PART "of the ſeveral meſſuages, lands, tenements, and heredita-"ments, to him or them the ſaid *James Woolſton* and *John* "*Woolſton* herein before reſpectively limited as aforeſaid." The teſtator died on the 12th of Auguſt, 1707.—*James* entered into his part, under the deviſe; and *John* alſo, into his part.—*John* died ſeiſed, leaving only one ſon, named alſo *John*; who is the leſſor of the plaintiff.—*James*, being ſo ſeiſed, took to wife the defendant, then *Elizabeth Bogan*; and, previous to the marriage, by indenture dated 31ſt May, 1712, duly executed, between the ſaid *James Woolſton* of the firſt part, *William Bogan* of Gatcomb in the ſaid county, Eſq. and *John Legaſſic*, clerk, of the ſecond part, and the ſaid *Elizabeth Bogan* (ſiſter to the ſaid *William Bogan*) of the third part (reciting the ſaid will as to the deviſe to *James*, and the proviſo), in conſideration of the intended marriage, and in part performance of certain articles of agreement (of the day before) between the ſaid parties, *James Woolſton*, having by virtue of his father's will an eſtate in poſſeſſion to his own proper uſe for his life in the ſeveral meſſuages, &c. ſo deviſed, doth, according to the power to him given, and by virtue thereof, and of all and every other power and powers and authorities which to him doth or may belong, aſſign, limit, and appoint, to the ſaid *William Bogan* and *John Legaſſic*, and the ſurvivor of them and his heirs, all that capital meſſuage, &c. and all other meſſuages, lands, &c. in Staverton, and his meſſuages and all other his lands in Weſtogell, and the reverſion and reverſions, &c.: to hold, as to the lands in Staverton, to the truſtees, to the uſe of *Elizabeth Bogan* for life, for, and in the name, and in lieu, of her jointure (to commence from and after the marriage and the death of *James*); and as to the other premiſes in Weſtogell, to the uſe of the ſaid *Elizabeth Bogan* during the joint-lives of herſelf,

herſelf, and of *Prudence Woolſton*, widow of the teſtator's eldeſt brother, for, and in the name, and in lieu, of her jointure (to commence from and after the marriage and the death of *James*).—In this indenture is contained a proviſo, That if the ſaid *Elizabeth Bogan* do not, within 3 months after requeſt made, at the coſts of ſuch perſon as ſhall then be tenant of the freehold, or be ſeiſed of all or any part of the meſſuages, lands, &c. whereof the ſaid *James Woolſton* ſhall, during the coverture, be ſeiſed of any eſtate of inheritance, releaſe all and every dower and claim of dower, and all her right and intereſt unto the ſeveral meſſuages, lands, &c. (her ſaid jointure excepted), every thing contained in this indenture ſhould be void.—There was alſo in this indenture a covenant from *James Woolſton* with the truſtees, That he has full power thus to appoint the premiſes in Staverton and Weſtogell; and that the ſaid *Elizabeth* and his ſons by her ſhall enjoy according to the intent of this deed and of the will, free from all incumbrances, except an annuity of 50l. per annum, payable out of *Blacker*, to the ſaid *Prudence*: and he covenants to make further aſſurance, within ten years, if required.—Afterwards, during the coverture, *James*, by deed poll dated the 15th of February, 1738 (containing a recital of the abovementioned deviſe to him, and of the ſaid indenture tripartite of 31ſt May, 1712, and of the proviſo therein contained and above mentioned, and that the then intended marriage took effect), for and in conſideration of the great love and affection which he bore to the ſaid *Elizabeth* now his wife, and for a better proviſion and maintenance for her, releaſes to *Norton Nelſon* and *Margaret* his wife, executrix of *William Bogan* the ſurviving truſtee, in the indenture of 31ſt May, 1712, the proviſoes contained in the ſaid indenture and in the articles of agreement therein mentioned.—Afterwards, by indenture, dated 3d October, 1751, reciting to the ſame effect as is recited in the deed poll of 15th February, 1738, and alſo reciting that the ſaid *Prudence Woolſton* (the widow) was dead, and that *James Woolſton* had received the ſum of 600l. and upwards, which had fallen to his wife *Elizabeth* ſince their marriage, ſo that the jointure made for her, by the ſaid indenture tripartite of 31ſt May, 1712, was no way equivalent to the fortune he had received with her, he the ſaid *James Woolſton*, in conſideration of the premiſes, and of love and affection to the ſaid *Elizabeth* his wife, as an increaſe to her jointure (being then in poſſeſſion, &c. *ut ſupra*), aſſigns, limits, and appoints, in purſuance and by virtue of the power given him by the will, and of all other powers and authorities that were in him, all the meſſuages, lands, &c. deviſed to him by his father's will, in the ſeveral pariſhes of Weſtogell, Broadhempſton, and Staverton (ſpecifying them particularly), to truſtees, to the uſe of the ſaid *Elizabeth* and her aſſigns for her life, as an augmentation of her jointure.—The jury

then

then find the value of all the lands deviſed to *James Woolſton* to be 196l. 10s. *per annum*; viz. Staverton 90l. Broadhempſton 60l. Weſtogell 46l. 10s. And that the lands deviſed to *John*, were of the yearly value of 230l.—*James* died on 30th November, 1756, without iſſue male; leaving only one daughter now living; and ten grand-children by another daughter, nine of which are now living.—*Elizabeth* entered into all the premiſes deviſed by the will of *Chriſtopher*, and compriſed in the ſaid indentures; and is ſtill poſſeſſed thereof. —*John*, the ſon of *John*, and leſſor of the plaintiff, is, and has been ever ſince the death of *John* his father, ſeiſed of the reſt. —*Prudence* died before *James*, and before his making the deed dated 3d October, 1751.—THE SINGLE QUESTION was, Whether the additional jointure was warranted by the power, and was a good execution of it; or whether the power was totally exhauſted by the ſettlement in 1712? LORD MANSFIELD, Ch. J. (after argument), This queſtion depends upon two points: 1ſt, What is the original conſtruction of the power? 2dly, Whether the ſettlement of 1712 has barred *James* the huſband from making any further ſettlement upon the ſame wife; (provided it be ſuch as is warranted by the original conſtruction of the power). The firſt point is— Whether it be neceſſary that this power muſt be executed all at once; or whether it may be executed at different times? The proviſo in *Chriſtopher*'s will, which gives this power, gives it at large, without any reſtraint: all is left in the diſcretion of the huſband. It is no bar of dower; becauſe 'tis only "for, or in the name, or in lieu of jointure:" (which does not bar dower). The only limitation to it is, that ſhe can not enjoy it longer than her life. It looks as if the drawer of the clauſe in the will, which gives this power, had it in view, "that it might be done at different times, and re-"peated more than once." For the words are, that the huſband ſhall have power "from time to time, during his "life, by deed or deeds, writing or writings, to limit all or "any part of the eſtate to any woman or women, that ſhall "be his wife or wives, for, and during their life or lives:" and it has no meaning, other than by applying theſe words to each reſpective wife that he might marry, and conſtruing them to impower the huſband to make different ſettlements upon the ſame wife. The anſwer given to this is, "That this "manner of expreſſion is meant to take in the caſe of marry-"ing different wives, one after another. But that might have been done without theſe particular words, and by a more general manner of expreſſion than is here uſed. So that upon the very frame and creation of the power, it is to be executed at different times, if it ſhall be ſo thought proper. The power in the caſe of *Harvey* v. *Harvey*, 2 *Eq. Ca. Abr.* 669, 670, was in different words from theſe, and not ſo ſtrong

as

as theſe: the power there was "to ſettle ſo much of the pre-"miſes as ſhould be the yearly value of 603 l. for a jointure "and proviſion for ſuch wife, during her natural life." That was for a jointure; one ſpecific entire thing: not "upon a wife (1) or wives;" not "from time to time;" nor "by deed or deeds, writing or writings." It was there urged, "that the power was executed." The Lord Chancellor (Lord *Hardwicke*) was clear, that he might execute the power at different times; leſs than the whole, at firſt; and then more. And ſo Lord *Hardwicke* again held, at the re-hearing. This caſe now before us is infinitely ſtronger than that of *Harvey* v. *Harvey:* and it is certain, that in the preſent caſe, the power might have been executed at different times, upon the original conſtruction of it.—Second point—This being ſo, it brings us to the operation of the deed of ſettlement in 1712; and leads us to enquire, in the firſt place, what *James* intended by this deed, which limits the lands in Staverton, and the farm in Weſtogell, to the uſe of the defendant *Elizabeth*. It is urged, that they are given her, "for, and in the name, and in lieu of, her join-"ture;" and that there is a covenant, "that ſhe and his "ſons by her ſhall enjoy." Now if this was a diſpute with the ſon of the marriage, I ſhould, even in that caſe, think that *James* had not exhauſted his power by his firſt deed, ſo as to bar himſelf from adding a further proviſion. For this is not ſaid to be in full of her jointure, or in bar of any further proviſion, or in full ſatisfaction of it, or any ſuch thing: and the covenant relates to *Chriſtopher*'s title and power of deviſing; and is for enjoyment according to the will, and to ſupport the title to the eſtate under the will. So that this covenant does not carry the thing further than if there had been no ſuch covenant in the deed: it is only *expreſſio eorum quæ tacitè inſunt*. He might, notwithſtanding that covenant, have executed the power for the benefit of another wife, if he had married one. And it is not natural to ſuppoſe, that *Elizabeth*'s friends ſhould tie him up againſt her, and not againſt a future wife, who would be a ſtep-mother to her children. The caſe of *Scrope* v. *Offley*, in *dom. proc.* 24 *Mar.* 1735-6, is not like this caſe. That caſe turned upon the words—"to be thereafter made, committed, or done by "them, or either of them;" and there could be no incumbrance but the ſecond jointure. But if there could have been a doubt, if the diſpute had been with the ſon or other iſſue of the marriage; yet this is a diſpute with the remainder-man: and it can not be imagined, that it could be the intention of *James* himſelf, or of any of the parties to this deed, "that

(1) The words were, "that if Edward marries any other wife, that then and ſo often Edward may ſettle, &c."

"he

" he ſhould preclude himſelf from making a further proviſion " for his wife, for the benefit of the remainder-man, who was " no party to the deed, but a mere ſtranger to it, and enjoyed " a good eſtate under the will." The remainder-man could never be in the contemplation of the parties who made this deed. And as to this point—The caſe of *Harvey* v. *Harvey* is very applicable. That was " in full for her jointure, and in full re- " compenſe and ſatisfaction of dower or thirds at common law:" and that power was a power " to ſettle a jointure;" and he had by the deed directed all the reſidue to be paid over to the remainder-man. *But Lord* Hardwicke *obſerved, that though the huſband barred* HER *to claim, yet he did not bar* HIMSELF *to give.* He was, in that caſe, clear, that the former ſettlement was no bar againſt the huſband's making an *additional* proviſion for his wife under the power: and ſo am I, here. There might be many reaſons very ſufficient to induce him to make an additional proviſion for her. For inſtance, alterations might have happened to his family or fortune, ſubſequent to the former ſettlement. Here is a circumſtance recited and not contradicted, though not expreſsly found; an *additional fortune* came to his wife ſince the former ſettlement was made: ſo that it became really his *duty* to make an additional proviſion for her; as he had no iſſue male. And there is nothing in the ſettlement of 1712 to prevent it. There is good ſenſe in what has been ſaid, at the bar, " That executions of powers " ſhould have the *ſame* conſtruction, force, and effect, in " courts of *law*, which they have in courts of equity:" becauſe the ſtatute of uſes transferred that mode of real property, from equity to the common law. Whatever is a good power, or execution in equity, the ſtatute makes good at law. But, in ſome of the early caſes, they reaſoned in courts of *law*, upon theſe equitable powers, from notions applicable to naked authorities, unconnected with any intereſt, or to mere legal powers introduced by other ſtatutes (ſuch as leaſes by eccleſiaſtical perſons, or tenants in tail); inſtead of adopting the liberality of courts of equity, and conſidering theſe powers, brought into the common law by the ſtatute of uſes, merely as a MODE *of ownerſhip or property.* Conſidering them in *this* light, no doubt could ever have been made, " whether a " man might not do *leſs* than his power;" or if he did more, " whether it ſhould not be good to the *extent* of his power." Courts of *equity* reaſoned as they would have done if the ſtatute had not been made; and were forced to aſſume a juriſdiction to correct the too ſtrict and narrow conſtruction put upon powers and the execution of them. And yet, whatever is an *equitable*, OUGHT to be deemed a *legal* execution of a power: for there can be no circumſtances to affect a remainder-man perſonally in conſcience, when a *power* is not duly executed, any more than the iſſue in tail, or the ſucceſſor of an

an eccleſiaſtical perſon if a *leaſe* is not duly made. In the caſe of *Rattle* v. *Popham*, *M.* 8 *Geo.* 2 *B. R.* 2 *Stra.* 992. THIS Court thought themſelves bound by *Whitlock*'s caſe, 8 *Co.* 70, and held the leaſe *not* to be warranted by the power. The widow brought her bill in the court of Chancery: and Lord *Talbot*, arguing from the ſame premiſes (the power and leaſe), without any other circumſtance, held the leaſe to *be* warranted by the power. He ſaid, it was *not a defective*, but a blundering execution: and he decreed the defendant to pay all the coſts, both at law and in equity. But there are no precedents which can ſtand in the way of our determining *this* caſe, as it ought to be determined, liberally, equitably, and according to the true intention of the parties. DENISON, J. declared himſelf of the ſame opinion. Mr. Juſt. WILMOT—Courts of *law* and courts of *equity* ought to *concur* in ſupporting the execution of theſe powers, which are very convenient to be inſerted in marriage ſettlements, and are very uſeful to families: and they ought not to liſten to nice diſtinctions that favour of the ſophiſtry of ſchools; but to be guided by true good ſenſe and manly reaſon. Here THE FIRST POINT is, Whether this power was, in its *original creation*, *intended* to be ſuch as might be executed at different times, and conſequently might be ſo, if the tenant for life thought proper to uſe it in that manner: *Firſt*—The *intention* is clear, that it was originally intended to be executed at *different* times, even upon the ſame woman. Then it is to be inquired, whether it might be ſo executed, within the *rules of law*. The determination in the caſe of *Hele* v. *Bond*, *Precedents in Chancery*, 474, was certainly right. There, the power of revocation was executed over the *whole* eſtate. The power reſerved to *A.* was "to revoke the uſes of the ſettlement, and "declare new ones:" and he did revoke the old uſe, and limit new ones, without annexing any *new* power of revocation to theſe *new* uſes. There, the firſt power of revocation did not ride over the *new* uſes: it was executed over the *whole* eſtate. Here, the queſtion is, Whether this power be ſo *indiviſible*, that it can be only executed *once*? *Digge*'s caſe is in point, "That a perſon who has ſuch a power of revocation, "may revoke *part* at *one* time and *part* at *another*; but not "the ſame part twice, unleſs he reſerve a *new* power of revo-"cation." 1 *Co.* 173. *b.* And this power in the preſent caſe relates *to all and* EVERY PART of the eſtate, by the expreſs terms of the proviſo. It can not therefore be neceſſary to be all done *uno ſtatu*; but may be executed at *different* times: and it is highly reaſonable, that it ſhould be ſo. There may be many cogent reaſons to render it convenient: as children being more or leſs numerous; a wife's additional fortune, or her good behaviour and merit; or many other circumſtances of a family. And what is ſuch a power, but a mode

mode of conveyance putting the tenant for life into the same condition as if he was tenant in *fee*, quoad *hoc?* Therefore it may be executed at different times. THE SECOND QUESTION—Then the only question is, Whether the *deed* in 1712, *prevents* this, and bars *James* from making any further provision for his wife? Now as to the frame of the deed, it must be observed, that the PRACTICE in conveyancing is, *to release* the power and all further claim to it, whenever the power is completely executed, and there is *no intention to go any further* in the exercise of it. And as to the covenant—This covenant means no more than the usual covenant for enjoyment *according to the limitations in the will*; "that his wife "and her issue shall enjoy it, *subject* to the power given by "his father's will." Therefore, even *if* there had been issue male, and this a litigation with that male issue of the marriage, I should still have been of this opinion that I have now declared: but, as there is *no* issue male, it would be absurd to make the husband stipulate that he should not provide for his daughter or daughters and their children. And the proviso, "that the wife should release her claim to dower," does not stand in the way; nor the release of that proviso: for though the husband might mean to bind *her* from CLAIMING any more, yet he did not mean to bind *himself* from GIVING her more, if he should think fit. *Per Curiam.*—Judgment for the defendant.

Doe on the demise of Mary Rebecca Milborne *v.* Christopher Milborne, Mic. Ter. 29 Geo. 3. B. R. 2 *Ter. Rep.* 721.

A power given to *an executrix* to raise a portion for a younger child does not extend to real estates, of which she was also trustee. And a power to raise portions may be executed at several times, provided the first execution be not meant as a complete execution, and that the party, in the whole execution, do not transgress the limits of the power.—This was an ejectment on two several demises by the lessor of the plaintiff, the first laid on the 1st October, 1781, and the second on the 4th April, 1788, to recover several premises at Frith, in the county of Huntingdon. At the trial a verdict was found for the plaintiff, subject to the opinion of this Court on the following case: *Clayton Milborne*, being seised in fee of the premises in question, by will duly executed, dated 11th May, 1723, devised to his wife *Rebecca* all his lands and tenements whatsoever in the counties of Huntingdon and Cambridge for life, remainder to the use of his eldest son *Clayton Milborne* in tail male, remainder to his youngest son *Christopher Milborne* in tail male, with remainder in fee to *Rebecca* his wife: and devised all his other real estate whatsoever to his wife; and her heirs, to the use of his eldest son *Clayton Milborne* in tail male, with remainder to his second son *Christopher Milborne* in tail male, remainder to his own heirs. The testator also gave to his wife 1500l. in trust to pay the same to his youngest son at his age of 21, with interest, and in the

mean time for his maintenance. And gave to his ſaid wife another ſum of 500l. in truſt, to apply the ſame for the benefit of his ſaid children, or either of them, as ſhe ſhould think fit; and appointed his wife guardian of his children, and his ſole executrix. On the 31ſt of Auguſt, 1726, the teſtator *Milborne* made a codicil to his will, alſo duly executed, to paſs real eſtates, in the following words: "Having about four or "five years ſince made my will, which by my codicil *I do* "*confirm in every part*, and having made my dear wife exe- "cutrix and reſiduary legatee, and ſince the making that will "having a daughter born, *I leave it in my executrix's power* "*to give my daughter what proportion ſhe ſhall think fit*, leav- "ing my dear wife *Rebecca Milborne* executrix to this codi- "cil, as well as to my ſaid will before mentioned." The leſſor of the plaintiff was the daughter of the teſtator, born between the time of making the will and codicil. The teſtator died in September, 1726, leaving *Clayton Milborne*, his eldeſt ſon and heir at law, and the defendant *Chriſtopher Milborne*, and *Mary Rebecca Milborne*, ſpinſter, the leſſor of the plaintiff, his only younger children. And after his death, *Rebecca Milborne*, his widow, duly proved the will and codicil. At the death of the teſtator, his perſonal eſtate was not ſufficient to pay his debts and legacies. The teſtator's eldeſt ſon, *Clayton Milborne*, died on the 3d June, 1743, inteſtate, and without iſſue. *Chriſtopher Milborne*, the defendant, attained his age of 21 years in July, 1736, and received from his mother for the principal and intereſt due on his legacy 2251l. 16s. 9d. by different payments at different times. The caſe then ſtated, that in 1749, the premiſes in queſtion, together with others, were mortgaged by the defendant and his mother for 500 years, ſubject to the life eſtate of the widow, for ſecuring a ſum of money, which has ſince been paid, and the deed delivered up to the defendant without any aſſignment of the term. By indentures, dated 31ſt July, 1750, to which the widow, the defendant, and the leſſor of the plaintiff, were parties, in conſideration of natural love, and in order *to make a proviſion for the leſſor of the plaintiff purſuant to the intention of her father*, it was covenanted that a fine ſhould be levied for the purpoſe of conveying to truſtees certain premiſes in the county of Cambridge, deviſed by the will of *Clayton Milborne*, for 500 years, upon truſt, to raiſe and pay 1000l. to the leſſor of the plaintiff, on her marriage or at the death of her mother; which fine was accordingly levied. By leaſe and releaſe of the 3d and 4th October, 1769, between the widow and the leſſor of the plaintiff, reciting the will and codicil, and the deed of 1750, and alſo reciting that the leſſor of the plaintiff was ſtill unmarried and wholly unprovided for, and that the widow was deſirous of making a preſent proviſion for her out of her eſtate for life; and alſo reciting

citing that the contingent intereſt to which ſhe was entitled on her marriage, or her mother's death, was not adequate to her father's intention, or in proportion to her brother's fortune, *the widow, in further performance of the power ſo given to her by the codicil*, conveyed to the leſſor of the plaintiff certain premiſes comprized in the deed and fine of 1750, for the mother's life, and certain other premiſes in Huntingdonſhire, not comprized in that deed and fine to her in fee. By a decree in Chancery, made 27th June, 1783, in a cauſe in which the leſſor of the plaintiff was the plaintiff, and the defendant and another executors of the truſtees in the deed of 1750 were defendants, it was ordered that the ſum of 1000l. and intereſt, ſecured to the leſſor of the plaintiff by the deed of 1750, ſhould be raiſed and paid. The premiſes in Huntingdonſhire, mentioned in the deed of 1769, are not compriſed in the deed of 1750, and are of the annual value of 20l. and for which this ejectment is brought. The eſtates in the counties of Cambridge and Huntingdon, deviſed by the will of *Clayton Milborne*, are of the clear annual value of 300l. For four or five years preceding the death of the widow, the receiver of the whole eſtate in Huntingdonſhire paid the leſſor of the plaintiff the net rent of the premiſes in queſtion by him received, by order of the widow, and took receipts in the widow's name. The widow continued in the poſſeſſion of the eſtates from the time of her huſband's death until her deceaſe, which happened on the 12th of January, 1781; and on her death the defendant entered on the eſtate in queſtion. PER CURIAM: A power may be executed at different times, if not fully executed at firſt, provided that the party, in the whole execution, do not tranſgreſs the limits of the power; as in *Zouch* and *Woolſton*. BUT THE PRINCIPAL QUESTION here is, WHETHER or not this power extend at all to the real eſtate? The real eſtate is divided into two branches, one part is deviſed to his wife for life, with remainder to his ſons in ſucceſſion, remainder to her in fee; the other to the wife in truſt for his eldeſt ſon in tail, with a remainder over to the youngeſt ſon in tail. It is to be remembered alſo, that the latter deviſe to the eldeſt ſon is a deviſe of *all other his real eſtate*; and the perſonal eſtate, diſpoſed of by the will, is not given to the wife beneficially, but a part of it is given to her in truſt for the youngeſt ſon if he ſhould attain the age of 21 years; and another part in truſt for either of the children. Then the teſtator made a codicil, by which he confirmed his will in every part, and after reciting that he had made his wife executrix, and that he had a daughter born after the making of his will, he added, "I leave it in my exe-"cutrix's power to give my daughter what proportion ſhe ſhall "think fit." Then what is it over which the executrix, *quâ executrix*, has power? It cannot apply to *realty*. He orders

the executrix to diſpoſe of that which came to her *as executrix*. Therefore, it is extremely clear, that the power was a power within the limits of her authority as executrix; and that can only apply to *perſonal eſtate*. It has been ingeniouſly argued, that the codicil was intended to extend to the real eſtates, becauſe it was atteſted by three witneſſes: but as the codicil was intended to confirm the will in every part, and as there might have been ſome alteration in his eſtates, or ſome other eſtate might have been purchaſed between the times of making the will and the codicil, it might have been atteſted by three witneſſes, for the purpoſe of taking in ſuch eſtates. As, therefore, the wife had no power, as executrix, over the real eſtate, the conſequence is, that there muſt be judgment for the defendant.—Poſtea to the defendant.

The Earl of Darlington *v.* Pulteney, Ea. Ter. 15 Geo. 3. B.R. Cowp. 260.

A common law power, to *appoint* by *deed*, executed in the preſence of two witneſſes, is ill executed by a will; but it is otherwiſe, if the power be to appoint by *any writing* or *inſtrument*, or other *general term*.—This was a caſe out of chancery, for the opinion of this Court; and the material facts ſtated, were as follows: Sir *William Pulteney*, by his laſt will, bearing date the 30th of April, 1685, deviſed certain houſes and tenements, in the county of Middleſex, to his wife, for life. Remainder to his ſon *William Pulteney*, for life. Remainder to his grandſon *William Pulteney*, ſon of his ſaid ſon *William*, afterwards Earl of *Bath*, for life. Remainder to truſtees, to ſupport contingent remainders. Remainder to the firſt and other ſons of his ſaid grandſon *William*, ſucceſſively in tail male. Remainder to the ſecond and other ſons of the ſaid teſtator's ſaid ſon *William*, ſucceſſively in tail male. Remainder to the ſaid teſtator's ſon *John*, for life. Remainder to the ſaid teſtator's grandſon *Daniel*, for life. Remainder to truſtees, to ſupport contingent remainders. Remainder to the firſt and other ſons of the ſaid *Daniel*, ſucceſſively in tail male; with remainder to the ſaid teſtator's grandſon *Henry*, for life; with remainder to truſtees, during his life, to ſupport contingent remainders; with ſeveral remainders over. Remainder to the ſaid teſtator, and the heirs of his body. Remainder to the teſtator's ſaid ſons *William*, *John*, *Charles*, and *Thomas*, ſucceſſively in tail general. Remainder to *Henry Guy*, eſq. and his heirs for ever. Afterwards the ſaid *William* the grandſon, then Earl of *Bath*, being then tenant for life in poſſeſſion, of the ſaid houſes and tenements under his ſaid grandfather's will, and being alſo entitled under the will of the ſaid *Henry Guy*, to the ultimate remainder in fee, expectant on the ſaid ſeveral particular eſtates limited by the will of his ſaid grandfather: and *William Pulteney*, eſq. commonly called Lord *Pulteney*, the only ſon of the ſaid Earl of *Bath*, being then of age, and being, under the ſaid will of Sir *William Pulteney*, tenant in tail in remainder, of the ſaid houſes and tenements, immediately

ately expectant on the deceaſe of his ſaid father; the ſaid Earl of *Bath*, and Lord *Pulteney*, by indenture of bargain and ſale, bearing date the 2d of January, 1753, conveyed the ſame to *Thomas Newton*, to make him tenant to the *præcipe*, for the purpoſe of ſuffering two recoveries of the ſaid premiſes; the uſes of which, it was declared, ſhould be, after limiting the ſame to the Earl of *Bath*, for life, and ſubject to a jointure of 1500l. a year to Lady *Bath*, "to the uſe of ſuch perſon or "perſons, and for ſuch eſtate or eſtates, and in ſuch manner "and upon ſuch truſts, and ſubject to ſuch proviſoes, powers, "and agreements, and for ſuch intents and purpoſes, as the "ſaid *William* Earl of *Bath*, and *William* Lord Viſcount "*Pulteney*, by any their deed or deeds (either with or without "power of revocation), to be by both of them ſealed and de-"livered, in the preſence of two or more credible witneſſes, "ſhould, from time to time, jointly grant, direct, limit, or ap-"point. And in caſe of the death of either of them, the ſaid "*William* Earl of *Bath*, and *William* Lord Viſcount *Pulteney*, "then as the ſurvivor of them, by any deed or deeds, to be "executed as aforeſaid, ſhould, from time to time, alone grant, "direct, limit, or appoint; and in default of ſuch appointment, "to the uſes they before ſtood limited to, by Sir *William Pul-"teney*'s will." In Hilary term, 1753, the two common recoveries were duly ſuffered. On the 12th of February, 1763, Lord *Pulteney* died, without having executed or joined with his father in the execution of any deed of appointment of any of the ſaid hereditaments, and without iſſue. On the 21ſt of May, 1763, the Earl of *Bath* made his will, and thereby gave all his real eſtate whatſoever, and whereſoever, other than and except the piece or parcel of ground, meſſuage, or tenemenr, with the erections and buildings therein-after mentioned to be in the poſſeſſion of the Earl of *Egremont*, to his brother General *Pulteney*, in fee; and limited the ſaid piece or parcel of ground to his ſaid brother, for life, in ſtrict ſettlement. This piece of ground was part of the eſtate late of Sir *William Pulteney*, and paſſed under the limitations in his will, to the Earl of *Bath*, and is compriſed in the indenture of the 2d of January, 1753; and the recovery ſuffered in Middleſex, in purſuance thereof. The Earl of *Bath* died on the 7th of July, 1764, without leaving iſſue. General *Harry Pulteney*, who was ſecond ſon of *William Pulteney*, the ſon of Sir *William Pulteney*, ſurvived his brother the Earl of *Bath*, and upon his death, became heir of the body of Sir *William Pulteney*; and upon the death of the Earl of *Bath*, came into poſſeſſion of the eſtates late of the ſaid Sir *William Pulteney*. General *Pulteney*, by his will, dated the 4th of Auguſt, 1767, deviſed all his meſſuages, grounds, lands, tenements, hereditaments, and real eſtate, in the county of Middleſex, and alſo all and every his manors, meſſuages, lands, tenements, and hereditaments,

ments, and real eſtate in the county of Somerſet, or any county adjacent to the ſaid county of Somerſet, and in the counties of Montgomery, Salop, and York, to truſtees therein named, for 500 years. Remainder to the uſe of *Frances Pulteney*, for life. Remainder to the firſt and other ſons of the body of the ſaid *Frances Pulteney*, ſucceſſively in tail male, with ſeveral remainders over, and died on the 26th of October, 1767, without iſſue; and upon his deceaſe, the defendant, Mrs. *Frances Pulteney*, grand-daughter of *John*, the ſecond ſon of Sir *William Pulteney*, became heir of the body of the ſaid Sir *William Pulteney*; and as ſuch, became entitled to an eſtate-tail in ſuch of the ſaid hereditaments as were deviſed by the will of Sir *William Pulteney*, by virtue of the limitations in that will to Sir *William Pulteney*, and the heirs of his body, if that limitation was then in force. All the preceding limitations under that will being ſpent and determined, upon the deceaſe of General *Pulteney*, without iſſue.—THE QUESTION ſtated for the opinion of the Court was, Whether ſo much of the eſtate comprized in the indenture, dated the 2d of January, 1753, as was taken by the will of Sir *William Pulteney*, deceaſed, paſſed by the will of *William*, Earl of *Bath*, deceaſed? And this depended upon THE QUESTION, Whether the will of the Earl of *Bath* was a good appointment, under the power contained in the indenture of the 2d of January, 1753; or, in other words, whether it was for this purpoſe a *deed?* Lord *Mansfield:* Under the will of Sir *William Pulteney*, the Earl of Bath, before he made his will, ſubject to his own chance of having iſſue male, and to the chance of his brother and ſeveral other perſons having iſſue male, had, as heir of the body of the teſtator, an eſtate-tail in the premiſes in queſtion; which, if not docked by a common recovery, would have come to General *Pulteney*, his brother. He could, therefore, by virtue of the will of Sir *William Pulteney*, deviſe nothing by his own will but his reverſion in fee; which, after an eſtate-tail in an adverſe claimant, was of no great value. To enable him to deviſe, it was neceſſary that he ſhould reſort to a common recovery, which, however, could not be ſuffered, without the aſſiſtance of his ſon. His ſon joined in it; and by this recovery, and alſo by the deed to make a tenant to the præcipe, it is provided, "that "ſubject to the Earl of *Bath*'s eſtate for life, and a jointure "of 1500l. a year to Lady *Bath*, the eſtate ſhould be limited "to ſuch perſon or perſons, and upon ſuch truſts as the Earl "of *Bath* and Lord *Pulteney*, by any their deed or deeds, either "with or without power of revocation, to be executed under "their hands and ſeals, and ſigned in the preſence of two witneſſes, ſhould from time to time grant, direct, limit, and "appoint; and in caſe of the death of either of them, then "that the ſurvivor of them, by any deed or deeds executed as "aforeſaid, ſhould alone grant, direct, limit, and appoint, and

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" in default of ſuch direction, and in the mean time, to all the " uſes of Sir *William Pulteney*'s will."—After this, the Earl of *Bath* makes his will, and by it he gives every thing to General *Pulteney*, *abſolutely*, except the ſpot of ground upon which the Earl of *Egremont*'s houſe was built, which he gives in ſtrict ſettlement. Now theſe premiſes are a part of the eſtate deviſed by the will of Sir *William Pulteney*, and one uſe made of it at the bar is, that Lord *Bath* meant to ſettle theſe premiſes in the particular manner ſtated: and therefore, meaning ſo to do, as againſt General *Pulteney*, there is a ſtanding condition, namely, that if he will take any part he muſt not diſturb the other deviſees. But that is not the queſtion ſent to us; and as to the intention of Lord *Bath*, there is no ſtrong intention one way or the other. The queſtion before us is, Whether, by the general words of the will, this power ſo created, is well executed? Be the value of the eſtate what it may, it does not alter the difficulty of the queſtion: whether it be worth 10l. or 10,000l. it is the ſame thing. If the Court has no doubt on a queſtion, it is due to the parties that we ſhould deliver our opinion, without allowing them to litigate the matter further, in a ſecond or third argument. I have no particle of doubt on this queſtion. It is very difficult to maintain, on any principle of law, reaſon, or convenience, a diſtinction between *equitable* and *legal* executions of powers; which were originally, and in their nature, equitable, but are by the ſtatute of uſes transferred to common law. Mr. *Kenyon* has ſaid very truly, that at common law powers were unknown. They were modifications of truſts, and directions to the truſtee, which bound his conſcience, and which he was compellable in a court of equity to execute. The ſtatute of uſes transferred entirely all that was equitable into a legal modification; and the courts of law were then bound to aſk what was the equity; becauſe the ſtatute ſaid, that the law ſhould follow the equity. It has likewiſe been very truly ſaid, that there were few caſes upon the execution of powers, before ſtat. 27 *H.* 8. c. 10. and none have come down to our time by way of precedents. Powers, therefore, being a new thing, and the courts of law having no equitable precedents in point to guide them, compared them at firſt to conditions which they are not at all like; and conſequently held, that they ſhould be conſtrued ſtrictly. They looked upon them in the light of powers veſted in a third perſon, over the eſtate of another man; whereas, in fact, they are only a different ſpecies of ownerſhip and enjoyment of property. But a long ſeries of precedents has now ſettled, in the court of chancery, that in the conſtruction of powers, wherever the power is executed for a *meritorious* conſideration, namely, as a proviſion for a wife or child, or for the benefit of creditors or purchaſors, there the preciſe form preſcribed for its execution need not be ſtrictly purſued;

ſued: and if it is now ſettled, it is ſettled on principles that exiſted before. That being the caſe, courts of law ought to follow equity; becauſe there ſhould be a general rule of property: and if the courts of equity ſay, we will preſume that where the execution is for a meritorious conſideration, a ſtrict adherence to the preciſe form was not intended, and therefore it is not neceſſary; the moment the ſame rule is fixed and adopted at law, every man who creates, and every man who is to exerciſe a power, underſtands what he is to do. In the conſtruction of powers, *originally* in their nature *legal*, courts of equity muſt follow the law; be the conſideration ever ſo meritorious: for inſtance, powers by a tenant in tail, to make leaſes under the ſtatute, if not executed in the requiſite form, no conſideration ever ſo meritorious will avail. So with reſpect to powers under the civil-liſt act, powers under particular family entails, as the caſe of the Duke of *Bolton*, &c.; equity can no more relieve from defects in them, than it can from defects in a common recovery. The principle upon which the rule of conſtruction in theſe caſes is founded, is, that there is nothing to affect the conſcience of the remainder man. Therefore, it is difficult, upon principles, to maintain any diſtinction between equitable and legal execution of powers. In the caſe of the Earl of *Bath*, *abroad*, where it was required that the power ſhould be executed by ſix witneſſes, three of which were to be peers of the realm, there being no peers there, if he had got ſix other people to ſign and ſeal, and conform to the requiſites of the power, it might have been good on account of the impoſſibility of executing it in any other way; but there is no impoſſibility in the preſent caſe. We come then to the conſtruction of the preſent power, and to ſay, whether the will of Lord *Bath* is a good execution of it. As to that queſtion, in conſtruing powers, there have, as I ſaid before, been ſome pretty narrow caſes; but, I think, as being a ſpecies of property, they ſhould be conſtrued liberally. *Kibbett* v. *Lee*, in *Hob.* 312. is a very proper deciſion. As to the caſe of *Dormer* v. *Thurland*, 2 *P. Williams*, 506. it goes a great way. There, a power was given by will, or any writing in nature of a will, ſealed and atteſted by three or more witneſſes, to *baron and feme*, to charge the premiſes with 2000l. upon the death of either firſt: the huſband died firſt, and by will under his hand, atteſted by three witneſſes, but *not ſealed*, charged the premiſes with 2000l. It was there ſtrongly contended, that the will was a ſufficient execution of the power, being made according to the ſtatute of frauds. Lord *King* was of opinion, that it was a good execution of the power, becauſe by will; and, I own, I ſhould incline to that opinion. But it was determined by the judges of B. R. that it was not. There are two caſes, however, that were lately decided in the Houſe of Lords, which have been conſtrued more liberally.

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The firſt is a caſe of the Earl of *Roſſcommon* againſt *Fowkes*, on the 3d of April, 1745, on an appeal from Ireland. *Fowkes* and his wife made a ſettlement of the wife's eſtate, with a power to the wife on contingencies which happened, in theſe words, "by any *writing* under her hand and ſeal, atteſted by "two credible witneſſes, notwithſtanding her coverture, and "as if ſhe was ſole and unmarried; and by the ſame, or any "other deed, notwithſtanding her coverture, to grant, limit, "and appoint, &c." She, by will duly executed, without reference to her power, deviſed her lands within that power; and the queſtion was, "Whether the power was well executed by the will?" The court of common pleas in Ireland, certified to the court of chancery that it was; and ſo the Houſe of Lords here adjudged it according to the opinion of the judges who attended. Now, there were only two witneſſes; it was to be "by the ſame," or, "any other deed." It was contended, theſe words did not apply to a will; but they laid hold of the words, "any *writing*." There was another caſe from Ireland, laſt year, in the Houſe of Lords, which was determined according to the opinion of the judges who attended(1). It was a power to let leaſes for any term not exceeding thirty-one years, or three lives, to *commence in poſſeſſion*. The execution of the power was a grant of a leaſe for thirty-one years, or three lives, *whichever ſhould laſt longeſt*. This, it was contended, was in manifeſt oppoſition to the power: becauſe, inſtead of being a leaſe for one or other of the terms *expreſsly* as the power directed, it was a leaſe for one or other, as chance ſhould direct. But, according to the opinion of the judges preſent, it was a good execution of the power for thirty-one years; and they rejected the words, "three lives" The doctrine of theſe authorities applies only to caſes, where there are words to lay hold of. But the difficulty, in the preſent caſe is, that there are no words to lay hold of. The firſt requiſite which the power preſcribes is impoſſible to be performed by will; which is, that it ſhall be by *joint deed* of Lord *Bath* and his ſon. Now, there cannot be a *joint will*. It is true, the ſurvivor has the ſame power. But then it is emphatically reſerved to be executed by "*d ed*:" Now the word deed, in the underſtanding of law, has a technical ſignification, to which a will is in no reſpect applicable. If any words had been thrown in, ſuch as writing, inſtrument, or other term of a general comprehenſive meaning, it might have been fair to have taken advantage of it in favour of the intention. But here are no ſuch general words, nor any meritorious conſideration. If there were, it might have fallen within the reaſoning of *Tollett* v. *Tollett*, 2 *P. Williams*, 489, and all the other caſes, which ſay, that in the execution of powers for a meri-

(1) *Commons*, leſſee of Lord *Netterville*, and Sir *Charles Burton*, v. *Marſhall*.

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torious consideration, it is not necessary strictly to adhere to the precise form. But those very cases shew, that where there is no meritorious consideration, the intention of the person who creates the power cannot properly be fulfilled, unless the form is strictly pursued. Therefore, in this case, there does not seem to me a possibility of saying, that a will is a deed within the terms of this power; and whatever the consequence may be, as we are very clear in our opinion, the justice of the case requires that we should deliver that opinion now, and certify accordingly.—The certificate was in these words: "Having considered the above case, and heard counsel on both "sides, we are of opinion, that the *power* given by the "declaration of the uses of the recovery abovementioned, "was not duly executed by the will of the late Earl of "*Bath*: and, consequently, that only the reversion in fee of "the premises comprized in the said recovery, passed by his "said will."

Goodtitle, on the demise of Russel, clerk, and two others, v. Weal, widow, and others, Hil. Ter. 3 Geo. 3. C.B. 7 *Wils.* 369.

A power under a marriage settlement, to appoint to the children of the marriage, is strictly confined to those children.—*Thomas Philpot*, the elder, great grandfather of the lessors of the plaintiff, being seised in fee of the premises in question, by indenture of the 2d of February, 1666, made between himself of the one part, and *J. C.* and *W. M.* of the other part, in consideration of a marriage between his son and heir, *Thomas Philpot*, the younger, and *Jane Chin*, covenanted *to stand seised to the use of himself*, Thomas Philpot *the elder*, *for fourteen years*, *for raising portions for the daughters of the marriage*, *remainder to the use of* Thomas Philpot, the elder, for life; *remainder to* THE USE OF THOMAS PHILPOT, THE YOUNGER, AND OF SUCH CHILD OR CHILDREN OF HIS BODY UPON THE BODY OF THE SAID JANE TO BE BEGOTTEN, in such manner and form, and for such estate and estates, in *fee or in tail*, upon such provisoes or conditions, and paying such legacies or proportions to the other children of the said *Thomas Philpot*, the younger, AS HE SHOULD, BY HIS LAST WILL AND TESTAMENT IN WRITING, OR BY ANY OTHER WRITING UNDER HIS HAND AND SEAL, IN THE PRESENCE OF TWO OR MORE CREDIBLE WITNESSES, NOMINATE, APPOINT, LIMIT, EXPRESS, AND DECLARE; *and for want of such nomination*, *appointment*, *limitation*, *or declaration*, *to the use of the heirs of the body of the said* Thomas Philpot, *the younger*, *on the body of the said* Jane, *to be begotten*; *and for want of such child or children*, *or issue*, *to the use of the heirs of the body of the said* Thomas Philpot, *the younger*, *lawfully to be begotten*, *remainder to the right heirs of the said* Thomas Philpot, *the elder*, *his heirs and assigns for ever*.—*Thomas Philpot*, the younger, the grandfather of the lessors of plaintiff, had issue by *Jane Chin*, *Richard*, *Thomas*, *John*, and *Mary*; and by his will of the 22d of June, 1688, reciting his

power

power under the ſaid ſettlement, deviſed the premiſes in Trebandy and Marſton-Court, and did thereby limit and appoint that the ſame ſhould remain and come to his ſon and heir, *Richard Philpot*, and the heirs of his body begotten for ever; and for want of ſuch iſſue, to the right heirs of the teſtator, *Thomas Philpot*, the younger; *Thomas Philpot*, the elder, died in 1682, whereupon *Thomas Philpot*, the younger, entered, and afterwards died ſeiſed in 1695; upon whoſe death, *Richard* his ſon, entered, and afterwards died ſeiſed in 1708, without iſſue. *Thomas*, the ſecond ſon of *Thomas* the grandfather of the leſſors of the plaintiff, died young without iſſue; *John*, the third ſon, upon the death of his brother *Richard*, entered in 1708, and by his will of the 28th of January, 1744, deviſed the premiſes in queſtion to *Hugh Ruſſel* his nephew, who was the eldeſt ſon of *Hugh Ruſſel*, who married *Mary* the ſiſter of the teſtator *John Philpot*; and afterwards the ſame teſtator, *John Philpot*, died without iſſue in 1748. *Mary*, the ſiſter of *John Philpot*, and daughter of *Thomas Philpot*, the grandfather of the leſſors of the plaintiff, had iſſue by *Hugh Ruſſel*, the ſaid *Hugh* the deviſee of *John*, and *Richard*, *Thomas*, and *William Ruſſel*, the leſſors of the plaintiff, and a daughter *Mary* now living, and *John Ruſſel*, who died in the life-time of his brother *Hugh*; the eldeſt brother *Hugh*, on the death of his uncle *John Philpot*, in 1748, entered, and by his will deviſed the premiſes in queſtion to his nephew *Thomas Ruſſel*, eldeſt ſon of his late brother *John*, whoſe tenants the defendants are; and afterwards the ſaid teſtator *Hugh Ruſſel*, died, 1765, without iſſue.

The queſtion was, Whether the contingent remainder to the uſe of the heirs of the body of the ſaid *Thomas Philpot* the younger, upon the body of *Jane Chin*, his intended wife begotten, created by the deed of ſettlement of the 2d of February, 1766, hath been in any manner deſtroyed or barred?

Curia: This is a covenant to ſtand ſeiſed to uſes, and therefore we can give it the moſt liberal conſtruction, according to the intent and meaning of the covenantor, which plainly was, that his ſon ſhould have power to limit the premiſes to his children of the marriage, in fee or tail, as he ſhould think fit. The firſt queſtion, therefore, is, Whether *Thomas Philpot* the younger has, in fact, made an appointment to any of his children of the marriage in fee? If he has, the whole fee is gone, and the ſettlement could never take place. 2dly, Suppoſe his appointment is not an appointment of a fee, then the queſtion is, Whether an eſtate-tail appointed, is a complete appointment within the power?

1ſt, The children of the marriage are the ſole objects of the ſettlement; and we are all of opinion, that *Thomas Philpot* the younger, has not appointed the fee to any of his children, for he has deviſed the premiſes to his ſon *Richard*, in tail general,

neral, with remainder *in fee to his own right heirs*, and his own right heirs might not have been any of his children of the marriage, ſo that this is not an appointment within the power, which is wholly confined to the children of the marriage.

2dly, We are of opinion that the appointment of an eſtate-tail to *Richard* is not ſufficient to defeat the ſettlement, the intent whereof is plain and clear; the old man the covenantor meant that the father ſhould have power over the whole eſtate, and to diſpoſe of it among his own children as he thought fit, to keep them dutiful to their parents; as if he had ſaid, "if "you think fit to diſpoſe of the *whole* eſtate, do it in ſuch "manner as you pleaſe, but you ſhall diſpoſe of the *whole* "among the children of the marriage; if you do not, the ſet-"tlement and the remainders therein ſhall take place;" this is the true meaning of the deed of ſettlement, and we do not confine ourſelves to the mere words of it. We are clear of opinion that the contingent remainder to the heirs of the body of *Thomas Philpot* the younger, upon the body of *Jane* to be begotten, has not in any manner been barred, defeated, or deſtroyed; and the *poſtea* muſt be delivered to the plaintiff.

Swift on the demiſe of Huntley and wife v. Gregſon, Mic. Ter. 27 Geo. 3. B. R. 3 *Ter. Rep.* 432.

Under a power of appointing a real eſtates "to the uſe of "ſuch child *and* children, &c." (and where in default of appointment, the eſtate was ſettled "to the uſe of all and every the child and children"), an excluſive appointment to one is good. On the trial of an ejectment for an undivided moiety of an eſtate in Durham. A verdict was found for the leſſors of the plaintiff, ſubject to the opinion of the court of King's-bench on the following caſe. "By virtue of a deed of ſettlement, bearing date the 25th of April, 11 *Geo.* 2. and by a fine in the ſaid deed of ſettlement covenanted to be levied, and afterwards duly levied accordingly, *Giles Rain*, of Eaſt Morton, in the county of Durham, gentleman, and *Mary* his wife, in conſideration of a marriage intended to be ſolemnized between *John Gregſon* the younger, of Eaſt Burdon in the ſaid county, and *Eleanor Rain* (daughter of *Giles Rain*) the nephew of the ſaid *Giles Rain*, granted and conveyed to *John Johnſon* and *Thomas Todd*, and to their heirs and aſſigns, all the aforeſaid premiſes in the ſaid declaration in ejectment mentioned to and upon the ſeveral uſes therein mentioned concerning the ſame, (which ſaid uſes are all reſpectively determined); and afterwards, and after the death of the ſaid *John Gregſon* the younger "To and for the uſe and behoof of *ſuch* "*child and children* of the ſaid *John Gregſon* the younger, on "the body of the ſaid *Eleanor Rain* his intended wife, begot-"ten, or to be begotten, and for ſuch eſtate and eſtates, in-"tents and purpoſes, as the ſaid *John Gregſon* the younger, "ſhould at any time, by any deed in writing, or by his laſt "will and teſtament in writing, or any other writing purport-"ing to be his laſt will and teſtament, under his hand and "ſeal,

" ſeal, to be executed in the preſence of two or more credible " witneſſes, limit, direct, or appoint; and for want of ſuch " limitation, direction, or appointment, or as and when the " truſt and truſts, eſtate or eſtates, ſo to be appointed " ſhould reſpectively end or determine, then to the uſe and " behoof of *all and every the child and children* of the ſaid " *John Gregſon* the younger on the body of the ſaid *Eleanor* " *Rain* lawfully begotten, or to be begotten, and the heirs " and aſſigns of ſuch *child* and *children* equally ſhare and " ſhare alike, and to take the ſame as tenants in common, " and not as joint tenants; and for default of ſuch iſſue then " to the uſe and behoof of the ſaid *John Gregſon* the younger, " his heirs and aſſigns for ever." — *John Gregſon* the younger, by a deed dated Feb. 2d, 1786, duly executed, reciting the deed of ſettlement, and that the ſaid marriage was ſolemnized between the ſaid *John Gregſon* and *Eleanor Rain*, and that the ſaid *Eleanor* died, leaving by the ſaid *John Gregſon* two children, *to wit*, *Rain Gregſon*, and the ſaid *Mary Huntley*, limited, directed, and appointed, that the premiſes compriſed in the ſaid ſettlement of the 25th of April, 1738, ſhould, from and after the deceaſe of him the ſaid *John Gregſon*, go, remain, and be, and that the ſaid ſettlement and the fine thereupon levied ſhould be and enure *to the uſe of the ſaid* Rain Gregſon, *and the heirs of his body lawfully begotten, or to be begotten; and in default of ſuch iſſue to the uſe of the ſaid* Mary Huntley, *her heirs and aſſigns for ever.* That the ſaid *John Gregſon* the younger is ſince dead; and that *Mary* the wife of *Thomas Huntley*, the leſſor of the plaintiff, and *Rain Gregſon* the defendant, at the time of the death of the ſaid *John Gregſon* the younger, were and are the only ſurviving children of the ſaid *John Gregſon* the younger. THE QUESTION for the opinion of the court was, whether the leſſors of the plaintiff were entitled to recover? and on the argument, the plaintiff contended, 1ſt, that under the terms of this marriage ſettlement it was neceſſary for *John Gregſon* to make a beneficial appointment to and amongſt *all* his children; and that he could not limit the eſtate in ſuch a manner, as virtually and ſubſtantially to exclude one of them. 2dly, That ſuch beneficial appointment had not been made, and conſequently the power was not well executed; inaſmuch as the appointment to one of a contingent remainder in fee after the expiration of an eſtate tail (which might be immediately barred by a recovery) was virtually and ſubſtantially an excluſion of ſuch child to whom that intereſt alone is appointed. ASHHURST, J. It appears to me that the true conſtruction of this ſettlement is, that the father ſhould have a diſcretionary power to appoint " to any child *or* children." There is a diſtinction between a power of diſtributing perſonalty as a proviſion for younger children,

children, and appointing a real eſtate. In the caſe of perſonalty it does not appear that there is any other proviſion for the younger children; and it is a natural conſtruction to be put on ſuch a power, to ſay, that it was the intention of the parties making the ſettlement, that every one of the children ſhould derive ſome benefit from the appointment. But in the caſe of a family eſtate, it is more natural to ſuppoſe that it was intended to be given to one child only. In the preſent caſe it was the intention of the parties that the appointer ſhould have it in his power to appoint to *any one* of the children. The words are "ſuch child and children:" now if it had been intended that *all* ſhould have derived ſome benefit, they would have ſaid "among them;" and if ſo they would not have uſed the word "child" in the ſingular number, which could only have been added for the purpoſe of giving the appointer a power of appointing to *one only* if he pleaſed. The caſe of *Spring* ex. dim. *Titcher* v. *Biles (infra)* ſeems to me to be a ſtrong caſe; there an appointment in favour of one, under a power of appointing "among ſuch relations as ſhould be living at his death," was held good. BULLER, J. The words of the power are "to and for the uſe and behoof of ſuch child and children, "and for ſuch eſtate and eſtates, &c." The argument for the plaintiff is, firſt, that where there is a power to give an eſtate "to and amongſt all and every the children," each muſt have a beneficial part; and ſecondly, that theſe words are tantamount to thoſe. My objection is to the minor propoſition; theſe words are not like thoſe aſſumed. There are no ſuch words in this power as "to and amongſt;" but juſt the reverſe. For it is a power to appoint to the uſe and behoof of ſuch *child* and children. Therefore, inſtead of including all, it ſays that the appointer may appoint to one only. The plaintiff's counſel admitted that, under a power of appointing "to "ſuch of my children," an appointment to one only would be good; but the preſent words are ſtronger. An appointment to one under a power of appointing "to ſuch child and children" is good becauſe it includes one. The caſe of *Spring* v. *Biles*, with the difference only of *relations* inſtead of *children*, is ſtronger than the preſent. There the power was "to and among ſuch of my relations, &c." in ſuch parts, ſhares, "and "*proportions*, &c.;" which imported that a diviſion was intended. But in the preſent caſe the words "parts, ſhares, "and proportions," are not uſed, and here is no evidence of intention that it ſhonld be divided into ſhares. In that caſe, the Court ſaid they had not a particle of doubt but that the word "ſuch" meant one or more. Here therefore it muſt have the ſame conſtruction: it muſt mean that the appointer might appoint to one or more. Poſtea to the defendant.

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An excluſive appointment, under a power of appointing "to and amongſt ſuch of his relations," was held good. On the trial, a verdict was found for the leſſor of the plaintiff, ſubject to the opinion of the court on the following caſe. *James Abraham*, of Heith, being ſeized of a freehold eſtate in *Dibdin*, and of four ſeveral copyhold eſtates in the manor of Eling, on the 17th of April, 1746, duly made his will, and thereby *(inter alia)* deviſed as follows: "I give "unto my relations, *John Abraham* and *Iſaac Abraham*, 5l. "each; *Elizabeth Abraham*, 15l. *Mary Abraham* 5l. *Wil-* "*liam Biles* 5l. *John Biles* 5l. and *Mary Biles* 5l." And after ſome other bequeſts, he gave the reſidue of his real and perſonal eſtate to his wife *Mary* for life. Then followed this clauſe; "And my further will is, that my ſaid wife ſhall, and "I do hereby give her full power and authority to diſpoſe of "the ſame, in and by her laſt will and teſtament, to be duly "made and executed, *to and amongſt ſuch of my relations as* "*ſhall be living at the time of my deceaſe, in ſuch parts, ſhares,* "*and proportions* as my ſaid wife ſhall think proper." Of this will he made his wife ſole executrix. *James Abraham* was admitted to all the ſaid five copyhold eſtates to him and his heirs for ever by five ſeparate admiſſions; to wit, to one on the 11th December, 1733; to two on the 12th May, 1735; to one on 8th May, 1745; and to one on 26th September, 1749; which laſt he purchaſed after making the will. On the 9th May, 1750, the ſaid *James Abraham* ſurrendered into the hands of the lords of the ſaid manor "all and every "his copyhold lands, tenements, and hereditaments, held by "four copies of court roll of the ſaid manor, to the uſe and "behoof of ſuch perſon and perſons, and for ſuch eſtate and "eſtates, and under and ſubject to ſuch conditions, limita- "tions, and proviſoes, as the ſaid *James Abraham*, by his laſt "will and teſtament, ſigned in the preſence of three or more "credible witneſſes, *ſhall* direct or appoint." By the cuſtom of the manor of Eling, the widow of every copyholder is entitled to her free bench for her widowhood in every copyhold eſtate, of which the huſband dies ſeiſed. On the 1ſt of February, 1755, the ſaid *James Abraham* died ſeiſed of the ſaid freehold and five copyhold eſtates, without making any other deviſe or diſpoſition. On the 21ſt May, 1755, the widow was admitted to all. On the 3d of Auguſt, 1757, ſhe ſurrendered all the copyholds to the uſe of her will. By indentures of leaſe and releaſe, dated the 6th and 7th March, 1758, between *Mary Abraham*, as the widow and deviſee of her huſband of the one part, and *P. Titcher*, the leſſor of the plaintiff of the other part, after reciting the ſaid will, ſhe, in purſuance of her power and in conſideration of 5s. paid by the leſſor of the plaintiff, conveyed the freehold to him and his heirs and aſſigns, to her uſe for life, and then to his own uſe in

Spring, on the demiſe of Titcher, v. Biles and another, M. 24 Geo. 3. B.R. 1 *Ter. Rep.* 435.

in fee. On the 22d February, 1760, *Mary Abraham* made her will, atteſted by three witneſſes, whereby, after reciting the power veſted in her by her late huſband's will, and the ſaid indentures of leaſe and releaſe, which ſhe confirmed, ſhe gave, deviſed, and bequeathed the ſame unto the ſaid *P. Titcher*, his heirs and aſſigns for ever, ſubject nevertheleſs to an annuity of 5l. payable to *Joan Macher* for her life: but if the ſaid teſtatrix had not then full power ſo to charge the ſaid premiſes, then the ſaid teſtatrix did charge and ſubject the ſeveral copyhold premiſes after mentioned to and with the payment thereof. And the ſaid teſtatrix, after ſo charging and ſubjecting the ſaid copyhold premiſes, (being the ſame copyhold premiſes as are contained in the ſaid five ſeveral admiſſions above ſet forth), gave and deviſed all the ſaid copyhold premiſes to the ſaid *P. Titcher*, to hold unto and to the uſe of him the ſaid *P. Titcher*, his heirs and aſſigns for ever, according to the cuſtom of the ſaid manor. On the 24th December, 1780, the ſaid *Mary Abraham* died without having revoked her ſaid will, or made any other diſpoſition of the ſaid freehold and copyhold lands. And on her death, the defendant *(Biles)*, as heir at law of *James Abraham* the teſtator, was admitted to the ſaid ſeveral copyhold eſtates, to hold to him, his heirs and aſſigns for ever, according to the cuſtom of the manor; and he entered upon the ſame. On the 23d March, 1782, the ſaid *Biles* ſurrendered four of the copyholds to the defendant *Smith*, his heirs and aſſigns, according to the cuſtom, and he has been admitted. On the 25th July, 1783, the leſſor of the plaintiff was admitted to all the copy-holds. The leſſor of the plaintiff is the grandſon of *Philip Titcher* and *Eleanor Mills*, which *Eleanor Mills* was the daughter of *Arthur Mills* and of *Martha* his wife, which ſaid *Arthur* was the firſt huſband of the ſaid *Martha*, who after the death of *Arthur* married one *James Abraham*, by whom the ſaid *Martha* had *James Abraham* the deviſor. And the ſaid leſſor of the plaintiff was living at the time of *James Abraham*'s death. The defendant *Biles* is the heir at law of the teſtator. THE QUESTION was, whether the leſſor of the plaintiff is entitled to the poſſeſſion of all or any and which of the aforeſaid freehold and five copyhold eſtates? And on the argument, the counſel for the leſſor of the plaintiff made three queſtions; 1ſt, Whether the four copyholds paſſed by the ſurrender containing words of futurity, by referring to a will which was then in being. 2dly, Whether the fifth copyhold, purchaſed after making the will, paſſed by the will. 3dly, Whether the wife had duly executed the power given to her by the will of her huſband. Lord MANSFIELD, Ch. J. after ſtating the caſe: Three queſtions have been made; 1ſt, Whether the ſurrender has relation to a will then in being? It is clear from the ſurrender that the teſtator meant that the copyholds

holds ſhould paſs as well as the freehold; for the words of the will are very full. Finding afterwards that there was a defect as to the copyhold eſtate for want of a ſurrender, he ſurrendered them to ſuch uſes as he *ſhould* by his will direct. The teſtator had then a will whereby he had clearly declared that his copyholds ſhould paſs. And it would be ſtrange to ſay that the ſurrender deſtroyed his intention. A will ſpeaks at different times for different purpoſes; to many purpoſes from the date; to other purpoſes from the teſtator's death. It amounts in ſome degree to a republication; and I am clear that the ſurrender referred to that will which ſhould be in exiſtence at the time of his death. As to the 2d queſtion, whether copyhold lands, purchaſed after the will, paſs by the will? the caſe of *Harris* v. *Cutler*, B. R. Tr. 10 *Geo.* 3. is deciſive, that they do not. 3dly, As to the execution of the power, there is no doubt of its being a good execution. There is no colour to ſay he meant it ſhould go to the relations mentioned in the beginning of the will. He could not mean thoſe relations to whom he had before given legacies. And though he mentions the word "living," it is ſuperfluous; for he could not give it to a deceaſed relation. It is a diſcretionary power and truſt; and although he ſays "in ſuch ſhares, "*&c.*" that is only to give a diſcretionary power as to the proportions, if ſhe choſe to divide it: but it does not prohibit her from giving it all to one. It is not like the caſes where a power is given to deviſe among children; but even in thoſe caſes the reaſoning is very ſubtle, for the perſon will have duly executed the power by giving a ſhilling to every one but a favourite, and the whole to ſuch favourite. If ſhe had died without an appointment it would have been a truſt, and it would have devolved on the court, who muſt have been governed by the ſtatute of diſtributions. WILLES, J. In the caſe in *Atk.* though that of a ſtrict power, "*ſuch*" did not extend to *all*. Great ſtreſs is laid on the word "all" in *Fort.* 72. BULLER, J. The caſes of powers to diſtribute among children ſtand on very different grounds; for the courts have conſidered them as portions to the children; and even ſuch caſes where one child has been provided for, a power has been held to be well executed, though nothing was given to ſuch child. But the truth is, that the court of Chancery has taken great latitude in that reſpect. We cannot reaſon from analogy to the caſes of perſonal eſtate. Where powers are not executed in ſuch caſes, the courts have been governed by the ſtatute of diſtributions; but in the caſe of real eſtates it is otherwiſe. The defendant's counſel was aware that this would not bear him out, and therefore he took a middle line, and contended that by the meaning of the teſtator the widow was confined to the ſurvivors of the relations mentioned in the will. But I think there are no words of reſtriction to

ſuch relations as before mentioned; and that the power is well executed. *Per Curiam:* Judgment for the plaintiff as to all, except the laſt-purchaſed copyhold.

Roe, on the demiſe of Thomas Buxton and Mary his wife, *v.* Tho. Dunt, Ea. Ter. 3 Geo. 3. C. B. 2 *Wilſ.* 336.

If there be a power under a marriage ſettlement to give to the children of the marriage, in ſuch ſhares, &c. and for ſuch eſtate, &c. and there is but one child of the marriage, ſuch child muſt have the whole eſtate which was ſettled.—*Sarah Smith*, widow, in the year 1744, was ſeiſed in fee of the premiſes according to the cuſtom of the manor, being copyhold of *Hetherſet Cromwells*, and being ſo ſeiſed, at a court held for the ſaid manor on the 25th of March, 1746, ſurrendered the premiſes to the uſe of her ſon *John Smith* and *Elizabeth* his wife during their lives and the life of the longer liver of them; and after the deceaſe of the ſurvivor of them, to the child or children, whether male or female, of the ſaid *John Smith* and *Elizabeth* his wife, *in ſuch proportion and proportions, and for ſuch eſtate and eſtates as the ſaid* John Smith *and* Elizabeth *his wife, or the ſurvivor of them, ſhould by any ſurrender or ſurrenders thereof, and according to the cuſtom of the manor, or by his or her laſt will and teſtament direct, declare, limit or appoint; and for want of ſuch direction, declaration, limitation or appointment, then to all and every the child and children of the ſaid* John Smith *and* Elizabeth *his wife, and their heirs, equally to be divided between them as tenants in common, and not as joint tenants; and for want of ſuch iſſue, then to the right heirs of the ſaid* John Smith *for ever.* *John Smith* and *Elizabeth* his wife were at the ſame court admitted tenants thereof, to hold the ſame, according to the uſes aforeſaid; and the ſaid *John Smith* immediately at the ſame court ſurrendered the premiſes to the uſe of his laſt will and teſtament. *Elizabeth Smith* the wife died, and *John Smith* her huſband ſurvived her, and by his will duly executed the 19th of March, 1764, deviſed as follows, *viz.* "I give and deviſe "unto *Sarah Smith* my daughter and her heirs for ever, "when ſhe attains the age of twenty-one years, all my meſ- "ſuages, lands, tenements and hereditaments whatſoever, ſi- "tuate, lying and being in Hetherſet aforeſaid; and if my "ſaid daughter *Sarah* ſhall depart this life before ſhe attain "the age of twenty-one years, then I give and deviſe the "ſaid meſſuages, lands, tenements and hereditaments, unto "my ſiſter *Ann Dunt*, the wife of *Thomas Dunt* of Hether- "ſet aforeſaid, maſon, and her heirs for ever, ſubject never- "theleſs to the condition following, that is to ſay, in caſe "my ſaid ſiſter *Ann* ſhall at any time when ſhe is poſſeſſed of "the ſaid meſſuages and lands, make ſale thereof to any "perſon or perſons, then my will is, that the ſaid *Ann* my "ſiſter do pay to *Samuel Smith* my brother, the ſum of fifty "pounds out of the money ariſing by ſuch ſale." *John Smith* died in May, 1764, and left only one child his daughter *Sarah*

Sarah Smith by his ſaid wife *Elizabeth*, who on her father's death took poſſeſſion of the premiſes, and died ſeiſed thereof on the 4th of Auguſt, 1765, an infant of the age of 19 years and 38 days; and *Mary* the wife of the leſſor of the plaintiff: *Thomas Buxton* is the couſin and heir at law of *Sarah* the infant, as being the only child and daughter of *Thomas Smith*, the eldeſt uncle of *Sarah* the infant, and grand-daughter and heir of *Sarah Smith* mentioned as the ſurrenderor in the ſurrender of the 25th of March, 1746, and *Thomas Dunt* the defendant is huſband of the ſaid *Ann Dunt*, the ſiſter and deviſee of the teſtator: the queſtion for the opinion of the Court was, Whether the plaintiff, as leſſee of *Thomas Buxton* and *Mary* his wife, in right of the ſaid *Mary*, as heir at law to *Sarah Smith* the infant, was entitled to recover in this ejectment? THE WHOLE COURT were clearly of opinion that *Smith the teſtator had no power or authority to make the will and ſurrender as above*, but that there being only one child of the ſaid teſtator by his late wife, that child was entitled to the whole of the premiſes in fee; and Mrs. *Buxton* being her heir at law, the leſſor of the plaintiff had judgment.—It was alſo ſaid by the Lord Chief Juſtice, that he had known a caſe where there has been one child only, that that child, under ſuch a power as this, had been made tenant for life, with remainder in tail to its iſſue, but he much doubted whether it could be legally done. He ſaid he thought a ſingle child in ſuch a caſe as this might be made tenant in tail. But the reporter adds a *quære*, as to this matter.

Venables and Elizabeth his wife *v.* R. Morris and Edwards, Tr. Ter. 37 Geo. 3. B.R. 7 *Ter. Rep.* 342.

By deed and fine an eſtate was limited to the uſe of the huſband for life, remainder to truſtees and their heirs during his life to preſerve contingent remainders, remainder to the wife for life, remainder to the truſtees and their heirs (not ſaying, "during her life"), in truſt to ſupport the contingent uſes and eſtates thereinafter limited, remainder to the firſt and other ſons in tail, remainder to the wife in tail, remainder in default of iſſue to ſuch perſons and for ſuch eſtates as ſhe ſhould appoint, &c.;—held that the truſtees took a legal eſtate in fee after the determination of the wife's life eſtate, and that all the ſubſequent limitations were truſt eſtates: it was held alſo that an appointment by the wife to the uſe of the right heirs of the huſband could not unite with the antecedent life eſtate of the huſband, but could only give an equitable eſtate to the perſon who at his death ſhould anſwer the deſcription of his right heir. This was a caſe out of chancery for the opinion of the judges of this Court. By indenture dated 15th Auguſt, 1767, and made between *S. Morris* and *Hannah* his wife of the one part, and *R. Lloyd* and *R. Edwards* of the other part, after reciting articles of agreement made prior to and in contemplation of the marriage then lately had between *S. Morris* and *H.* his wife of certain

lands and hereditaments, the eſtate and inheritance of the wife, and that it was agreed that in purſuance of the articles a ſettlement ſhould be made of the ſaid hereditaments and premiſes after the death of the wife's mother in reverſion, as therein mentioned, it was witneſſed that in purſuance of the articles and agreement *S. Morris* covenanted with *Lloyd* and *Edwards* their heirs and aſſigns that he *(S. M.)* and his wife would at or before the end of the next great ſeſſions for the county of Montgomery acknowledge a fine ſur conuſance de droit come ceo, &c. to *Lloyd* and *Edwards* and their heirs of the ſeveral undivided parts of land therein mentioned (being the lands in queſtion); and it was thereby agreed that the fine ſhould enure to the uſe of *S. Morris* for life without impeachment of waſte, remainder to the uſe of ſaid *Lloyd* and *Edwards* and their heirs for the life of *S. Morris* in truſt to ſupport contingent remainders, remainder to the uſe of *Hannah Morris* for life without impeachment of waſte, remainder to the uſe of *Lloyd* and *Edwards* and their heirs generally in fee in truſt to ſupport the contingent uſes and eſtates thereof thereinafter limited from being defeated or deſtroyed, and for that purpoſe to make entries and bring actions as occaſion ſhould require, but nevertheleſs to permit *Hannah* and her aſſigns to receive the rents, &c.; and after the ſeveral deceaſes of *S. Morris* and his wife to the uſe of the firſt and other ſons of the marriage ſeverally and ſucceſſively in tail, remainder to the uſe of the firſt and other daughters ſucceſſively in tail, remainder to the uſe of the ſaid *Hannah* and the heirs of her body lawfully iſſuing; and for default of ſuch iſſue to the uſe of ſuch perſon or perſons and to and for ſuch uſes eſtates intents and purpoſes as *Hannah* ſhould at any time thereafter notwithſtanding her coverture by any deed or deeds or by will duly execute limit or appoint; and in default of ſuch limitation or appointment, to the uſe of the right heirs of *Hannah* for ever. A fine was accordingly levied by *S. Morris* and his wife. *Hannah Morris* by a deed-poll bearing date 2d September, 1767, properly executed, reciting the indenture of the 15th Auguſt, 1767, and the fine ſo levied, and that ſhe was deſirous to limit the reverſion of the ſaid hereditaments and premiſes in default of any iſſue of her body, did by virtue of the ſaid power veſted in her limit and appoint all and ſingular the ſaid premiſes in default of any iſſue of her body begotten or to be begotten (ſubject nevertheleſs as is thereinbefore mentioned) to the uſe of ſuch perſon or perſons and to and for ſuch uſes intents and purpoſes as ſhe ſhould at any time thereafter by her laſt will in writing duly executed direct limit and appoint; and for want of ſuch direction, &c. to the uſe of the right heirs of *S. Morris* for ever. *Hannah Morris* died in November, 1770, without leaving any child or iſſue, and without having made any will or other appointment, ſave as

before

before mentioned, and leaving the plaintiff *Elizabeth Venables* her ſiſter and heir at law. *S. Morris* died in February, 1793, inteſtate, leaving the defendant *R. Morris* his brother and heir at law. THE QUESTIONS ſubmitted to this Court were; 1ST, Whether, upon the death of *S. Morris*, *R. Morris* became entitled to any and what intereſt in the premiſes in queſtion? 2dly, Whether upon the death of *S. Morris*, *Elizabeth Venables* became entitled to any and what intereſt in the premiſes in queſtion? Lord KENYON, Ch. J. Several topics have been ſtated at the bar, of which no doubt can now be entertained. Ever ſince the caſe of *Jones* v. Lord *Say & Seal* (1) it has been conſidered, and perhaps there was no doubt of it before, that a legal eſtate in the anceſtor and an equitable eſtate to the iſſue could not be united ſo as to increaſe the eſtate in the anceſtor. But the preſent caſe is different from all thoſe that have been cited: that which comes neareſt to the preſent is the caſe of *Habergham* v. *Vincent*, 5 *Ter. Rep.* 92. *ante*, p. 151, but that is diſtinguiſhable from this; for there the will was wholly ineffective at firſt, the power created by the will could not operate at all at the time when it was made. But the defendants' counſel has accurately ſtated the ground on which this caſe ought to be decided, namely, that *an appointment when executed is to be conſidered in the ſame light as if it had been inſerted in the original deed by which the power of appointment was created.* Then let us ſee what would have been the caſe here if this appointment had been inſerted in the deed creating the power. An eſtate was limited to *S. Morris* for life, and after ſeveral intermediate limitations an eſtate was limited to his heirs for ever; and whether the laſt be a legal or an equitable eſtate makes no other difference than this, that in the one caſe the heir will take as a purchaſer in the other by deſcent: but quâcunque viâ datâ the defendant is entitled in this caſe. For if the limitation to the heir of *S. Morris* be a legal eſtate, it enlarged the eſtate in the anceſtor and gave him a fee; if it be an equitable remainder to which the prior legal eſtate in the anceſtor could not be united, it was a contingent remainder to the heir, and the heir takes as a purchaſer; and the prior eſtate in the truſtees if they took ſuch an eſtate or in the father would ſupport this remainder, and the inſtant the prior eſtate was determined this contingent remainder was ready to take effect. Therefore the heir of *S. Morris* is now entitled to take, and it is immaterial whether he takes as a purchaſer or by deſcent.

The following certificate was ſent by the Court to the Lord Chancellor:

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(1) 1 *Eq. Caſ. Abr.* 383. *pl.* 4. 3 *Bro. P. C.* 458.

" We are of opinion that the eſtate limited to *Robert Lloyd* and *Rowland Edwards*, on the determination of the life of *Hannah Morris*, was an uſe executed in them in fee; and that the appointment made by her did not create any eſtate which could unite with the life eſtate of *Sampſon Morris*, and that it could only give an equitable eſtate to the perſon who at his death ſhould anſwer the deſcription of his right heir. And we are of opinion that neither *Randal Morris* nor *Elizabeth Venables* took any legal intereſt in the premiſes in queſtion.

Moſes Griffith *v.* B. Harriſon, Eliz. Griffith, T. Harriſon Griffith, Charl. Griffith, John Yeldham, and M. Yeldham, Tr. Ter.
32 Geo. 3. B.R.
4 *Ter. Rep.* 737.

This was a caſe from the court of chancery, which ſtated that the teſtator, Doctor *Guyon Griffith made his will*, dated 27th May, 1777; and having afterwards *purchaſed and become ſeiſed in fee-ſimple of a freehold farm*, called Vawtorts, and ſeiſed to him and his heirs of certain copyhold lands (part of the farm called Vawtorts) according to the cuſtom of the manors whereof they were reſpectively holden, and having duly ſurrendered the copyholds to the uſe of his will, he by a codicil dated 7th March, 1781, " gave and deviſed the ſaid " farm and premiſes unto *Frances* his wife during her life- " time, and after her deceaſe *to ſuch child or children of him* " *the ſaid deviſor, as ſhe ſhould judge moſt proper to bequeath* " *the ſame to by her will.*" Doctor *Griffith* by another codicil to his will, dated 31ſt December, 1783, ratified and confirmed his will, and former codicil, and " deviſed his " eſtate, called Vawtorts, both freehold and copyhold, to " the uſe of his wife during her life, and directed and *em-* " *powered her to give and deviſe the ſame to any one or more of* " *his ſaid child or children by her, in ſuch manner, ſhare, and* " *proportion, as ſhe ſhould direct and appoint in* and by her laſt " will in writing, duly executed, *but ſo as the ſaid eſtate* " *ſhould not be divided, but tranſmitted whole and entire to his* " *heirs.*" And after reciting alſo that he was entitled to the reverſion (and which reverſion hath ſince fallen into poſſeſſion) of a certain meſſuage, &c. adjoining to Vawtorts, he " deviſed the ſame unto his wife for life, to be enjoyed by " her as part of the eſtate, called Vawtorts, and to be an- " nexed thereto; and he alſo directed and empowered his " wife to deviſe and bequeath the ſame to any ſuch one or " more of his ſaid children as ſhe ſhould appoint and direct in " and by her laſt will; and declared his will and intention to " be, that the ſaid eſtate and lands called Vawtorts, and the " ſaid other eſtate thereto adjoining, ſhould be conſidered as " one eſtate and be tranſmitted entire to his family; and alſo " declared that in caſe his wife ſhould not execute her will in " due form, or ſhould neglect or omit to make ſuch appoint- " ment, and deviſe as aforeſaid, he thereby deviſed the ſame " premiſes and every part and parcel thereof to the uſe of " his own right heirs." Doctor *Guyon Griffith* died in January, 1784; leaving *Frances Griffith* his widow and five children

children by her, *viz.* the ſaid *Moſes Griffith* his eldeſt ſon and heir at law, and alſo his heir according to the cuſtom of the reſpective manors whereof the copyhold lands are holden, the ſaid *Thomas Harriſon Griffith*, *Guyon Griffith*, the ſaid *Elizabeth Griffith*, and *Charlotte Griffith*; all of whom were living at the time of his making both the codicils to his will. *Frances Griffith* is ſince dead, having firſt made her will, dated 12th April, 1784, and executed and atteſted ſo as to paſs real eſtates; whereby, after reciting the beforementioned codicils, "ſhe by virtue of the powers and authorities "to her in that behalf given, gave, deviſed, directed, and ap- "pointed, to her ſaid ſon *Guyon Griffith* all the ſaid eſtates ſo "compriſed in the deviſe and power of appointment to the "uſe of her ſaid ſon *Guyon Griffith* for life, remainder to the "uſe of *J. Yeldham* and *M. Yeldham* and their heirs, during "the life of *Guyon Griffith* the ſon, in truſt to preſerve con- "tingent remainders, remainder to the uſe of the firſt and "other ſons of *Guyon Griffith* (the ſon) ſucceſſively, in tail "general, remainder to the uſe of the firſt and other daugh- "ters of *Guyon Griffith* (the ſon) in tail general; remainder "to the uſe of *M. Griffith* for life, with remainder to the "ſame truſtees during his life, in truſt to preſerve contingent "remainders, remainder to his firſt and other ſons ſucceſſive- "ly in tail general, remainder to his firſt and other daughters "ſucceſſively in tail general; with like remainders to *T.* "*Harriſon Griffith*, *Elizabeth Griffith*, and *Charlotte Griffith*, "reſpectively in ſtrict ſettlement." *Guyon Griffith* (the ſon) ſurvived his mother, but is ſince dead, an infant, and without iſſue, leaving *Moſes Griffith* his eldeſt brother, and heir at law, and alſo heir according to the cuſtom of the ſeveral manors whereof the ſaid copyholds are held. *Moſes Griffith* the eldeſt ſon and heir of *Guyon Griffith* the deviſor, and alſo the heir of *Guyon Griffith* (the ſon) having after the death of his brother contracted with *Benjamin Harriſon* to ſell him the eſtates both freehold and copyhold deviſed by the codicils of *Guyon Griffith* (the father) and appointed by the will of *Frances Griffith*, *Benjamin Harriſon* objected to the title to the eſtates; and thereupon *Moſes Griffith* filed this bill againſt the defendants for a ſpecific performance of the agreement for ſuch ſale. THE QUESTION ſent for the opinion of the Court was, What eſtates each of the children of the ſaid *Guyon Griffith* the father, and *Frances Griffith* his wife, namely, *Guyon Griffith*, *Moſes Griffith*, *Thomas Harriſon Griffith*, *Elizabeth Griffith*, and *Charlotte Griffith*, took reſpectively in the premiſes in queſtion?

The plaintiff's counſel made two points; 1ſt. That the power was not well executed by Mrs. *Griffith*, and that *Moſes Griffith* took an eſtate in fee, in the premiſes in queſtion, as

the heir at law of Doctor *Griffith*; 2dly, That if the limitations in Mrs. *Griffith*'s will could not take affect as ſhe intended, and the Court ſhould be inclined to give effect to them as nearly as might be, then according to the doctrine of *cy pres M. Griffith* took an eſtate tail.

For the defendants, it was argued, 1ſt, That all the limitations by Mrs. *Griffith*'s will might be ſupported; but 2dly, That, if they could not all ſtand, the life eſtates to the children of Doctor and Mrs. *Griffith* were good; and 3dly, That *Moſes Griffith* could not be adjudged to take an eſtate tail on any principle of law.

THE COURT took time to conſider of this caſe; and now ſent the following certificates to the court of Chancery.

This caſe has been argued before us by counſel, and we have conſidered of it. The operation of the will of *Frances Griffith* muſt be confined within the limits of the power given to her by her huſband. He empowered her to give, deviſe, and bequeath, to any one or more of his child or children, in ſuch manner, ſhare, and proportion, as ſhe ſhould by her will direct and appoint.

His child or children are the only objects mentioned in the power; and we think it is clear, that ſhe could not make any other perſon a purchaſer of any intereſt in the property.—The whole of the execution of the power muſt be exhauſted upon the children. The execution, which ſhe has attempted, takes in perſons who were not children of the teſtator, and affects to make them purchaſers; and is not only not warranted by the words of the power, but might give a deſcendible quality to the eſtate to perſons out of the teſtator's views, viz. to the heirs *ex parte maternâ* of the children of the ſons, and *ex parte paternâ* of the children of the daughters.

But although the appointment cannot, as we conceive, take effect in the particular manner the widow intended, yet her general intention being, that the children of her ſeveral children ſhould take eſtates of inheritance in tail general, on the death of their reſpective parents, we think that that general intention ſhould be carried into execution, as far as the power given by her huſband will allow; and conſequently, that *Guyon Griffith* the ſon, and his brothers, and ſiſters, reſpectively, took eſtates in tail general. This conſtruction we think fairly warranted by great authorities

Kenyon.
N. Groſe.

In the execution of powers, the material object to be attended to, is the intention of the perſon creating the power; and that intention is to be collected from the words of the will, or other inſtrument, giving the power, according to the ordinary

nary and common acceptation of the words, and not according to any legal or technical expoſition of them.

A ſettlement on a child for life, with remainders to his firſt and other ſons in ſtrict ſettlement, is in common parlance a ſettlement on the child; and the general intention of perſons, who look forward to future ſettlements, is that the eſtate ſhall be tied up as long as the rules of law will allow.

The queſtion is, Whether the words uſed in this will ſufficiently indicate that intent? and we are of opinion that they do. If the words, "in ſtrict ſettlement," had been uſed, the caſe would have admitted of no doubt: and we think the words, "manner," "ſhare," "proportion," and "tranſmit," are equivalent to them. The wife having a power of ſettling the eſtate among the children, in ſuch manner as ſhe thought fit, it is as extenſive as if every manner had been expreſsly enumerated, or the teſtator had ſaid, "in ſtrict ſettlement, or otherwiſe." Beſides, the word, "tranſmit," in our judgment, moſt naturally applies to a ſtrict ſettlement; and means, that the remote deſcendants of the teſtator, as far as the law allows, ſhould take by the gift of the wife, and not by deſcent.

The word "children" has been held to be co-extenſive with iſſue; and to include grand-children, and great grand-children, both in law and equity; as we find in *Wild*'s caſe, 6 *Co.*; *Bendloe*, 30; and 1 *Ventr.* 231. We think the intention of the teſtator, in this caſe, requires that conſtruction, and that the teſtator uſed the term, "children," as denoting the branches ſprung from him. The expreſſions, that it was his will and intention "that the eſtate, called Vawtorts, and the other eſtate adjoining, ſhould be conſidered as one eſtate," and be "tranſmitted entire to his family," confirm our opinion.

The caſe of the Duke of *Devonſhire* againſt *Cavendiſh* ſeems to us to be in point: and the language there uſed by the Court was, that *whatever the perſon, to whom the power was given, might do with the eſtate if it were his own, he might do now*; with this exception only, that the children were the objects.

But, ſuppoſing that the eſtate could not, under this power, be ſtrictly ſettled on the iſſue of the children, yet we are of opinion, that *Moſes Griffith* cannot make a good title to the eſtate.

There is *primâ facie*, a contradiction in the power, which firſt enables the wife to give to one or more of the children, in ſuch proportions as ſhe thought fit, and afterwards adding the reſtriction, that the eſtate ſhould not be divided, but tranſmitted whole and entire to his heirs; for if the eſtate were always to remain entire, it could not be divided into different proportions. The only way of making the different parts of this power conſiſtent (provided the eſtate cannot be limited

in

in ſtrict ſettlement), is to conſider the word "heirs" as applicable only to more remote deſcendants than the children; and to confine the wife's power of appointment to the children, during their lives only; in which caſe, whatever appointments the wife might make amongſt the children, during their lives, the eſtate, after their deaths, would go entire to the right heir of the teſtator. If the teſtator delegated this power to the wife, merely to ſecure the obedience of the children to her, this conſtruction will anſwer the end.

In either way, we are of opinion, that *Moſes Griffith* takes only an eſtate for life in poſſeſſion.

W. H. Aſhhurſt.
F. Buller.

Doe dem. Duke of Devonſhire and Duke and Ducheſs of Portland, v. Lord G. Cavendiſh, Hil. Ter. 22 Geo. 3. B.R. 4 *Ter. Rep.* 741 (n. *a.*)

The caſe of the Duke of *Devonſhire* v. Lord *George Cavendiſh*, was as follows: Lady *Burlington*, being ſeiſed in fee of the meſſuage in queſtion, made her will, dated the 20th of February, 1755, to the effect following: "I do give and deviſe all my manors, meſſuages, lands, tenements, mines, fee farm and other rents, advowſons, &c. and hereditaments whatſoever, in Great-Britain or elſewhere, with their rights, members, and appurtenances, unto *R. Arundell* and *C. Denton*, their heirs and aſſigns, to have and to hold, &c. to the following uſes, viz. to the uſe and behoof of my ſon in law, *William*, Lord *Cavendiſh*, otherwiſe Marquis of *Hartington*, and his aſſigns for his life, without impeachment of waſte, &c. and then to truſtees to preſerve contingent remainders, in caſe of the determination of the eſtate during his life by forfeiture, &c.; "and after his deceaſe, to the uſe and behoof of ſuch of "his child or children by *Charlotte*, Lady *Cavendiſh*, his late "wife, for ſuch eſtate and eſtates, and in ſuch ſhares and pro-"portions, and under and ſubject to ſuch powers, proviſoes, "conditions, reſtrictions, or limitations, as he ſhall by deed in "writing, ſigned and atteſted by, and in the preſence of, two "or more credible witneſſes, or by his will ſo ſigned, &c. no-"minate, direct, limit, or appoint;" and in default of ſuch nomination, to the uſe of all and every the child or children of the ſaid *William*, Lord *Cavendiſh*, by the ſaid *Charlotte*, Lady *Cavendiſh*, equally to be divided between them, if more than one, ſhare and ſhare alike; to take ſeverally as tenants in common, and not as joint tenants; and of the ſeveral and reſpective heirs of the body or bodies of all and every ſuch child or children, lawfully to be begotten; and failing iſſue of any one of the ſaid children, then as to the ſhare or ſhares of him, her, or them ſo dying without iſſue, to the uſe of every other ſuch child or children, equally to be divided between them, &c. (as before); and if but one child, then to the uſe of ſuch child, and the heirs of his or her body; and for default of ſuch, to the uſe of *William*, Lord *Cavendiſh*, his heirs, &c. for ever." She alſo gave Lord *William* a power to leaſe for twenty-one years;

years; and bequeathed to him all her perſonal eſtate, in confidence, that if there ſhould remain any ſurplus, "he would "divide the ſame amongſt his children, at his diſcretion."—And ſhe appointed him her executor. At her deceaſe, *William*, Lord *Cavendiſh*, afterwards Duke of *Devonſhire*, had iſſue then living, the ſaid *William*, Lord *Cavendiſh*, now Duke of *Devonſhire*; *Richard*, Lord *Cavendiſh*; and *George*, Lord *Cavendiſh*; and *Dorothy*, now Ducheſs of *Portland*. *William*, Lord *Cavendiſh*, entered by virtue of the ſaid will, and remained in poſſeſſion till his death. Previous to his deceaſe, being Duke of *Devonſhire*, he made his will, dated the 18th of May, 1763, as follows: "Alſo, I give and deviſe unto my brothers *George Cavendiſh* and *Frederick Cavendiſh*, their heirs and aſſigns, all ſuch real eſtate, either in poſſeſſion, reverſion, remainder, or expectancy, as I have power to diſpoſe of, either by the will of *Dorothy Richmond*, deceaſed, or of my own or late father's purchaſe, or otherwiſe howſoever; and alſo all my money which I have power to raiſe out of my eſtate, and all other perſonal eſtate of which I have not made, or ſhall hereafter make, any particular appointment (except ſuch part as I ſhall hereafter bequeath to my eldeſt ſon), in truſt that they do pay and appropriate unto the uſe of my daughter *Dorothy*, 30,000l. which I give her as a portion." He then directed them to lay out the remainder of his perſonal eſtate in land or government ſecurities for his two younger ſons, *Richard* and *George Cavendiſh*, in equal ſhares, until the younger attained twenty-one years; and then to make an equal partition, and ſtand ſeiſed, as to one divided moiety, to the uſe of the ſaid *Richard* for life, remainder to truſtees to preſerve contingent remainders, with remainder to truſtees for 500 years, in truſt for the firſt and every other ſon of *Richard* ſucceſſively in tail male, remainder to his ſon *George* for life, remainder to truſtees to preſerve contingent remainders, during the life of *George*; remainder to truſtees for 500 years, to the firſt and every other ſon of *George* ſucceſſively in tail male; remainder to his eldeſt ſon *William Cavendiſh*, his heirs, &c. for ever. The like of the other divided moiety, *mutatis mutandis*. And he declared the truſt of the ſaid ſeveral terms of 500 years, to be for the purpoſe of providing out of the ſaid ſeveral eſtates, compriſed within thoſe terms, ſuch jointure or jointures for the wife or wives which his ſaid ſons *Richard* and *George* ſhould reſpectively have during the life of ſuch wife or wives, and alſo ſuch portions for the younger children of his two ſons, as the truſtees ſhould think reaſonable and direct; and in like manner for the daughters. The deviſor *William*, Duke of *Devonſhire*, died, leaving iſſue *William*, the preſent Duke; *Dorothy*, Ducheſs of *Portland* (the leſſors of the plaintiff); the ſaid *Richard*, Lord *Cavendiſh*; and the defendant, Lord *George Cavendiſh*. The perſonal eſtate of the ſaid *William*, Duke of *Devonſhire*, amounted

amounted to upwards of 20,000l. after payment of the ſaid 30,000l. to the Ducheſs of *Portland*, which has been paid to her; and the real eſtate deviſed to the ſaid Lord *Richard* and Lord *George Cavendiſh*, amounted to upwards of 2,000l. per annum. Lord *Richard Cavendiſh* is lately deceaſed, a batchelor. THE QUESTION WAS, Whether the will of the late Duke of *Devonſhire* was a good execution of the power given to him by the will of Lady *Burlington*, or to any, and what extent? LORD MANSFIELD delivered the opinion of the Court as follows: Lady *Burlington* gave the duke a power to appoint to *ſuch child or children* (ſtating the words); and for want of appointment, to all, as tenants in common, in tail, with croſs remainders. The duke limited all the eſtates in queſtion to his two younger ſons, in ſtrict ſettlement, with a power to make jointures, &c.; remainder in fee to the preſent duke. A ground ſtruck me, in conſidering this caſe, which the parties had not thought of, or adapted the caſe to. I have read the will, and wiſh you to adopt theſe facts. The Duke of *Devonſhire*, by will, left great bequeſts to all his children; to the preſent duke mines, jewels, pictures, &c.; to the Ducheſs of *Portland* 30,000l.; and left his eſtates, charged with 20,000l. to the increaſe of the perſonalty. He then gave 1000l. per annum to each of his younger ſons. At the duke's death, the children were all under age, but have ſince attained twenty-one. They have all taken the bequeſts under the will, and have enjoyed them ever ſince. They now object to the appointment under the will. 1ſt ground, It is not permitted to any of the parties to this cauſe, to diſpute the duke's will, or whether he has made this appointment legally or illegally. Their mouths are ſhut. It is a tacit condition, that every man who takes under a will, is bound not only not to diſpute the will, but to maintain the title of all the reſt, unleſs he give up every thing under it. No rule can be better eſtabliſhed than that whoever takes under a will, unleſs he gives up the right which he derives from it, cannot diſpute other proviſions of it. A moſt reaſonable rule; becauſe a man makes his will, ſuppoſing the whole to ſtand.—An old entail diſcovered may overturn the whole plan. Here the plaintiffs are tenants in tail under Lady *Burlington*'s will, and tenants for life under the duke's. They claim great property under the duke's will, and have taken it. If they reject his will, they muſt renounce all benefit under it. Therefore they are bound to ſuffer a recovery, or make the title complete. That is deciſive. 2dly, It is objected, that the appointment being void in part, ſhould be void *in toto:* but as to that, we are of opinion, that if void as to the children, it is good to Lord *George* for life; and therefore this ejectment, at any rate, is premature. But the laſt ground of conſideration, and which is what the caſe is particularly adapted to is, whether

ther the power was well executed? As we are all of opinion with the iſſue unborn, and all other parties are of age, and deſire our opinion, we think for the ſatisfaction of the family we ought to give it, though it is not neceſſary. All powers muſt be executed according to their meaning. When a power is given to allot amongſt particular objects, the party cannot give it to other objects. All the caſes cited went on that ground; whether the perſon giving that power meant it ſhould be extended ſo far as the execution went. *Alexander* v. *Alexander*, 2 *Vez.* 640, is no more. *Maddiſon* v. *Andrews*, 1 *Vez.* 57. No concluſion can be drawn from *Alexander* v. *Alexander* that "children" may not, in ſome caſes, be extended to "grand-children" and "great grand-children." *Wyth* v. *Blackman*, 1 *Vez.* 196, ſhews it may. There are three grounds from which we are of opinion that this was a good execution: 1ſt, From the ſubject-matter of the power. 2dly, From the limitations over for want of appointment. 3dly, From the words in which the power is created. 1ſt, This is not money, nor to be turned into money, nor portions. It is a limitation of a family eſtate, how it ſhall go after her death. She conſidered how it ſhould go, being determined that it ſhould go amongſt grand-children. Suppoſe ſhe had only ſaid, at the time of making her will, that ſhe meant it to go to the grand-children; it muſt have been enquired whether abſolutely, or in ſtrict ſettlement; if ſo, her anſwer muſt have been "in ſtrict ſettlement." There are two kinds of ſettlement, one by which the iſſue of the perſon to whom the iſſue of the perſon to whom the firſt limitation is made ſhall certainly take, by giving the firſt taker only an eſtate for life; the other by creating an eſtate tail in the firſt inſtance. But then there is a trick in law, by which, when the iſſue arrive at twenty-one, the entail may be barred. If this had been repreſented to Lady *Burlington*, her anſwer would have been, that ſhe was ſorry for it, as it might be a mean of defeating her purpoſe; but then it would be anſwered to that again, that there was a trick againſt that to make a ſtrict ſettlement. That was meant; but to guard againſt all events, ſhe ſaid, "*I will put the father in my place*, and give "him authority, if he chooſe to execute it." If the words "in ſtrict ſettlement" had been uſed, no body could have doubted her meaning. Now all the words in the language, except thoſe, are uſed to carry this power as far as poſſible, and to ſhew that ſhe meant an appointment in ſtrict ſettlement. Whatever he might do with his own eſtate, he might do with this; that was her intention, only that the children were the objects. What is the uſe of powers? it implies a ſtrict ſettlement, with power to *make jointures, leaſes, and raiſe portions*. Partial objections have been made, which it is not material to go into; as, that the Duke of Devonſhire could

could not take a reverſion in this caſe; and *Alexander* v. *Alexander* was cited; in which caſe, the maſter of the rolls was of opinion that a reverſion could not be given. But why? Becauſe it was meant as a portion; but this was not ſo. Another objection was, that the power could not be delegated. That is a good maxim, but it does not apply to this caſe; for Lady *Burlington* did not fix the power of jointuring, but gave authority to the duke to give the power. He made the power, and therefore there is no delegation. On all the grounds we are of opinion with the defendant.

Ren, leſſee of Hall and others, v. Bulkeley, Mich Ter 5 Geo. 3. B.R. 1 *Doug.* 292.

If a tenant for life with power to grant leaſes in poſſeſſion for 21 years at the beſt rent, convey his life eſtate to truſtees to pay an annuity for his life, and the ſurplus to himſelf, the power is not thereby extinguiſhed, but he may ſtill grant a leaſe agreeable to the terms thereof.—On a motion for a new trial. The facts, as reported by the judge, appeared to be as follows:—In 1741, by the marriage-ſettlement of Lord *Onſlow*, the premiſes in queſtion were ſettled upon him for life, remainders over in ſtrict ſettlement, with a power to the tenant for life in poſſeſſion, to make leaſes, for any term not exceeding twenty-one years, to take effect in poſſeſſion and not in reverſion, reſerving the beſt rent that could be had without taking a fine. In 1754, Lord *Onſlow*, by leaſe and releaſe, conveyed all his life-eſtate to *Briſcoe*, and his heirs, upon truſt to apply the profits in the payment of an annuity of 150l. to *Wilſon*, during the life of Lord *Onſlow*, and the ſurplus to Lord *Onſlow*. The year following he conveyed all his eſtate to truſtees, for ninety-nine years, if he ſhould live ſo long, for the payment of his debts; but with an expreſs reſervation as to all leaſes granted, or to be granted. Afterwards, in 1760, he made a leaſe of the premiſes in queſtion, to *Lewin* (then in poſſeſſion as tenant at will), for twenty-one years, which leaſe *Lewin*, in 1774, aſſigned to *Hall*, one of the leſſors of the plaintiff. Lord *Onſlow* died in 1776, and, in 1777, the remainder-man who had come into poſſeſſion on his death, conveyed to the defendant. The ſame rent was reſerved by the leaſe to *Lewin* which he had paid for ſeveral years as tenant at will, and he had, beſides, covenanted for repairs. THE QUESTION now was, Whether the operation of the conveyance to *Briſcoe* was not ſuch as diſabled Lord *Onſlow* from making the ſubſequent leaſe to *Lewin*? Lord MANSFIELD: Powers came into the courts of common law with the ſtatute of uſes (1), and the conſtruction of them, by the expreſs direction of the ſtatute, muſt be the ſame as in courts of equity. The creation, execution, and deſtruction of them, de-

(1) 27 *Hen.* 8. c. 10.

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pend on the ſubſtantial intention and purpoſe of the parties. It is ſaid, 1ſt, That the grantor, in this caſe, was not in poſſeſſion, and that it was neceſſary that he ſhould be, to execute the power. But I think poſſeſſion here means the receipt of the rents and profits, which were applied to his uſe. If *actual* poſſeſſion were neceſſary, a leaſing power could never be executed where the land is in the hands of a tenant (1). 2dly, It is contended, that, by granting away his life-eſtate, he extinguiſhed the power. Certainly, where the whole life-eſtate is conveyed away by the intention of the parties, the power muſt be at an end, and cannot be afterwards exerciſed to the prejudice of the grantee. But the conveyance here was only to let in a particular charge, ſubject to which the rents and profits ſtill belonged to Lord *Onſlow*; and the leaſe could not prejudice the ſecurity, nor the remainder-man, for the beſt rent muſt be reſerved. It would therefore be contrary to the intention of all the parties, to hold that the power was extinguiſhed by the conveyance to *Briſcoe*. Rule diſcharged.

Buckland, executor of Elizabeth Barton *v.* Barton, Ea. Ter. 33 Geo. 3. C.B. 2 *Hen. Black.* 136.

A power of appointment by will, is not executed by a mere deviſe of the reſidue. This was an action of debt, on a bond conditioned for the payment of an annuity of 40l. a year to the teſtatrix during her life, "and alſo in caſe ſhe the ſaid *Eli-* "*zabeth Barton* ſhall happen to depart this life at any time "during or before the expiration of five years from the day "of the date of the abovewritten obligation, then, and in that "caſe, if he the ſaid *James Barton* (the defendant), his heirs, "executors, and adminiſtrators, or any or either of them, do "and ſhall well and truly pay, or cauſe to be paid, *to ſuch* "*perſon or perſons as ſhe the ſaid* Elizabeth Barton *ſhall in* "*and by her laſt will and teſtament in writing*, or in and by "any writing purporting to be her laſt will and teſtament, "to be by her ſigned and ſealed in the preſence of two or "more credible witneſſes, nominate, direct or appoint to "have or receive the full and juſt ſum of *one hundred pounds* "of lawful money of Great Britain, without any deduction, "defalcation, or abatement whatſoever out of the ſame, for "or on account or pretence of any matter, cauſe, or any thing "whatſoever, within the time or ſpace of ſix months next "after the time of the deceaſe of her the ſaid *Elizbeth*, then "the abovewritten obligation ſhall be void, *&c.*" The will of *Elizabeth Barton* referred to a former bond given by the defendant for the ſecuring her an annuity of 30l. a year, and which was afterwards cancelled, but took no notice of the bond in queſtion, or of any power of appointment; but the plaintiff relied on the following reſiduary clauſe, "And as to "all the reſt, reſidue, and remainder of my ready money,

(1) *Vide Goodtitle* v. *Funucan*, *ante*, p. 44.

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" perſonal eſtate, and effects whatſoever and whereſoever, not " hereinbefore given and diſpoſed of (except the ſum of 10l. " which I give and bequeath to *A. B.* to be paid to him by my " executor immediately after my deceaſe), I give and bequeath " the ſame to the ſaid *Marmaduke Buckland* (the plaintiff) for " his own uſe, *&c.*" A verdict having been obtained for the plaintiff, a rule was granted to ſhew cauſe why the verdict ſhould not be ſet aſide, and a nonſuit entered. AND PER EYRE, Lord Chief Juſtice: I cannot conſider the 100l. in this caſe, as any part of the wife's eſtate, and unleſs that point can be eſtabliſhed, it clearly cannot paſs under the deviſe of the reſidue. The caſe of *Peaſe* v. *Meade* (1) is directly in point, and the reaſon given by *Cook* in the report in *Godbolt*, is the true one, that if a man be bound to pay a ſum of money to the obligee or his aſſigns, there the executors ſhall have it, becauſe it was a *duty in the obligee himſelf.* So in the preſent caſe, if it could be ſhewn that there was a duty in the wife herſelf, that inſtance would be applicable; but ſhe was not to take, there was no duty in her, and therefore the money could not paſs to her aſſignee in law, it being in that character only, that her executor could claim it. For it is ſufficiently clear from the latter caſes, *Molton* v. *Hutchinſon*, 1 *Atk.* 558. *Ex parte Caſwell* 559, *Andrews* v. *Emmotts*, 2 *Brown. Rep. Chanc.* 297, cited by my brother *Le Blanc*, that a mere deviſe of the reſidue does not amount to an execution of a power of appointment. As to the caſes, where money ſo circumſtanced has been made aſſets in favour of creditors, thoſe caſes have been decided on principles peculiar to a court of equity; but deciſions in a court of equity afford no authority for a court of law, unleſs they proceed on legal grounds. It is a matter for a court of equity to ſupply the defective execution of a power, but all we can do, is to ſee whether the money paſſed to the executor, that is, whether it were part of the wife's perſonal eſtate. But there is no caſe which has gone that length, where a bond has been conditioned for the payment of money, to the nominee of a third perſon. The other judges were of the ſame opinion.

Withnell, clerk, v. Gartham, clerk, Tr. Ter. 35 Geo. 3 B. R. 6 *Ter. Rep.* 388.

Powers granted to ſeveral perſons.]—A power to appoint a ſchoolmaſter to an ancient foundation given to the vicar and churchwardens (of whom there were eleven), and in caſe of their neglect in appointing them to devolve to two corporate bodies in ſucceſſion, and to reſult in the

(1) In *Peaſe* v. *Meade*, *Godb.* 192. *Cook* made this diſtinction, " If I " be bounden to pay 10l. to the aſſignee of the obligee, and his aſſignee, " and his aſſignee makes an executor, and dieth, the executor ſhall not " have the 10l. But if I be bounden to pay 10l. to the obligee or his " aſſignees, there the executor ſhall have it, becauſe it was a duty in " the obligee himſelf."

dernier

dernier reſort to the ſame vicar and churchwardens, to whom alſo the general power of managing the truſt was committed, is well executed by the vicar and a majority of the churchwardens; eſpecially if ſuch an election be ſupported by uſage. In an action on two feigned iſſues to try whether the plaintiff or the defendant had been duly nominated and appointed ſchoolmaſter of the grammar ſchool of Skipton in Craven in the county of York, it appeared at the trial that the plaintiff claimed under an appointment by the vicar and a majority of the churchwardens of the pariſh of Skipton, and that the defendant claimed under an appointment by the maſter and fellows of Lincoln-college, Oxford, under a power, as they contended, devolved upon them in default of an appointment by the vicar and all the churchwardens of the pariſh of Skipton. And the only queſtion was, Whether it was neceſſary for all the churchwardens to concur with the vicar in the appointment, or whether the concurrence of the majority of the churchwardens was ſufficient? Both parties claimed under an indenture dated 1ſt September, 1548; whereby *William Ermyſted* clerk and canon reſidentiary of St. Paul's, London, did give grant and convey to thirteen truſtees therein named and their heirs all his meſſuages lands and tenements in Ardyngam therein deſcribed to their uſe, to the intent that they ſhould take and receive the rents and profits thereof, and yearly apply the ſame as in a certain ſchedule thereto annexed was mentioned. By this ſchedule the founder ordained that there ſhould be for ever a grammar ſchool in Skipton in a houſe which he had lately purchaſed there, and a ſchoolmaſter thereof; and after giving a power of amotion in caſe of miſbehaviour of the ſchoolmaſter in certain caſes to the vicar of Skipton and his ſucceſſors together with the guardians of the church for the time being, he gave the power of appointment in theſe words; "Item volo et ordino "quod jus nominandi ordinandi et preſentandi habilem et "idoneum capellanum ad dictum ſervitium pedagogi ut præ- "mittitur exercendum pertineat ad prædictum vicarium *T.* "*I.* et ſucceſſores ſuos et ad guardianos eccleſiæ prædictæ "pro tempore exiſtentes. Item quod benè licebit eiſdem "toties quoties ſervitium prædictum vacaverit unum capella- "num habilem et idoneum ad dictum ſervitium ut præmitti- "tur exercendum nominare præſentare admittere inducere et "imponere. Item volo et ordino quod quoties contingit "eoſdem vicarios et alios ſupradictos pro tempore exiſtentes "in hujuſmodi nominationis et ordinationis negotio eſſe neg- "ligentes ita quod infra menſem unum à tempore ceſſationis "officii prædicti continuè numerandum nullum habilem et "idoneum capellanum ad idem ſervitium ut præmittitur no- "minent et imponant, tunc quod toties incontinentur vigore "hujus preſentis ordinationis et voluntatis meæ jus nomi-

" nandi admittendi inducendi et imponendi unum habilem et " idoneum capellanum eâ vice ſicut alias cum conſimilis caſus " et negligentia prædictorum vicariorum et aliorum ſe ob- " tulerit, et non aliter, ad rectorem ſive magiſtrum *Lin-* " *colnienſis* collegii in *Oxoniâ* doctorem *Weſton* et ſocios ejuſ- " dem collegii et ſucceſſores ſuos hoc pacto et eâ lege de- " volvatur. Et ſi prædictus magiſter ſive rector et ſocii col- " legii ſupradicti in hujuſmodi nominationis negotio negli- " gentes fuerint, ita quod nullum habilem et idoneum capel- " lanum nominent et imponant ad idem ſervitium ut præmit- " titur exercendum per unum menſem poſtquam ad eorum " notitiam pervenerit, de defectu et negligentiâ prædictorum " magiſtri ſive rectoris et ſucceſſorum ſuorum, tunc volo et " ordino quod jus nominandi et imponendi unum habilem et " idoneum capellanum ad officium prædictum ad decanum et " capitulum eccleſiæ cathedralis *Sancti Pauli London* eâ vice " et non alias devolvatur; ita quod illis benè licebit in tali " caſu unum habilem et idoneum capellanum ad dictum ſervi- " tium nominare et imponere; quos ſi contingat fore negli- " gentes in hujuſmodi negotio poſt habitam per eoſdem noti- " tiam de defectu ſuperiorum per unum menſem integrum, " tunc volo et ordino quod jus nominandi unum habilem et " idoneum capellanum ad dictum ſervitium exercendum ad " præfatos vicarios *T. I.* et ſucceſſores ſuos et guardianos ſu- " pradictos pro tempore exiſtentes in perpetuum revolvatur." There was alſo a power given to the vicar and his ſucceſſors and the guardians of the church for the time being, in caſe of the illneſs of the ſchoolmaſter for upwards of a year, to provide a ſubſtitute, who was to have half the ſalary, and the ſchoolmaſter the other half. The power of demiſing was alſo given " ad præfatos vicarios *T. I.* et ſucceſſores ſuos " ibidem et guardianos eccleſiæ de Skipton prædictos pro " tempore exiſtentes et capellanum ſcolæ prædictæ guberna- " cula prædicta tenentes; ita quod emolumenta inde collecta " per eoſdem expendantur ad reparationem et ſuſtentationem " dicti magiſtri et dictæ ſcolæ de tempore in tempus in per- " petuum." It appeared at the trial that there had always been eleven churchwardens in the pariſh of Skipton; and the jury found as a fact that the uſage had been to appoint by the vicar and a majority of the churchwardens; and they accordingly found a verdict for the plaintiff, who claimed under ſuch an appointment. A NEW TRIAL BEING MOVED FOR in order to obtain the opinion of the Court upon this caſe, and a rule niſi granted. On ſhewing cauſe againſt the rule: THE OBJECTION urged againſt the plaintiff's title was, that a majority only of the churchwardens concurred with the vicar in the appointment, whereas the conſent of all of them was neceſſary. Lord KENYON Ch. J. It is ſometimes difficult to get rid of firſt impreſſions; and from the time when this

this case came before the Court the first time (1) down to the present moment I have had no doubt in my mind about it. Upon reading the deed itself, perhaps, it may be said to be a little in dubio whether these churchwardens should or should not be considered as a corporation for this purpose. In the course of the argument the defendant's counsel said that *the churchwardens of a parish are a corporation for a particular purpose, namely, to take care of the goods of the church:* but speaking in legal language that is not so; *they are in that case only quà a corporation.* If they were a corporation, actions should be brought against them in their corporate name, and any damages recovered against them would be recoverable out of their corporate estate: whereas all actions must be brought against them in their individual names, for they have no corporate name; damages must be recovered against them personally, and not to be paid out of their corporate estate, for they have none; and if they go out of office before the action is concluded, it does not survive and go to their successors. Therefore I take it that they are quà a corporation only. It has been said that according to some of the old cases there is a difference between those cases where a power is given to persons nominatim, and those where it is given to them by the name of their office; that in the latter, the survivors may act though some of the original persons are dead, though when they are mentioned by name they cannot: as far as that distinction goes, it is in support of our determination in this case. But the whole of that doctrine is founded on law, which was perhaps a little doubtful in its origin, and was the occasion of making the statute 21 *Hen.* 8. c. 4. For it appears by the preamble that that act was passed rather to remove doubts than to make a new law: it recites that such a sale of lands "after the opinion of divers persons can in no wise be good or effectual in the law, &c." The observations that have been made on the deed of foundation by the plaintiff's counsel have great weight with me, particularly that on the word *negligence.* If the vicar and churchwardens of the parish do not appoint within the time limited, the right of appointing goes to Lincoln-college, Oxford, then to the dean and chapter of St. Paul's, and at last it returns to the same vicar and churchwardens; and I cannot forbear laying some stress on the last devolution; for it comes back to the vicar and churchwardens in perpetuum; and if they cannot all agree in such a case, how is it to be decided? And in the other cases of deprivation and of sickness, the office is to be filled by this body alone, without any devolution on any other

(1) This case first came before the Court on a motion for a mandamus to the Archbishop of Canterbury to license the plaintiff; and on arguing that rule, the Court directed these issues.

body. I alſo lay ſtreſs on the words by which the power is given to this body; it is given to them "and their ſucceſſors," which rather applies to corporations than to individuals. Then as this body are quà a corporation for ſome purpoſes, it ſeems to me to have been the founder's intention, collecting that intention from the deed itſelf, that the nomination to this ſchool ſhould be by the vicar and the majority of the churchwardens. If this be not ſo, how is the next power of nominating given to Lincoln-college in their corporate capacity; the college is incorporated for certain purpoſes, for the good government of the youth committed to their care, &c.: but they are not a corporation for all purpoſes; and if this power of nomination devolved on the college the ſame objection that is made to the appointment of the plaintiff might be made to a nomination by them, if the maſter and fellows did not all agree. I am now giving my opinion in the abſence of two of my brethren: but they had heard almoſt the whole of the argument on behalf of the defendant, and as far as they could form an opinion, I have their authority for ſaying that they agree in this conſtruction of the deed. And my brother *Groſe* ſaid that he was particularly ſtruck with the obſervation that the power given to this body was claſſed with the ſame power given to other bodies who act by its majority; and that the rule, noſcitur à ſociis, was applicable to this caſe, as affording a clue to the intention of the founder. Thus my opinion is formed, without reſorting to the uſage; but I think that alſo is important. It is inſiſted, however, that we ought to reject the uſage in this caſe, not only becauſe the inſtances given in evidence were not as ancient as the deed, but becauſe alſo no uſage can be let in to explain a private deed. If the firſt reaſon were ſufficient to reject the uſage, I do not know how far ſuch an objection might extend. In many caſes a party undertakes to prove a cuſtom from the time of legal memory, the reign of *Richard* the Second; but that proof is generally eſtabliſhed by evidence of acts done at a much later period, and frequently no evidence is given beyond the preſent century. And of courſe the ſame ſtrength of evidence is ſufficient in this caſe. And it is enough to ſay in this caſe that the jury found it as a fact that the uſage was in favour of the plaintiff. Neither is there any difference in this reſpect between a private deed and the king's charter: in both caſes evidence of uſage may be given to expound them. If there were any difference, it would rather operate againſt the defendant; for the king's grants are not conſtrued ſtrongly againſt the grantor as private deeds are; and yet uſage is admitted in that caſe. On the whole I am clearly of opinion that the nomination of the plaintiff by the vicar and the majority of the churchwardens was a valid nomination; and if the defendant be diſſatisfied with our determination, he may carry

carry this queſtion up to the Houſe of Lords by inducing the attorney-general to file an information in the court of Chancery. LAWRENCE, J. The reaſons given by Lord *Kenyon* ſufficiently ſhew that it was the intention of this founder that the right of nomination ſhould be in the vicar and the majority of the churchwardens. *In general it would be the underſtanding of a plain man that, where a body of perſons is to do an act, a majority of that body would bind the reſt.* It is clear that if there be any ambiguity in this deed, uſage is admiſſible to explain it. And the argument of convenience from this or that conſtruction of a deed creates that ſort of ambiguity that ſhould be explained by referring to uſage. So Lord *Hardwicke* thought in the caſe of *the Attorney-General* v. *Parker*, where great inconvenience would have ariſen from conſtruing the word "inhabitants" in its full ſenſe; and he ſaid that "in "the conſtruction of ancient grants and deeds there is no "better way of conſtruing them than by uſage, and *contem-* "*poranea expoſitio* is the beſt way to go by." As the uſage in this caſe has been found by the jury, we are to take it to have prevailed from the time when the deed was made. And though it is contended that it ought not to be concluſive on Lincoln-college, there is no reaſon why they ſhould not be bound by it; for if this uſage has at all times prevailed ſince the ſchool was founded, inſtances muſt have occurred in which they had an opportunity of diſputing it, if they had thought proper; and having always acquieſced, they are now concluded by it. Rule diſcharged.

If a power of a public nature be committed to ſeveral, who all meet for the purpoſe of executing it, the act of the majority will bind the minority.—This was treſpaſs for ſeizing, detaining, and converting certain hides of leather, the property of the defendants. The plea juſtified the ſeizure and detainer, for that after the making of 1 *Jac.* 1. c. 22, entitled an act concerning tanners, curriers, ſhoemakers, and other artificers occupying the cutting of leather to wit, on, &c. *John Barker*, *John Pym*, *Robert Pownds*, and *John Matthiſon* (the defendants), and alſo *Henry Matchwick*, *John Thomas Wolley*, *Thomas Slack*, and *Thomas Mead*, were duly appointed ſearchers to view and ſearch all and every tanned hide, ſkin, or leather which ſhould be brought as well to the market at Leadenhall, as to any other fair or market within three miles of the city, of whom the ſaid *Thomas Mead* was duly appointed a ſealer, &c.; and that afterwards and while they continued ſuch ſearchers, &c. the ſaid hides of tanned leather above mentioned were offered and put to ſale by the plaintiffs, &c.; and that the ſaid hides had not after the tanning thereof been well and thoroughly dried, &c. wherefore the ſaid defendants ſeized, &c. &c. in order that the Lord Mayor might appoint triers for the trying of the ſame, according to the directions

Grindley and another v. Barker and others, Ea. Ter. 38 Geo. 3. C.B. 1 *Pul.* & *Bos.* 229.

of the ſaid ſtatute, to wit, at &c. which is the ſaid treſpaſs, &c. And this, &c. Wherefore, &c. THE REPLICATION tendered iſſue on the fact of the hides not being well dried, and newly aſſigned, that after the ſeizure, the ſaid mayor did appoint ſix men, to wit, *Joſeph Lacey*, *George Murray*, *Edmund Sylveſter*, *Samuel Norris*, *Samuel Brooks*, and *William Webſter*, triers for the trying, amongſt others, of the ſaid hides ſo ſeized as aforeſaid; which ſaid ſix perſons did on, &c. enquire, examine, and try whether the ſaid hides were ſufficiently ſerviceable or not. And that upon ſuch inquiry, the ſaid *S. B.* and *W. W.* differed from the four other triers with reſpect to the verdict which ought to be given concerning the ſaid hides, and the ſaid *S. B.* and *W. W.* then and there refuſed to find the ſame inſufficient or unſerviceable, and the ſaid hides were found and returned inſufficiently dried, and accordingly condemned by the ſaid *J. L.*, *E. S.*, *G. M.*, and *S. N.* only, without the concurrence of, and in oppoſition to, the ſaid *S. B.* and *W. W.* Of all which premiſes the ſaid defendants afterwards and before the commencement of this action, to wit, on, &c. at, &c. had notice. And the ſaid plaintiffs further ſay that they brought this action not only for the treſpaſſes in the introductory part of the plea mentioned and thereby attempted to be juſtified, but alſo for that the ſaid defendants after the ſaid *S. B.* and *W. W.* had refuſed to find the ſaid hides of tanned leather to be inſufficient or unſerviceable, and alſo after the ſaid defendants had ſuch notice as aforeſaid, to wit, at, &c. kept and detained the ſaid hides for a long ſpace of time, to wit, &c. and converted, &c. &c. which ſaid treſpaſſes above newly aſſigned are other and different, &c. wherefore, &c. The pleas to the new aſſignment were: 1ſt, Not guilty. 2dly, That the defendants being ſuch ſearchers, and having ſo as aforeſaid ſeized the ſaid hides, &c. afterwards and after the ſame had been found by the triers, and the ſaid plaintiffs had by reaſon thereof forfeited the ſame, the defendants kept and detained the ſame in order that the ſaid hides ſo forfeited, might be brought to *Guildhall* there to be prized by indifferent perſons as by the ſtatute directed, &c. &c. and this, &c. wherefore, &c. General demurrer and joinder. This demurrer was twice argued; AND FOR THE PLAINTIFFS IT WAS ARGUED, that by the preamble of 1 *Jac.* 1. c. 22. it appears that the former ſtatutes upon this ſubject had been too ſharp and rigorous, and that the legiſlature intended that the goods of the ſubject ſhould not be condemned *unleſs by the concurrent opinion of the three branches of the trade*, *viz.* the tanner, the currier, and the cordwainer, or at leaſt by a majority compoſed of perſons in thoſe three branches of the trade. That the 33d ſect. of the act by which the triers are appointed, following up the idea of the preamble which had expreſſed that the trade had been oppreſſed by ſome laws

that

that were too rigorous, enacts that to the end there might be an indifferent trial, the triers ſhould be ſelected two from each branch of the trade, and very much aſſimilates them to a jury; they are not to be of kin or affinity to the owner of the leather, and they are upon their corporal oaths "to enquire, "ſtraightly examine, and try." *That it is not unreaſonable to ſuppoſe that the legiſlature intended all ſix to be unanimous, when the common law has in the caſe of a jury required the unanimity of twelve.* But ſuppoſing that a majority of the triers might decide, ſtill as the legiſlature had anxiouſly compoſed this tribunal of the three branches of the trade, whoſe united ſkill and experience would beſt enſure a juſt verdict; that majority muſt be compoſed of one at leaſt of each of thoſe three branches; whereas upon the preſent pleadings it appears that the condemnation in queſtion was made by the two curriers and the two cordwainers, excluſive of the two tanners. That there is no inſtance in which the majority of a number of perſons appointed to try a fact can determine the queſtion. In the courts of law, though a majority of the judges decide, ſtill they decide upon a queſtion of law and not of fact, which makes a material diſtinction. Nor is there any analogy between this and the caſe of corporations; whoſe acts are either legiſlative or miniſterial, relate to their own intereſts only, and do not take away the rights of other perſons, as the act of the majority in this inſtance does. That in the caſe of elections the majority muſt of courſe bind the reſt. Generally ſpeaking, however, where any number of perſons are appointed to do a particular act, they muſt all join. Thus in the *King* v. *Hobbes*, *Noy*. 47, where a commiſſion made out to ſix, four, or two, was executed by three, the execution was held void, and *Co. Litt.* 181. *b.* was there cited (1). That it is obſervable alſo that where any number of perſons are appointed by act of parliament, the majority of whom are intended to act, it is always ſo expreſſed.

EYRE, Ch. J. The true queſtion in this caſe lies in a very narrow compaſs; it is this: What is the operation in law of a judgment of four out of ſix triers, ſix being the number conſtituted to be the triers, and the ſix being aſſembled to enquire and try; whether it is to be deemed the finding and judg-

(1) A caſe decided in K. B. about three years back, of —— v. *Bland* was mentioned: that was an action on a bond given by the defendant as ſecurity for a collector of the rates in St. Andrew's, Holborn; the local act had directed that the collector ſhould be nominated by the commiſſioners, five of whom ſhould be a quorum; the collector was elected by three, and it was held on a motion for a new trial that the ſurety was not liable, as the collector was not duly appointed. But *Eyre*, Ch. J. ſaid, that if the appointment had been made by three, at a board conſiſting of five, he ſhould have thought the appointment good.

ment of the body, or merely the finding and judgment of the four individuals who concurred? If it is the mere finding of the four who concurred, then this leather is not found insufficient; but if the operation of law on the finding of four, who are the majority of the body duly assembled, be, that their judgment is the judgment of the whole, and therefore the judgment of the triers, then the leather must be taken to have been found insufficient, and the defendants are justified. On the first argument, I thought this question would turn on two general heads of enquiry. 1st, What the general rule of law was in the case of bodies of men entrusted with powers of this nature; whether they must all concur, or whether the decision of the majority would bind the whole? 2dly, Supposing the latter to be the general rule, whether that general rule is to be controlled by the intent of the legislature as collected from the scope and provisions of this act?

With respect to the first question, I think it is now pretty well established, that where a number of persons are entrusted with powers not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole. The cases of corporations go further: there it is not necessary that the whole number should meet; it is enough if notice be given; and a majority, or a lesser number, according as the charter may be, may meet; and when they have met, they become just as competent to decide as if the whole had met. With a view to this case, those who have met resemble the six triers who have authority to decide: and then a question arises, how they may act when they have met. The case of the *Attorney-General* v. *Davy*, 2 *Atkyns*, 212 (where it was decided in the case of a corporation, that a majority may act though nothing be mentioned in the charter of the major part), shews the opinion of a great judge, Lord *Hardwicke*, who was much conversant with this subject in one part of his judicial life, that the majority of persons assembled will conclude the minority, and an act done by them will be the act of the whole body. And that part of the law of corporations applies to this case; that with regard to powers not merely private, which are to be exercised by many persons, provided a sufficient number be assembled, the act of the majority concludes the minority, and becomes the act of the whole body. If that be so, the argument drawn from the word, "triers," being used generally, in the 33d section, will not stand much in our way: because the judgment of four triers in this case is the judgment of all, as much as if all had concurred. There is nothing then in the general rule of law to prevent this finding from being held good. But the question is still open, Whether, on the construction of this particular statute, it does not appear that not only

only all the perſons muſt be aſſembled, but that every one of them ſhould concur, or at leaſt that one of each claſs ſhould concur? There was ſomething very plauſible in that laſt argument, but I am now clearly ſatisfied, either that all muſt concur, or that a majority may decide for the whole. There is nothing in the act which neceſſarily leads to a conſtruction, that the majority muſt be compoſed in any particular manner. With regard to the general queſtion, it has been argued moſt weightily, that as the leather might be ſeized in all the ſtages of the manufacture, it was right that the authority which was to determine ſhould be delegated to perſons of all the different trades, in order that the body might be aided and aſſiſted by the united experience of all the branches, whenever the inquiry ſhould come before them. But it ſtruck me, that when the body was ſo conſtituted and had aſſembled, and could have the aſſiſtance of the united experience of all, the neceſſity of all concurring in the final judgment was not ſo apparent, and might be attended with inconvenience. It is, indeed, a truth, that in a body compoſed of three claſſes of trade, thoſe who are of the particular trade of which the owner of the goods happens to be, may feel an inclination to favour the members of their own trade, and may heſitate to condemn, when they themſelves might be liable to condemnation the next time. And this might be attended with a great deal of inconvenience, ſince the ſearchers are obliged to execute a public duty, and the validity of their acts muſt depend upon the judgment of the triers(1). It ſeems better that when all the knowledge which each claſs can afford has been communicated, the whole ſhould be governed by the majority. This caſe has been compared to the caſe of juries, and in many reſpects it is analogous; but in an abundance of particulars it is unlike. On the abſtract queſtion, it has often been debated, whether there is policy and good reaſon on the ſide of the rule which requires unanimity in a jury. However good, therefore the rule may be found in practice, when applied to juries, yet if it be doubtful in theory, we ought not to force the analogy, and apply the rule to other caſes where it may be found inconvenient. It is impoſſible that bodies of men ſhould always be brought to think alike: there is often a degree of coercion, and the majority is governed by the minority, and *vice verſâ*, according to the ſtrength of opinions, tempers, prejudices, and even intereſts. We ſhall not, therefore, think ourſelves bound in this caſe by the rule which holds in that. I lay no great ſtreſs on the clauſe of the act which appoints a majority to act in certain caſes, becauſe that appears to have been done for particular reaſons which do not apply to the ultimate trial: it relates only to the aſſembling the ſearchers;

(1) *Warne* v. *Varley*, 6 *Term Rep.* 443, *ante*, p. 103.

now

now there is no doubt that all the ſix triers muſt aſſemble; and the only queſtion is, what they muſt do when aſſembled? We have no light to direct us in this part, except the argument from the nature of the ſubject. The leather being ſubject to ſeizure in every ſtage of the manufacture, the tribunal ought to be compoſed of perſons ſkilful in every branch of the manufacture. And I cannot ſay there is no weight in the argument, drawn from the neceſſity of perſons concurring in the judgment, who are poſſeſſed of different branches of knowledge, but ſtanding alone it is not ſo concluſive as to oblige us to break through a general rule: beſides, it is very much obviated by this conſideration, that when all have aſſembled and communicated to each other the neceſſary information, it is fitter the majority ſhould decide than that all ſhould be preſſed to a concurrence. If this be ſo, then the reaſons drawn from the act, and which have been ſuppoſed to demand, that the whole body ſhould unite in the judgment, have no ſufficient avail, and conſequently the general rule of law will take place; viz. that the judgment of four out of ſix being the whole body to whom the authority is delegated, regularly aſſembled and acting, is the judgment of all.

Buller, J. This is a caſe in which ſix perſons are united together as one body, and are required by the act to form an opinion. They are not permitted to ſay we will form no opinion, but they muſt decide whether the leather be ſufficient and ſerviceable or not. Four of them expreſsly decide that it is not; the other two do not agree in that finding, but they do not diſſent: and I take it, that in ſuch a caſe, where the law compels perſons convened under an oath to form an opinion, if any of them do not pronounce againſt the opinion of the majority, they find for it. If that be ſo, it puts an end to this caſe, for if it is to be underſtood, upon this record, that this judgment has the effect of a judgment of the ſix triers, no queſtion remains to be conſidered. But upon the act two queſtions ariſe: 1ſt, Whether all the ſix triers muſt concur in their judgment, or whether a majority are ſufficient to decide? 2dly, If a majority can decide, what that majority muſt conſiſt of? Now it ſeems to me, that upon the firſt queſtion the authority of *Co. Litt.* if we went no further, is deciſive; becauſe it is there ſaid, in expreſs terms, that in matters of public concern the voice of the majority ſhall govern. It is to be remembered, that not a ſingle caſe, not a dictum has been quoted on the other ſide of the queſtion, and that this ſtands wholly uncontradicted. In the next place, I think there is great weight in ſome of the caſes which have been mentioned. *Wittnell* v. *Gartham* was ſaid to have been decided upon three different grounds: 1ſt, Upon the founder's intent; 2dly, on a reſemblance to the caſe of corporations; and 3dly, upon uſage. One thing is clear from this authority, that a deed

which

which ſpeaks in general terms, giving a power to a certain number of perſons, does not neceſſarily import that all theſe perſons ſhall concur, becauſe if that were neceſſarily the legal conſtruction of the deed, uſage would be laid out of the queſtion. Then we have got thus far upon this caſe, that a deed which gives a power to a certain number of perſons, may admit of two conſtructions; either that all muſt join in the act, or that the majority may do it; in no other way could uſage be admitted: uſage being admitted, it certainly had its effect in that caſe. The caſe, therefore, is open to the argument of inconvenience, which was ſlightly touched upon: for if the act admits of two conſtructions, certainly the argument of inconvenience applies. Now, if it be neceſſary that all ſhould concur, one man may deſtroy the determination of five, though that one may be the leaſt qualified of the whole ſix to judge; and the conſequence will be, that if the defect be in the tanning of the leather, and by the tanners' and the cordwainers' opinions be pronounced inſufficient, yet if one currier declare it to be ſufficient, the judgment of the others will not avail.—Why, that is unreaſonable upon the face of it, and therefore ſuch a conſtruction cannot be adopted. It ſeems to me, therefore, upon the whole view of the caſe, that the majority of the ſix muſt decide. With reſpect to that majority being compoſed in any particular way, I can ſee nothing in the ſtatute which warrants ſuch an idea.

Heath, J. was of the ſame opinion; and ſaid, though we have no particular deciſions directly in point, yet there are ſome uſages and ſome received opinions which are equivalent to deciſions. We know very well that in all commiſſions of oyer and terminer and gaol delivery, and of the peace, where a quorum is conſtituted, and it is neceſſary that a quorum ſhould be preſent to do the acts for which they are appointed, yet if the quorum are in the minority, the majority ſhall conclude the minority.

Rooke, J. I might reſt ſatisfied with deciding on the particular circumſtances of this caſe; and if I did, I ſhould agree, that after the authority of the *King* v. *Foxcroft*, 2 *Burr.* 1017. four having abſolutely found in this caſe, and the two others having only refuſed to concur, will amount to a finding by the whole body. But as that might lay a ground for further litigation, I think it right to be more explicit. I think the words of the ſtatute are at leaſt doubtful, and I am warranted in ſo thinking ſince the counſel have not confined themſelves to contending that the whole body muſt concur, but either the whole body or one of each claſs. The latter conſtruction ſeems extremely queſtionable, ſince the act makes no mention of the three claſſes, which in ſ. 24. appoints triers for the country, though they are to examine and try in the ſame way as thoſe in London. The authority given to the triers in the preſent inſtance

is

is general, to examine and try whether certain goods are ſerviceable or not, and is committed to them for the advancement of public juſtice, and as a public truſt. Now the deciſions are numerous (and may be found in *Viner*, title *Authority*, letter B) to ſhew that a different conſtruction prevails with reſpect to private authorities and authorities for the advancement of public juſtice. So alſo *Lambard*, in his Juſtice of the Peace, ſtates expreſsly, that where a precept for keeping the peace is made jointly to twain, one alone may ſerve and execute that precept; following the rule laid down in *Co. Litt.* 181. *b.* If this be the caſe, and we are not bound by the ſtrict words of the act (which it ſeems agreed we are not), but are to give the clauſes ſuch a conſtruction as will beſt advance the ends of public juſtice, there can be very little doubt how we ought to decide. We ſhall not advance public juſtice by ſaying, that though a majority of the triers who have had the advantage of all the information to be derived from the whole ſix who compoſe the tribunal, are of opinion that the leather is unſerviceable, ſtill any one man ſhall have it in his power to prevent a finding by holding out againſt the reſt. All ſix muſt undoubtedly try; but it does not, therefore, follow that they muſt all decide the ſame way. Each man is, after due examination and enquiry, to decide according to the beſt of his judgment, and the queſtion is to be determined by the opinion of the majority.—Judgment for the defendants.

A TABLE

A

TABLE

OF

THE PRINCIPAL MATTERS

CONTAINED IN

THIS VOLUME.

ABANDONMENT.

See MARINE INSURANCES, No. 8.

ABATEMENT.

If an action be brought within the time limited by a ſtatute, and it abate by the death of the defendant, it muſt be revived againſt the heir or repreſentative within the ſame time of limitation. *Knight* v. *Bate.* 150

See alſo ANCIENT DEMESNE.

ACTION.

1. If *A.* tenant for life, ſubject to forfeiture, with remainder over to *B.* grants a leaſe to *C.* for a term of years, and afterwards, apprehending that he has forfeited, acquieſces in *B.*'s claiming and receiving the rent from *C.* the executor of *A.* may, on ſhewing that he acquieſced under a falſe apprehenſion, and that his intereſt was not in point of fact forfeited, recover from *C.* the amount of the rent erroneouſly paid to *B.* *Williams* executor of *Elizabeth Breedon* v. *Bartholomew.* 3

2. Searchers of leather, appointed under ſtat. 2 *Jac.* 1. c. 22. are authorized to ſeize leather *inſufficiently dried,* in order to carry it before other officers, called triers; but they cannot ſeize any leather which is ſufficiently dried, *though in their judgment it be not ſo*; and if they do they are liable to an action of treſpaſs. *Warne* v. *Varley, and two others.* 103

3. An action will lie for publiſhing any thing in writing, which tends to render another ridiculous. *Villers* v. *Monſley.* 110

4. A letter written to a third perſon calling the plaintiff *a villain,* was held actionable without proof of ſpecial damage. *Boll* v. *Stone.* 111

5. If *A.* and *B.* have a general running account, conſiſting of bills drawn by *B.* and *C.* in favour of *A.* and of bills and other ſecurities depoſited by *A.* and *B.*; and, upon the failure of *B.* and *C.*, *A.* be obliged to take up the bills received by him from *B.* whereby the balance of the accounts is in favour of *A.* ſtill he cannot maintain trover for the bills depoſited by him with *B.* unleſs they were ſpecifically appropriated to anſwer

swer *B.*'s drafts on *C.* in favour of *A.* and depositted for that purpose expressly. *Bent*, et al. v. *Puller*, et al. *Assignees of Caldwell and Co.* 145

6. Actions for use and occupation cannot be maintained in the court of Conscience in London. *Woolley* v. *Cloutman.* 202

7. In an action for a libel written in a foreign language, the plaintiff must set forth the libel in the original; and, if he only set out a translation of it, the court will arrest the judgment. *Zenobio* v. *Axtell.* 127

8. The plaintiffs, together with *A.* and *B.* being owners of one ship, and the defendant of another, a prize was taken, condemned and shared by agreement between them; afterwards the sentence of condemnation was reversed, and restitution awarded, with costs, which was paid solely by the plaintiffs. *A.* and *B.* having in the mean time become bankrupts; it was held that an action could not be brought by the plaintiffs alone for a moiety of the restitution money and of the costs, because it was either a partnership transaction, when *A.* and *B.* ought to be joined; or not, when separate actions should be brought by each of the persons paying. *Graham* et al. v. *Robertson.* 628

ADMINISTRATORS.

See EXECUTORS.

AGENT.

See MARINE INSURANCES, No. 11. PARTNERS, No. 3.

AGREEMENT.

1. An agreement to grant a lease, whereby the lessor did let and set for twenty-one years from a future day, shall be a lease *in præsenti*, if the circumstances shew the party's intent so to be. *Baxter* ex dim. *Abrahall, esq.* v. *Browne.* 73

2. A subsequent agreement may, by relation, operate to make a reservation of rent from the beginning. *M'Leish* v. *Tate.* 87

ALIENS.

The statute of limitations can never begin to run against a plaintiff who is a foreigner until he comes into this realm. *Strithorst* v. *Graeme.* 154

AMENDMENT.

See CORPORATIONS, No. 7.

ANCIENT DEMESNE.

Ancient demesne must be pleaded within the first four days of the term. *Denn* ex dim *Wroot.* v. *Fenn.* 728

ANNUITY.

In debt, on an annuity bond, defendant pleaded *no such memorial as the statute requires*, to which plaintiff replied, that there was a memorial which contained the names of the parties, &c. *and the consideration for which the annuity was granted*, and the defendant rejoined that the consideration is untruly alleged by the memorial to have been paid to both obligors, for that one of them did not receive any part of it. To this there was a special demurrer; and joinder in demurrer. And it was held that the rejoinder was bad on two grounds: 1st, That it was a departure from the plea; 2dly, That it alleged no matter inconsistent with the allegations in the memorial. *Praed* v. *The Duchess of Cumberland.* 765, 766

APPRENTICE.

An indenture executed by the defendant, in which it is recited that one had put himself apprentice to the defendant, is evidence against the defendant that the apprentice executed the other part of the indenture. *Burleigh* v. *Stubbs.* 711

ARREST.

A party having a mortgage and also a bond, as a security for the same debt, may bring an action on the bond, and arrest the defendant, pending a suit in equity for a foreclosure. *Burnell* v. *Martin.* 512

ASSAULT.

To trespass for an assault and battery, the defendant may plead that the plaintiff with force and arms and with

with a ſtrong hand endeavoured forcibly to break and enter the defendant's cloſe, whereupon the defendant reſiſted and oppoſed ſuch entrance, &c. and if any damage happened to the plaintiff it was in the defence of the poſſeſſion of the ſaid cloſe. *Weaver* v. *Buſh.* 730

See alſo NEW TRIAL.

ASSIGNMENT.

1. A covenant not to *aſſign, tranſfer, ſet over, or otherwiſe do or put away the leaſe or premiſes,* does not extend to an under-leaſe granted for part of the term. *Cruſoe* ex dim. *Blencowe* v. *Bugby.* 92

2. But if a leaſe contain a proviſo, that the leſſee and his adminiſtrators ſhall not *ſet, let,* or *aſſign over,* the adminiſtratrix of the leſſee cannot underlet without incurring a forfeiture. *Roe* ex dim. *Gregſon, widow,* v. *Harriſon.* 93

3. If a leſſee covenant not *to underlet* without conſent of the leſſor, under *hand and ſeal,* with a power of reentry in caſe of a breach, acceptance by the leſſor, of rent due after the condition broken, with full notice, is a waiver of the forfeiture. *Goodright* ex dim. *Walter* v. *Davids.* 96

4. And if a leſſee, who has covenanted not "*to let, ſet, aſſign, tranſfer, make over, barter, exchange, or otherwiſe part with the indenture,* &c." with a proviſo that the landlord may, in ſuch caſe, re-enter, gives a warrant of attorney to conſeſs judgment; on which the leaſe is taken in execution, and ſold; it is no forfeiture of the leaſe. 97

5. *But where the warrant of attorney is given fraudulently for the expreſs purpoſe of aſſigning the leaſe it is otherwiſe.* See *Doe* ex dim. *Mitchinſon* v. *Carter,* 8 *Ter. Rep.* 300 under title LEASES, in the general appendix to this work.

6. The future half pay of an officer is not aſſignable. *Lidderdale* v. *Duke of Montroſe.* 551

7. An aſſignment of a choſe in action need not be by deed. *Howell* v. *Mac Ivers.* 759

ASSIGNEE.

The declaration being againſt the defendant as aſſignee of *all* the *eſtate,* &c. in certain premiſes: and the evidence that he was aſſignee of *part only;* was held to be a *fatal variance. Hare* v. *Cator.* 705

ATTACHMENT.

1. An attachment of privilege, though informal, being returnable on a general return, is a ſufficient commencement of an action to avoid the ſtatute of limitations. *Leadbetter, executrix,* v. *Markland adminiſtratrix.* 154

2. But an attachment of privilege is not a continuance of a bill of Middleſex, ſo as to avoid the ſtatute of limitations. *Smith* et al. v. *Bower.* 155

ATTORNEY.

In an action againſt the defendant for negligence as an attorney, in not proſecuting a debtor of the plaintiff's to judgment, the return of the writ on which the debtor was arreſted, being laid to be in the 25th year, &c. and the writ itſelf appearing to have have been returnable in the 24th year, &c. was held to be a fatal variance; even though the day of the return was alleged in the declaration under a *videdicet. Green* v. *Rennett.* 701

AUCTION.

See PLEADING, No. 11.

AUTHORITY.

1. On the diſſolution of a partnerſhip between *A., B.* and *C.* a power given to *A.* to receive all debts owing to, and pay thoſe owing from the late partnerſhip, does *not authorize* him to *indorſe a bill of exchange in the name of the partnerſhip,* though drawn by him in that name, and accepted by a debtor of the partnerſhip, after the diſſolution: ſo that the indorſee *cannot maintain an action on the bill* againſt *A., C.* and *B.* as partners. *Kilgour* v. *Finlyſon, Galbreath, and Harper.* 644

2. A power granted to ſeveral perſons may be executed by the majority of them. *Withnell* v. *Gartham.* 832

3. If

3. If a power of a public nature be committed to ſeveral, who all meet for the purpoſe of executing it, the act of the majority will bind the minority.—*Grindley* et al. v. *Barker* et al. 837

AUTHORS.

See MUSIC.

BAKERS.

1. The offence of ſelling a loaf of bread ſhort of weight, is not within the juriſdiction of the court leet. *Sir George Colebrooke, bart.* v. *Elliott.* 106

2. Bakers are not prohibited by 29 *Car.* 2. from baking dinners for their cuſtomers on a Sunday. *The King* v. *John Younger.* 204

BAIL.

1. To a plea to *a ſci. fa.* againſt bail, that the principal died before the return of any *ca. ſa.* a replication ſtating a particular *ca. ſa.* and that the principal was alive at the return of that *ca. ſa.* ought to conclude to the court.—*Chandler* v. *Roberts* et al. *Bail of White.* 760

2. To a plea of *ſcire facias* againſt bail, that the principal died before the return of any *ca. ſa.* the replication ſtated a particular *ca. ſa.* and that the principal was alive at the return of that *ca. ſa.* concluding, and this he is ready to verify. To this there was a ſpecial demurrer; becauſe the replication concluded with a verification, whereas it ought to have concluded to the country. And there was judgment for the plaintiff. *Henderſon* v. *Withy* et al. 761

3. An outlawry cannot be reverſed, without ſuch bail as the law requires. *Cracraft* v. *Gledlowe.* 555

4. Special bail muſt be put in, upon appearing to an outlawry, where ſpecial bail was originally required. *Campbell* v. *Daley.* 590

See alſo PARLIAMENT, No. 1.

BANKERS.

1. A cuſtomer lodged bills of exchange in the hands of his banker generally, and when the banker advanced money to him, he applied it to the diſcount of ſuch of the bills as happened to be neareſt in value to the ſum advanced, but without any ſpecial agreement to that effect: held that this did not invalidate the banker's general lien upon all the other bills in his hands, but that he might retain them in order to ſecure the payment of his general balance.—*Davis*, et al. v. *Bowſher.* 143

2. *A.* ſold goods to *B*, for which the buyer was to pay by a bill at three months, *B.* gave *A.* a check on his bankers (who were alſo the bankers of *A.*) requiring them to pay *A.* on demand, in a bill at three months; *A.* paid the check into the bankers, and took no bill from them: but the amount was transferred in the banker's books from *B.*'s account to *A.*'s with the knowledge of both; the bankers failed before the check became due; and it was held that *A.* could not recover the value of the goods againſt *B.* *Bolton* v. *Richard.* 647

BANK OF ENGLAND.

The Court will not grant a *mandamus* to the Bank to transfer ſtock, becauſe there is a remedy by an action on the caſe, if they refuſe. *The King, on the proſecution of Parbury and another, executors of Dawes* v. *Bank of England.* 237

BANKRUPTCY.

To *aſſumpſit* by ſeveral partners, the defendant may plead in bar the bankruptcy of one of them. *Eckhardt* et al. v. *Wilſon.* 646

BARON AND FEME.

The wife had power to limit to ſuch uſes as notwithſtanding her coverture, ſhe ſhould, by deed or will, executed in the preſence of three witneſſes, appoint: *a leaſe was afterwards granted by the huſband and wife, atteſted by two witneſſes only.* And it was held, that the leaſe by the huſband and wife, of the wife's land, was not void as to the wife, but merely voidable after ſhe was *diſcovert;* and that the wife had confirmed it by accepting rent accruing

ing after her husband's death. *Doe* ex dim. *Collins* v. *Weller*. 38

BARRATRY.

See MARINE INSURANCES, No. 1. *et seq.*

BARRISTER.

A *mandamus* will not lie to compel admission to the degree of barrister. The only mode of relief is by appeal to the twelve judges, who have a domestic jurisdiction over the inns of court. *The King* v. *the Benchers of Gray's Inn, on the prosecution of William Hart*. 239

BEYOND SEA.

If one plaintiff be abroad, and the others in England, the action must be brought within six years after the cause of action arises. *Perry*, et al. v. *Jackson, bart.* et al. 152

BILL OF EXCEPTIONS.

When there is a bill of exceptions, a new trial shall not be moved for on the point of law contained therein. The bill of exceptions is ordained by the legislature to be in nature of a writ of error. And it would be highly unbecoming in us to stop it *in transitu*, unless you will waive the bill of exceptions: which the defendant declining to do, the Court refused to hear his counsel on the point of law. *Fabrigas* v. *Mostyn*. 543

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The statute of limitations does not begin to run upon money lent upon a bill of exchange, until after the day of payment. *Witteryheim* v. *the Countess Dowager of Carlisle*. 159

2. Declaration, that the defendant and another made their promissory note, by which they *jointly or severally promised* to pay, is good. *Rees* v. *Abbott*. 700

3. Where in an action of *assumpsit* on a bill of exchange with the usual money counts, the defendant pleads *nil debet* to the count on the bill, but does not plead at all to the other counts, after a verdict for the plaintiff, the defendant shall not take advantage of his own mis-pleading in arrest of judgment.—*Harvey* v. *Richards*. 753

4. The acknowledgement of one, out of several drawers of a joint and several promissory-note, takes it out of the statute of limitations, as against the others; and may be given in evidence on a separate action against any of the others. *Whitcomb* v. *Whiting*. 159

5. One of two makers of a joint and several promissory-note became a bankrupt, and the payee received a dividend under the commission, on account of the note; the Court held that the payment of the dividend, under the commission, was such an acknowledgment of the debt, as took the case out of the statute of limitations. *Jackson* v. *Fairbank*. 159

6. A note, given fraudulently, to carry on a marriage treaty, shall be good against the maker, though given without any consideration. *Montefiori* v. *Montefiori*. 485

BILL OF LADING.

See MARINE INSURANCES, No. 13.

BISHOPS.

1. A *mandamus* to a bishop to license a curate of an augmented curacy, where there was a cross nomination, was refused; because the party had another *specific legal remedy* by *quare impedit*. *The King* v. *the Bishop of Chester*. 233

2. The Court will not grant a *mandamus* to a bishop to license a lecturer, *without the consent of the rector*, where such lecturer is supported by voluntary contributions, unless an immemorial custom to elect without such consent be shewn. *The King* v. *the Bishop of London*. 236

3. So also in this case, a *mandamus* to the rector to certify to the bishop the election of a lecturer was refused; there being no immemorial custom in the parish for the lecturer to use the pulpit without the rector's consent, and the lecturer being paid out of the poor-rates. *The King* v. *Field (the rector)* et

et. al. *the Church-wardens of the United Parishes of St. Ann, St. Agnes, and Zachary.* 236

BOND.

If a defendant plead to debt on bond, that the plaintiff won money of him at cards, and that the bond was given for ſecuring payment of it, to which the plaintiff replies, that it was given for ſecuring the payment of money juſtly due, and not for ſecuring the payment of money won; the replication may either conclude to the country, or with an averment. *Hedges* v. *Sandon.* 764

See alſo CHILDREN.

BRIBERY.

1. In an action of bribery at an election, where the declaration ſet forth the precept from the ſheriff to the portreeve of a borough, the improper inſertion of the word "*if*" in ſuch precept is not a fatal variance, but it will be rejected as ſurpluſage. *Francis King* v. *Samuel Pippet.* 709

2. In an action for bribery on the ſtatute 2 *Geo.* 2. c. 24. it is not a material variance if the declaration ſtate the precept to have iſſued to *the bailiffs of the borough*, but the precept produced in evidence is directed *to the bailiff.*—*Warre* v. *Harbin.* 711

BUILDINGS.

1. The builder of a houſe in London, on an entire new foundation, may not erect half his flank or ſide wall on his neighbour's vacant ground. *Barlow* v. *Norman.* 188

2. The 11 *Geo.* 1. c. 28. "for the "better regulating of buildings, and "to prevent miſchiefs that may hap-"pen by fire, &c." *(an act ſince repealed)*, was held to be confined to party-walls between *houſes*, and not to extend to party-walls between *ſtables.*—*Rex* v. *John Pratt.* 189

3. A leſſee for twenty-one years at a pepper-corn rent for the firſt half year, and a rack rent for the reſt of the term, who, by agreement, was to put the premiſes in repair, and covenanted to pay the land-tax, and all other taxes, rates, aſſeſſments, and *impoſitions*, having aſſigned his term for a ſmall ſum in groſs, was held not to be liable to pay the expence of a party-wall, either by the proviſions of the ſtatute or the covenant; but that charge muſt, in ſuch caſe, be borne by the original landlord. *Southall* v. *Leadbetter.* 189

4. So alſo in this caſe it was held, that the owner of the improved rent, not of the ground-rent, is liable to pay the expences of a party-wall, built under the 14 *Geo.* 3. c. 78.: alſo that the three months' notice required by ſ. 38. is only neceſſary where the perſon, who, at the time when it is neceſſary to build, &c. is liable to pay, cannot agree with the owner of the adjoining houſe. *Peck* v. *Wood.* 191

5. But if the leſſee of a houſe at a rack-rent, underlet it at an advanced rent, he is liable to contribute to the expences of the party-wall. *Sangſter* v. *Birkhead.* 193

6. But the leſſor of a houſe at rack-rent *(there being no other perſon entitled to any kind of rent)* is liable to contribute to the expences of a party-wall, though the leſſee has improved the houſe demiſed. *Beardmore* v. *Fox.* 195

CARRIERS.

1. Caſe *on the cuſtom of the realm* againſt a carrier and trover, may be joined. *Dickon* v. *Clifton.* 720. *Maſt* v. *Goodſon.* ibid.

2. But the common way of declaring againſt a carrier now is in aſſumpſit, to which trover cannot be joined.—*Brown* v. *Dixon.* 721

CELLAR.

A demiſe of premiſes in Weſtminſter, late in the occupation of *A.* particularly deſcribing them, part of which was a yard, does not paſs a cellar ſituate under that yard, which was then in the occupation of *B.* another tenant of the leſſor. And the leſſor, in an ejectment brought to recover the cellar, is not eſtopped by his deed from going into evidence, to ſhew that the cellar

cellar was not intended to be demiſed. *Doe* ex dim. *Freeland* v. *Butt.* 75

CERTAINTY.

Upon an information againſt the defendant for a libel, for that *he*, &c. wickedly, maliciouſly, and ſeditiouſly, did write and publiſh, &c. a certain falſe, ſcandalous, and ſeditious libel "OF AND CONCERNING *his Majeſty's government and the employment of his troops*," according to the tenor and effect following (ſetting forth the libel *verbatim*):—The Court held that the words "*of and concerning*" were a *ſufficient introduction* of the *matter* contained in the libel, and a ſufficient *averment* that it was written "*of and concerning the King's government and the employment of his troops.*" *Rex* v. *Horne*, 115

CHILDREN.

1. A bond given by a father on the marriage of his daughter, to pay to the huſband a ſum of money within a limited time after the obligor's death, *if any of the iſſue of the marriage ſhould be living at that time*, extends to *the leaving of grand-children*, there being children of the marriage who all died before the obligor. *Haydon*, et al. executors of *Haynes*, v. *Wilſhere*. 484

2. A power under a marriage ſettlement, to appoint to the children of the marriage, is ſtrictly confined to thoſe children. *Goodtitle*, on the demiſe of *Ruſſel*, clerk, and two others, v. *Weal*, widow, and others. 810

3. Under a power of appointing a real eſtate "to the uſe of ſuch child *and* children, *&c.*" (and where in default of appointment, the eſtate was ſettled "to the uſe of all and every the child and children"), an excluſive appointment to one is good. *Swift*, on the demiſe of *Huntley* and wife, v. *Gregſon*. 812

CHURCHWARDEN.

In this caſe a *mandamus* to the churchwardens to make a church rate was refuſed, it being a ſubject purely of eccleſiaſtical juriſdiction. *The King* v. *the Churchwardens of St. Peter's, Thetford.* 237

COAL-MINE.

The leſſee of a coal-mine covenanted to pay a moiety of all ſuch ſums of money as the coals there raiſed *ſhould ſell for at the pit's mouth:* and the Court held that he was not liable to pay any part of the money produced by the ſale of the coals elſewhere. *Gerrard* v. *Clifton*, in error. 86

CONQUERED COUNTRY.

1. A country conquered by the Britiſh arms becomes a dominion of the king, in right of his crown; and, therefore, neceſſarily ſubject to the legiſlature, the parliament of Great Britain.

2. The conquered inhabitants, once received under the king's protection, become ſubjects, and are to be univerſally conſidered in that light, not as enemies or aliens.

3. The articles of capitulation upon which the country is ſurrendered, and the articles of peace by which it is ceded, are ſacred and inviolable according to their true intent and meaning.

4. The law and legiſlative government of every dominion equally affects all perſons and all property within the limits thereof, and is the rule of deciſion for all queſtions which ariſe there. Whoever purchaſes, lives, or ſues here, puts himſelf under the law of the place. An Engliſhman in Ireland, Minorca, the Iſle of Man, or the Plantations, has no privilege diſtinct from the natives.

5. The laws of a conquered country continue in force, until they are altered by the conqueror: the abſurd exception as to Pagans, mentioned in *Calvin*'s caſe, ſhews the univerſality and antiquity of the maxim. For that diſtinction could not exiſt before the chriſtian æra; and in all probability aroſe from the mad enthuſiaſm of the Croiſades.

6. If the king, without the concurrence of parliament, has a power to alter the

old and to introduce new laws in a conquered country, this legiſlation being ſubordinate, that is, ſubordinate to his own authority in parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for inſtance, from the laws of trade, or from the power of parliament, or give him privileges excluſive of his other ſubjects; and ſo in many other inſtances which might be put *Campbell* v. *Hall.* 688, 691

CONSTABLE.

A *mandamus* will not lie to the treaſurer of a county to reimburſe conſtables monies expended for conveying rogues, vagabonds, and diſorderly perſons. *Rex* v. *Walter Erle.* 229

CONVEYANCING.

The buſineſs of conveyancing, as carried on in the country, is this: *Where there is an attorney or counſel of credit, they receive money to place out upon ſecurities; and perſons who want to borrow, as well as thoſe who want to lend, apply to them for that purpoſe.* *Willet* v. *Chambers.* 631

CONVICTION.

1. The offence of exerciſing trade on a Sunday can be committed but once in the ſame day; and if a juſtice of the peace proceed to convict an offender in more than one penalty for the ſame day, it is an exceſs of juriſdiction, for which an action will lie before the convictions are quaſhed. *Crepps* v. *Durden.* 205

2. A conviction under 22 *Geo.* 3. c. 47. for inſuring, muſt ſtate that the ticket, on which the inſurance was made, was a ticket in the ſtate lottery. *The King* v. *Edward Trelawney* 206

3. An unſtamped agreement to ſell a ſhare of a ticket in the lottery before the tickets are depoſited with the commiſſioners, is within the penalty inflicted by the 21ſt ſection of the 22 *Geo.* 3. c. 47. *The King* v. *Hawkſworth.* 206

4. The ſale of lottery tickets, by which the purchaſer is to be entitled to all the benefit of them, except the low prizes, is prohibited and made void by 22 *Geo.* 3. c. 47. *Dey* v. *Shee.* 207

5. Juſtices, either of the county from which tenants fraudulently remove goods, or of that in which they are concealed, may convict the offenders in their reſpective counties, under 11 *Geo.* 2. c. 19. *Rex* v. *Morgan.* 33

COPYHOLD.

If a lord of a manor mortgage the manor in fee to *A.* and afterwards purchaſe copyholds held of the manor, and take ſurrenders of them to himſelf in fee, they ſhall enure to the benefit of the mortgagee; and a ſettlement by the lord of all his eſtate mortgaged to *A.* ſhall paſs the equity of redemption of ſuch ſurrendered copyholds. *Doe*, leſſee of Sir *W. Gibbons*, bart. v. *Pott*, et al. 498

COPYRIGHT.

See MUSIC.

CORN.

The corporation of London having a cuſtomary duty on corn imported, it is a good cuſtom, that factors, free of the corporation, ſhall receive to their own uſe that part of the duty which ariſes from corn conſigned to them as factors. *Cockſedge* v. *Fanſhaw.* 177

CORPORATIONS.

1. A *mandamus* was granted to the mayor, to put the corporate ſeal to the certificate of the election of the recorder, on an affidavit that he had the majority of legal votes; though it was ſtated that the other candidate had the majority at the election, and that the corporation had already certified his election. *The King* v. *the Mayor, &c. of York.* 216

2. In this caſe the Court granted a *mandamus* to compel a mayor and the capital burgeſſes of a corporation to fill up two vacancies, occaſioned by the deaths of two capital burgeſſes, though there was a *quo warranto* information depending againſt the mayor, queſtioning

ing his title. *The King* v. *The Mayor and Burgeſſes of Grampond.* 216

3. The Court will grant a *mandamus* after an election which is colourable and clearly void. *Rex* v. *Mayor, Bailiffs, and Burgeſſes of Cambridge.* 217

4. In rules for a *mandamus* to elect a mayor, a ſubſiſting mayor *de facto* muſt always be a party *The King* v. *Bankes*, et al. 218

5. A rule was made abſolute for an attachment againſt the defendants, who were capital burgeſſes, for their contempt in not obeying a *mandamus*, on an affidavit of the town-clerk, which ſtated, that ſix days previous to the time appointed he affixed a notice on a ſtone poſt of the Guildhall, of the intended election; and alſo ſerved the two defendants, and moſt of the other members of the corporation, *with a copy of the rule*, which had been iſſued reſpecting the notice: that though 16 members attended the meeting, the defendants and three others did not: in conſequence of which no election could be had, the charter requiring a majority of the capital burgeſſes (conſiſting of 36) to be preſent at the election of a mayor. *Rex* v. *Eaywean* and *Spiller*. 219

6. It is no reaſon againſt a *mandamus* to a corporation, to permit a lord of a manor to hold a court leet, and court baron, in the town-hall, on two preſcriptive days; that certain perſons who were to form the grand jury have been refuſed to be ſummoned; for they may apply for a *mandamus* to be ſummoned. *The King* v. *The Corporation of Grantham.* 222

7. After verdict on a traverſe to a return to a *mandamus* made by a corporation, the Court would not allow the defendants to amend the return, by ſetting forth a different conſtitution. *The King*, on the proſecution of *W. E. Dillon*, v. *The Mayor and Burgeſſes of Grampond.* 757

COSTS.

1. Where a plaintiff refuſes to be nonſuit, contrary to the opinion of the judge; a new trial (if granted) ſhall be without coſts: and if he ſubmits to an erroneous nonſuit; it ſhall be ſet aſide without coſts. *Pochin* v. *Puxley.* 548

2. The caſe of a miſdirection at the trial is not the only caſe in which the Court will award a new trial *without* coſts. For if the verdict be manifeſtly againſt the juſtice of the caſe, and the judge's direction, it is fit that a new trial ſhould be granted without coſts. *Jackſon* v. *Duchaire.* 548

COUNTY PALATINE.

1. Upon a ſuggeſtion entered by leave of the Court upon the roll, that a fair and impartial trial cannot be had in the county-court of the city of Cheſter, the Court will award the trial to be had in the adjoining county palatine. *The King* v. *the Inhabitants of St. Mary-on-the-Hill, Cheſter.* 591

2. A warrant for a tales on a trial, in a county palatine muſt come from the king's attorney-general. *Rex* v. *Lamb.* 592

COURT LEET.

In an action for an amercement in a court-leet, if the declaration ſtate the court to have been holden before the ſteward of the manor, and the evidence proves it to have been holden before the deputy ſteward, it is a material variance. *Wyvill Clerk* v. *Shepherd.* 704

COURT OF REQUESTS.

1. The ſtat. 14 *Geo.* 2. c. 10. which enables certain perſons to ſue for debts under 40s. in the court of Requeſts in London, does not extend to caſes where the plaintiff recovers leſs than 40s. in a ſpecial action on the caſe for the breach of an agreement. *Jonas* v. *Greening.* 203

2. And a citizen and freeman of London, not reſident therein, having a demand under 40s. for goods ſold againſt another citizen and freeman who is reſident, is not bound to ſue in the court of Requeſts, purſuant to the

14 *Geo.* 2. c. 10. *Webb* v. *Brown.* 283

3. So alſo in this caſe it was held, that the court of Requeſts for the city of London has no juriſdiction in a ſuit, unleſs both the plaintiff and defendant be reſident within the city. *Brooks* v. *Moravia.* 204

4. When a defendant, living within the juriſdiction of the Court of Requeſts of Weſtminſter, is ſued in one of the ſuperior courts for a debt under 40s. he may *plead the* 23 *Geo.* 2. c. 27. *in bar.* But if he omit to do ſo, the Court will not after verdict either enter a ſuggeſtion on the record that the defendant lived within the juriſdiction or ſtay the proceedings. *Taylor* v. *Blair.* 731

See alſo INFERIOR COURTS.

COVENANT.

1. The act of the leſſor and his anceſſors, by *repeatedly* inſerting, in different renewals of a leaſe for lives, a covenant to renew, under the ſame rent and covenants, may be held to conſtrue ſuch covenant, though doubtfully worded, a covenant for a perpetual renewal. *Cooke* v. *Booth.* 89

2. A covenant in a leaſe for 61 years, to renew at the end of every 20 years, *for the further term of* 20 *years, to commence at and from the expiration of the term then laſt before granted,* &c. does not authorize the leſſee to claim a further term of 20 years, at the expiration of the laſt term of 20 years in the leaſe, if he has omitted to claim a further term at the end of the firſt and ſecond 20 years in the leaſe. *Rubery* v. *Jervoiſe* et al. 91

CRIM. CON.

The Court will not grant a new trial, in an action for criminal converſation, merely becauſe the damages appear to them to be exceſſive. *Duberley* v. *Gunning.* 537

CURATE.

See BISHOP.

CUSTOM.

See LONDON, No. 4. 15.

DAMAGES.

See NEW TRIAL.

DAY OF THE DATE.

1. A leaſe to hold *from the date,* or *from the day of the date,* may include the day of the date, and ſo be conſidered as a leaſe in poſſeſſion, and not to commence in *futuro.* *Pugh* et ux. v. *Duke of Leeds.* 48

2. A leaſe for lives, to begin from the day of the date thereof, and ſeiſin delivered afterwards, is good, and ſhall not be ſaid to convey a freehold to commence in *futuro.* *Freeman* ex dim. *Vernon* alias *Bund* v. *Weſt.* 77

DEAD PERSONS.

An indictment for publiſhing libellous matter, reflecting on the memory of a dead perſon, not alleging that it was done *with a deſign to bring contempt* on the family of the deceaſed; and to ſtir up the hatred of the king's ſubjects againſt them; and to excite his relations to a breach of the peace; cannot be ſupported. *The King* v. *E. Topham.* 112

DECLARATION.

See PLEADING.

DEEDS.

1. One partner cannot bind the other partners by deed. *Harriſon* v. *Jackſon, Sykes, and Ruſhforth.* 643

2. But if one partner execute a deed for himſelf and his partner, by the authority of his partner and in his preſence, it is a good execution, though only ſealed once. *Ball* v. *Dunſterville,* et al. 644

3. A deed may be pleaded *as loſt by time and accident,* without *profert.* *Read* v. *Ann Brookman.* 741

4. So in this caſe, where in ſetting forth a conveyance it was ſtated that a releaſe was *cancelled by the ſeal of the releaſor being taken off and deſtroyed,* and that *part of the deed was deſtroyed or loſt,* with a profert of the reſidue, it was holden to be good pleading. *Bolton* v. *the Biſhop of Carliſle, the Earl of Lonſdale, and Smith Clerk.* 745

5. A

5. A chose in action need not be assigned by deed. *Howell* v. *Mac Ivers.* 756

DEMURRER.

See PLEADING.

DEVIATION.

See BARRATRY. MARINE INSURANCES, No. 74.

DISSENTERS.

1. A *mandamus* may be granted to the trustees of a meeting-house to *admit* a dissenting teacher duly elected. *Rex* v. *Barker* et al. 209

2. But where the minister of an endowed dissenting meeting-house had been expelled by a majority of the congregation, the Court refused a *mandamus to restore* him applied for to enable him to justify his conduct, because, it did not appear he had complied with all the requisites necessary to give him a *primâ facie* title. *The King* v. *Jotham.* 210

3. A *mandamus* will lie to register and certify a dissenting meeting-house. *Rex* v. *Justices and Clerk of the Peace for the county of Derby.* 221

DISTRESS.

1. A mortgagee, after giving notice of the mortgage to the tenant in possession under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards; and he may distrain for it after such notice. *Moss* v. *Gallimore* et al. 496

2. A horse cannot be distrained, *damage feasant*, and led to pound, if there be a rider upon him. *Storey* v. *Robinson* et al. 783

DISTRINGAS.

1. The costs of issuing writs of distringas, under stat. 10 *Geo.* 3. c. 50. are to be paid before appearance, though no issues be levied. *Martin* v. *Townshend and Sawbridge.* 595

2. And the stat. 10 *Geo.* 3. chap. 50. extends to all writs of *distringas*, as well as those issued against members of parliament as others. *Raban* v. *Plaistowe.* 596

DOGS.

There is no lien on a Dog lost for the expence sustained for its keep by the person finding it. *Binstead* v. *Buck.* 140

DUCHY OF LANCASTER.

On a proviso in a duchy-lease, that it shall be inrolled with the auditor, the certificate of the auditor on the margin is sufficient evidence of the inrolment; also under-leases are not within provisoes concerning assignment. *Kinnersley* v. *Orpe*, et. al. 79

DUTCH PROPERTY.

See MARINE INSURANCES, No. 15, 16.

DYERS.

A Dyer has no lien on goods delivered to him in the course of trade, but for the price of the dying. *Green* v. *Farmer.* 137

EAST-INDIA COMPANY.

1. A policy of insurance on East-India ships, includes the chance of their being detained in India, and the risque of the country voyage there. *Salvador* v. *Hopkins and Heaton* v. *Rucker.* 275

2. The exclusive right of trading to the East Indies, granted to the East-India Company, by stat. 9 & 10 *W.* 3. has never been put an end to. And though such parts of that act as inflicted penalties, &c. were repealed by stat. 33 *Geo.* 3. c. 52. and though the latter act says that no acts or parts of acts thereby repealed shall be pleaded or set up in bar of any action, &c. it is competent to under-writers who have subscribed policies on ships trading to the East Indies in contravention of the stat. of *Will.* to avail themselves of the illegality of such trading in an action brought on the policies. *Camden* et al. v. *Anderson.* 305

3. In an indictment against a public officer for a breach of duty, it is sufficient to state generally that he is such

such officer, without shewing his appointment.

4. And where a duty is thrown on a body, consisting of several persons, each is individually liable for a breach of duty; as well for acts of commission as for omission.

5. Also in an indictment against a servant of the East India Company for offences in India, it is sufficient to charge him with a wilful breach of duty, without adding that it was corrupt.

6. Likewise in an indictment against an officer for disobedience of orders, it is not necessary to aver that the orders have not been revoked, or that they are in force.

7. And where a public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his government, it is not necessary to aver in an indictment against him that he had notice of those acts: he is presumed from his situation to know them.

8. But time and place must be added to every material fact in an indictment. And a charge in an indictment against an officer with a breach of orders, in not prosecuting a war "with all possible vigour and decision," is too uncertain, even though the charge be made in the very words of the order given to him. *The King* v. *E. J. Hollond. Esq.* 552

ECCLESIASTICAL MATTERS.

See BISHOP.

EJECTMENT.

1. A tenant to a mortgagor, who does not give him notice of an ejectment brought by the mortgagee to enforce an attornment, is not liable to the penalties of the 11 *Geo.* 2. c. 19. s. 12. for secreting ejectments. *Buckley* v. *Buckley.* 512

2. A new trial may be granted in ejectment causes. *Goodtitle* ex dim. *Alexander* v. *Clayton* et al. 519

3. The Court will rather lean to new trials on behalf of defendants, in the case of ejectments, especially on the footing of surprize. *Lessee of Clymer* v. *Littler.* 519

EMBANKMENT.

See LONDON, No. 6.

ENTRY.

See LANDLORD AND TENANT, No 7, & 9.

EVIDENCE.

1. A tenant in possession, is not a good witness to support his landlord's title, because it is to uphold his own possession. *Doe* ex dim. *Foster* v. *Williams.* 16

2. But declarations, by tenants, are admissible evidence after their death, to shew that a certain piece of land is parcel of the estate which they occupied; and proof that they exercised acts of ownership in it, not resisted by contrary evidence, is decisive. *Davies* v. *Pierce*, et al. 17

3. Evidence of buying a libel in the shop of a known bookseller is sufficient *primâ facie* evidence to convict him of publication. *Rex* v. *Almon.* 132

4. On a suit for jactitation, evidence was given of a strong acknowledgment, and *an open avowal of a marriage* for eighteen years to plaintiff, but there was *no actual proof* of the marriage, which was previous to the statute 25 *Geo.* 2. and the court of delegates held this sufficient. *Harvey* v. *Harvey.* 483

5. The king's sign manual may be given in evidence by the prisoner, on an indictment for returning from transportation; and if not revoked, and the condition be literally, though not substantially, complied with, it shall discharge the prisoner from that indictment. *The King* v. *Milter.* 593

6. Acts subsequent to the time of delivering goods on a contract may be admitted as evidence to shew that the goods were delivered on a partnership account, if it were doubtful at the time

time of the contract: but if it clearly appear that no partnership existed at the time of the contract, no subsequent act by any person, who may afterwards become a partner (not even an acknowledgment that he is liable, or his accepting a bill of exchange drawn on them as partners for the very goods), will make him liable in an action for goods sold and delivered; though he will be liable in an action on the bill of exchange. *Saville* v. *J. Robertson and Hutchinson.* 634

7. A witness being indicted for perjury is no reason for postponing judgment against a person convicted. *Rex* v. *Thomas Haydon.* 661

8. An allegation in a plea, that "*A. by his writing sold the aftermath of land to B.*," is not proved by evidence that at an auction held for the purpose of selling it, *B.* was the purchaser, that *B.* gave a promissory note for the sum, and that *B.*'s name was written (by *A.*'s agent) in the printed catalogue as the buyer. *Symonds* v. *Ball and two others.* 706

9. Proof that defendant's boat run down the plaintiff's *in* the half-way reach in the Thames, will support an allegation that the boat was run down in the Thames *near* the half-way reach, in a declaration in an action on the case for negligence. *Drewry* v. *Twiss.* 713

See also MARINE INSURANCES, No. 31, 32, 44; and NEW TRIAL.

EXECUTION.

See LANDLORD AND TENANT, No. 12.

EXECUTORS AND ADMINISTRATORS.

1. In the case of a tenancy from year to year, as long as both parties please, if the tenant die intestate, his administrator has the same interest in the land which his intestate had. *Doe* ex dim. *Shore* v. *Porter.* 1

2. A covenant, by two joint lessees, if it be joint and several, shall bind the executors of the deceased lessee. *Enys* v. *Donnithorne.* 83

3. A *mandamus* for administration to the next of kin may be granted, notwithstanding a suit depending his consanguinity be not denied. *The King* v. *Dr. Hay.* 222

4. But a *mandamus* for administration to the next of kin will not be granted if a suit be depending concerning the validity of a will. *Rex* v. *Hay, on the application of Lovegrove.* 223

5. A writ sued out by plaintiffs *as executors*, and declaration by them *in their own right*, was held a sufficient variance for discharging the defendant out of custody on filing common bail. *Douglas* v. *Irlam.* 706

6. In assumpsit brought by an administrator *de bonis non*, the promise may be laid to have been made to the first administrator. *Hirst* v. *Smith.* 714

7. A power given to *an executrix* to raise a portion for a younger child does not extend to real estates, of which she was also trustee. *Doe* ex dim. *Milborne* v. *Milborne.* 800

FAILER OF RECORD.

1. In an action on a judgment, if the declaration state the judgment to have been recovered in a term different from that which appears on the record, it is a failer of record. It is also a variance, if the declaration states the judgment against one defendant only, when it was against more than one. *Rastall* v. *Stratton.* 704

FEES.

A clerk of assize has no lien on the records of the Court for his fees. *The King* v. *Bury.* 140

FELONY.

A prisoner acquitted on a charge of felony committed as a forger and charger of letters, cannot be convicted on another count charging him generally as a person employed in the post-office, under the statute 7 *Geo.* 3. *The King* v. *Shaw.* 780

See also INDICTMENT, No. 3, 4, 5.

FISH.

The water-bailiff of the Thames has

no right to ſeize engines, or fiſh, in a perſon's own fiſhery, as prohibited by 1 *Eliz.* c. 17. without a previous preſentment or conviction. *Bulbrook* v. *Sir Robert Goodere.* 186

FORMA PAUPERIS.

A proſecutor cannot proſecute *in forma pauperis*, without ſpecial cauſe. *Rex* v. *Clarke.* 647

FRAUDULENT CONVEYANCE.

One *after marriage* made a ſettlement of certain premiſes, and three years afterwards mortgaged the ſame to a perſon, who was told that there was a ſettlement; and the Court held the ſettlement void againſt the mortgagee within the ſtatute 27 Eliz. c. 4. *Chapman* ex dim. *Staverton* v. *Emery.* 510

GAMING.

If a defendant plead to debt on bond, that the plaintiff won money of him at cards, and that the bond was given for ſecuring payment of it, to which the plaintiff replies, that it was given for ſecuring the payment of money juſtly due, and not for ſecuring the payment of money won; the replication may either conclude to the country, or with an averment. *Hedges* v. *Sandon.* 764

GUARDIAN.

The Court were all clearly of opinion, that a teſtamentary guardian of an infant cannot make a leaſe of the infant's lands, and that a leaſe in ſuch a caſe is abſolutely void. *Roe* ex dim. *Parry* v. *Hodgſon.* 37

HABEAS CORPUS.

1. An action againſt a *feme covert*, as ſole trader, may not be removed by *habeas corpus* from the city courts. *Pope* v. *Vaux and wife.* 199

2. A cauſe was removed from the Lord Mayor's court by an *habeas corpus cum cauſâ*, to which a return was made, ſtating a cuſtom under which the defendant was ſued and arreſted: error was ſuggeſted upon the face of the proceedings below; but the Court would not ſtay the *procedendo* merely on that ground, but ſaid they would leave defendant to his writ of error. *Horton* et al. v. *Beckman* et al. 109

3. The Houſe of Lords having voted the defendant guilty of a breach of privilege, in publiſhing a libel upon the Biſhop of *Landaff*, and having ſentenced him to pay a fine of 100l. and to be impriſoned ſix months, and until ſuch fine was paid, which commitment was returned into this court upon an *habeas corpus* ſued out by the defendant, the Court refuſed to diſcharge him out of cuſtody. *The King* v. *Flower.* 605

HALF-PAY.

See ASSIGNMENT, No. 5.

HIGHWAYS.

In treſpaſs, a plea of juſtification, ſtating that a public highway led from another highway (leading from A. to B.) *in, through, over, and along the locus in quo* to a certain other highway (leading from C. to D.), was well ſupported by evidence proving that the way in queſtion led from the *terminus a quo*, viz. the road leading from A. to B. over the *locus in quo*, to a different way called E., and *along that way* into the way leading from C. to D., the *terminus ad quem*. In pleading a public highway, it is not neceſſary to ſtate any *termini*. *Rouſe* v. *Bardin*, et al. 732

2. It is ſufficient in pleading a public highway, to allege that it is a common public highway, without ſhewing how it became ſo, or that it has been ſo time immemorial. *Aſpindall* v. *Brown.* 755

HOSPITALS.

A houſe within the limits of an hoſpital, appropriated to an officer of the hoſpital for the time being, *is not aſſeſſable to the land-tax.* *Harriſon* v. *Bullcock*, et al. 34

INDICTMENT.

1. Such previous orders, as are the foundation of the magiſtrate's authority, muſt be recited, or at leaſt referred to, in an indictment for diſobedience

dience of ſuch authority. *Rex* v. *White and Eling, Overſeers, &c.* 492

2. In an indictment for perjury committed at an Admiralty Seſſion, where the commiſſion was directed to *A.*, *B.* and *C.* and others not named, of whom *A.*, *B.* and *C.* were amongſt others *to be one*; the Court will take it to mean that if either of the perſons named of the quorum were preſent, it would be ſufficient. Stating that at ſuch a court *J. K. was in due form of law tried upon a certain indictment then and there depending* againſt him for murder; and that *at and upon the ſaid trial it then and there became and was made a material queſtion*, whether, &c. are ſufficient averments that the perjury was committed on the trial of *J. K.* for the murder, and that the queſtion on which the perjury was aſſigned was material on that trial. *The King* v. *Dowlin.* 657

3. In an indictment againſt a receiver of ſtolen goods for a miſdemeanor, it is not neceſſary to aver that the principal has not been convicted. *The King* v. *J. Baxter.* 767

4. *As follows*, is a ſufficient averment of the tenor of a forged receipt, in an indictment: and it is only neceſſary to aver a general intent to defraud *A. B.* without ſetting out the manner in which that fraud was to be effected. *The King* v. *Robert Powell.* 768

5. In an indictment, the words, "*in manner and form following, that is to ſay*," do not bind the party to recite the inſtrument, &c. *verbatim*, nor render mere formal omiſſions or miſtakes fatal. And if a clerk of the peace, in drawing an indictment, introduce unneceſſary recitals, the Court will order him to pay the expence thereby incurred. *The King* v. *May.* 769

6. Variance in the word underſtood for underſtood, was held not material. *Rex* v. *Beach.* 770

INFANT.

A tenant for life, and the reverſioner, granted a leaſe to *A.*; but the reverſioner being then an infant, did not execute it. *A.* entered and enjoyed, and two years after the death of the tenant for life, the other leſſor (the reverſioner) being then of age, executed the leaſe, and afterwards brought an action againſt the leſſee for breach of covenant: but the Court held, that upon the death of the tenant for life, the leaſe became totally void. *Ludford* v. *Barber.* 39

See alſo LANDLORD AND TENANT, No. 29.

INFERIOR COURTS.

1. In an inferior court the declaration muſt allege that *the money was had and received* within the juriſdiction, as well as that the defendant *promiſed to pay* within it. Alſo a court of error cannot award a *venire de novo* when the proceedings originate in an inferior court: and therefore if any one count in the declaration be had, and the judgment be general, it muſt be reverſed *in toto*. *Trevor* v. *Wall.* 700

2. In caſe for reſcuing a debtor taken upon meſne proceſs ſued out of the Palace court, it was holden not to be ſufficient ground for arreſting the judgment after verdict, that it was not alleged that the cauſe of action in the inferior court aroſe within the juriſdiction, or that it was not alleged that the party below did not appear at the return of the writ. *Bentley* v. *Donelly and Benton.* 726

See alſo COURTS OF REQUEST.

INFORMATIONS.

1. The ſtat. 21 *J.* 1. c. 4. ſ. 1. which enacts, "That all offences againſt any penal ſtatute, for which any common informer may lawfully ground any popular action, bill, plaint, ſuit, or information, *before juſtices of aſſize, juſtices of* Niſi Prius, *or gaol-delivery, juſtices of oyer and terminer, or juſtices of peace in their ſeſſions*, ſhall be commenced, ſued, proſecuted, tried, recovered, and determined, by way of action, plaint, bill, information, or indictment, before the juſtices of aſſize, &c. or before the juſtices of peace of every county, city, &c. wherein ſuch offences

offences ſhall be committed, &c. and not elſewhere, &c." does not extend to *all* proceedings on penal ſtatutes; it only prohibits the proceedings in the courts of Weſtminſter, in all thoſe caſes where popular actions, bills, plaints, ſuits, or informations, might have been brought in the inferior courts. *Shipman* qui tam. v. *Henbeſt.* 101

2. When a power is given to a juriſdiction, which does not ordinarily entertain actions, bills, or plaints, and that power is only generally to enquire of, hear, and determine the offence, it muſt be underſtood to mean by the common law mode of proceeding, namely, by indictment, or preſentment. *Ibid.*

3. An information was granted againſt the printer of "*Lloyd*'s Evening Poſt," for a ludicrous paragraph, giving an account of the Earl of *Clanrickard*'s marriage with an actreſs at Dublin, and appearing with her in the boxes with jewels, &c. *The King* v. *Kinnerſley.* 112

4. An information for a libel need not charge the offence to have been committed *vi et armis*, or allege that the libellous matter is *falſe*. *The King* v. *Burks.* 124

5. There ſhall not be a new trial where there is a verdict for a defendant in a criminal proſecution. *Rex* v. *Praed*, or *Rex* v. *Edwards.* 543

6. The Court refuſed to grant a criminal information againſt a bookſeller for printing, on his own account, a report of the Houſe of Commons, though it reflected on the character of an individual. *The King* v. *J. Wright.* 602

7. The Court will not grant an information againſt the magiſtrates of a borough for having diſfranchiſed perſons entitled to their freedom, although ſworn to have been done *to ſerve election purpoſes*, if the defendants deny that motive, and ſwear that they thought there was legal ground for the diſfranchiſement, and the ground on which the diſfranchiſement went has not been decided. *The King* v. *Davie and ſeven others.* 606

INSOLVENT DEBTOR.

A convict for perjury cannot be diſcharged as an inſolvent debtor. *Rex* v. *Norris.* 662

IRELAND.

Leaſes by governors of colleges in Ireland, muſt reſerve more than a moiety of the true value, at the peril of the leſſee. *Clements, eſq.* et al. *executors of Dr. Baldwin,* v. *Waller. eſq.* 81

JUDGMENT.

1. When a defendant is brought up for judgment, his acts ſubſequent to the trial may be conſidered, either by way of aggravating or mitigating the puniſhment, even though they be ſeparate and diſtinct offences, for which he may be afterwards puniſhed. But in ſuch caſes the Court will take care not to inflict a greater puniſhment than the principal charge itſelf will warrant.—*The King* v. *Withers.* 131

2. For a libel. The Court fined the defendant 100l. impriſoned him for three months, and ordered him to find ſecurity for his good behaviour for ſeven years, himſelf in 500l. and two ſureties in 250l. each. *The King* v. *Dr. Smollet.* 137

3. On an implied, though not expreſs, undertaking, in point of honour, from the proſecutor to excuſe the publiſher, if he would deliver up his principal: the Court diſcharged the defendant on entering into a recognizance of 200l. to appear when required. *The King* v. *Kearſley.* 137

JURIES.

1. An action of covenant upon a charter-party was tried at the bar by a ſpecial jury of the citizens of London, who all conſented to be ſworn, and waived any privilege as citizens of London, in not being obliged to go out of the city to ſerve on juries. *Lockyer* v. *Eaſt-India Company.* 176

2. Previous to the ſtatute 32 *Geo.* 3. c. 60. on the trial of an indictment for a libel, the only queſtions for the conſideration of the jury were, the fact of publiſhing, and the truth of the *inuendos,*

ders. Whether the ſubject-matter was or was not a libel was a queſtion of law for the conſideration of the Court. *The King* v. *the Dean of St. Aſaph.* 127

3. Subſequent declarations of the jury ſhall not vitiate a general verdict, given according to the merits of the caſe. *Clark* v. *Stevenſon, executor.* 527

4. Alſo a ſubſequent confeſſion of a juryman to the defendant's attorney, that the jury drew lots which ſix of them ſhould determine the verdict, not otherwiſe proved to the Court, is no ground for a new trial. *Aylett* v. *Jewell, executor.* 528

KING.

See PLANTATIONS.

LANDLORD AND TENANT.

1. In the caſe of a tenancy from year to year, as long as both parties pleaſe, if the tenant die inteſtate, his adminiſtrator has the ſame intereſt in the land which his inteſtate had. *Doe* ex dim. *John Shore* v. *Porter.* 1

2. A general parol demiſe at an annual rent, where the bulk of the farm is incloſed, and a ſmall part in the open common fields, is only a leaſe from year to year, and not for ſo long as the uſual round of huſbandry extends. *Roe* ex dim. *Bree* v. *Lees.* 1

3. A parol agreement to leaſe lands for four years only, creates a tenancy at will; and, if that tenancy be not determined before the day of the demiſe laid in the declaration, the landlord cannot recover. *Goodtitle* ex dim. *Gallaway* v. *Herbert.* 2

4. If an action be brought againſt a tenant for double rent, for holding over after the expiration of his term, and a regular notice to quit, under the circumſtance of having *held the premiſes for two or three years under a parol demiſe for twenty-one years from the day mentioned*, the holding muſt be ſtated in the declaration according to the legal operation of it, as a tenancy at will. *Clayton* v. *Blakey.* 3

5. On the trial of an ejectment, brought by the landlord againſt his tenant, it is competent for the defendant to ſhew that the original leaſe, by which the landlord claims to hold the premiſes, is expired; and, therefore, that he has no right to turn him out of poſſeſſion. *England* ex dim. *Syburn* v. *Slade.* 3

6. If *A.* tenant for life, ſubject to forfeiture, with remainder over to *B.* grants a leaſe to *C.* for a term of years, and afterwards, apprehending that he has forfeited, acquieſces in *B.*'s claiming and receiving the rent from *C.* the executor of *A.* may, on ſhewing that he acquieſced under a falſe apprehenſion, and that his intereſt was not in point of fact forfeited, recover from *C.* the amount of the rent erroneouſly paid to *B.* *Williams, executor of Elizabeth Breedon*, v. *Bartholomew.* 3

7. Actual entry is not neceſſary to take advantage, by ejectment, of a clauſe in a leaſe to re-enter, for non-payment of rent. *Goodright, Leſſee of Hare*, v. *Cator*, et al. 5

8. But if the rent be tendered before the delivery of the declaration in ejectment, the Court will, on motion, ſet aſide the proceedings with coſts.—*Goodright* ex dim. *Stevenſon* v. *Noright.* 6

9. Where the landlord has a right to re-enter for non-payment of rent, he cannot recover in ejectment at common law, unleſs he demand the rent on the day when it becomes due; nor under the ſtat. 4 *Geo.* 2. c. 28. ſ. 2. if there be a ſufficient diſtreſs on the premiſes. *Doe* ex dim. *Forſter* v. *Wandlaſs.* 7

10. If *B.* claiming under *A.* let lands for a year to *C.* and die, and *A.* afterwards bring an ejectment againſt *C.*, *C.* cannot diſpute the title of *A.*—*Barwick*, ex dim. *Mayor and Aldermen of Richmond in Yorkſhire*, v. *Thompſon*, et al. 8

11. If a perſon, who is ſued by a landlord in the name of his tenant, procure a releaſe from the nominal plaintiff, the Court will order the releaſe to be delivered up, and permit the landlord to proceed. *Payne* v. *Rogers.* 9

12. The

12. The landlord is entitled to one year's rent before the defendant can ſell upon an execution for coſts on a non-ſuit. *Henchett* v. *Kimpſon*. 9

13. A ſheriff's officer, being in poſſeſſion of the tenant's effects under an outlawry, made a diſtreſs for rent, ſold the goods ſo diſtrained, and afterwards the outlawry was reverſed: held, that the officer was liable to pay the produce of the goods to the landlord, in an action for money had and received; and that the goods of a tenant are liable to a year's rent, notwithſtanding an outlawry in a civil ſuit. *The Preſident and Scholars of St. John's college, Oxford*, v. *Murcott*. 10

14. In an action againſt the ſheriff, for taking goods without leaving a year's rent, the declaration need not ſtate all the particulars of the demiſe, but if it does, and they are not proved as ſtated, there ſhall be a non-ſuit.—*Briſtow* v. *Wright and Pugh*. 12

15. In an action againſt a tenant for not performing his agreements, the eſtate of the leſſor is an immaterial averment, if the tenant has had the fruit of his leaſe. And an agreement to leave a farm as he found it, is an agreement to leave it in tenantable repair, if he found it ſo; and will maintain a declaration ſo laid. *Winn* v. *White*. 15

16. A tenant, in poſſeſſion, is not a good witneſs to ſupport his landlord's title, becauſe it is to uphold his own poſſeſſion. *Doe* ex dim. *Foſter* v. *Williams*. 16

17. But declarations, by tenants, are admiſſible evidence after their death, to ſhew that a certain piece of land is parcel of the eſtate which they occupied; and proof that they exerciſed acts of ownerſhip in it, not reſiſted by contrary evidence, is deciſive. *Davies* v. *Pierce*, et al. 17

18. A cuſtom that tenants, whether by parol or deed, ſhall have the way-going crop after the expiration of their terms, is good. *Wigglefworth* v. *Dalliſon*, et al. 18

19. Half a year's notice to quit poſſeſſion muſt be given to a tenant at will, and before the end of that time an ejectment will not lie to turn him out of the farm. *Parker* ex dim. *Walker* v. *Conſtable*. 20

20. And in the caſe of a tenancy from year to year, there muſt be half a year's notice to quit, ending at the expiration of the year *Right* ex dim. *Flower* v. *Darby and Briſtow*. 20

21. Notice to quit at Midſummer was given to a tenant holding from Michaelmas, and it was held that he might inſiſt on the inſufficiency of the notice at the trial, though he did not make any objection at the time when it was ſerved. *Oakapple* ex dim. *Green* v. *Copous*. 21

22. Notice ſerved juſt before Michaelmas, 1795, to quit "at Lady-day, which will be in the year 1795," held ſufficient, *Doe* ex dim. *Duke of Bedford* v. *Kightly*. 21

23. A notice to quit "or I ſhall inſiſt on double rent," is good to ſupport an ejectment. *Doe, Leſſee of Matthews*, et al. v. *Jackſon* et al. 549

24. But a month's notice is not ſufficient, to quit a leaſe from year to year. *Gulliver* ex dim. *Tayſer* v. *Burr*. 549

25. Where a tenant for life grants a leaſe for years, which is void againſt the remainder-man, and the latter before he elects to avoid it, receives rent from the tenant, whereby a tenancy from year to year is created; yet this is with reference to the old term, and, therefore, a half-year's notice to quit from the remainder-man, ending with the old year, is good. *Doe* ex dim. *Collins* v. *Welter*. 21

26. The like had been before determined by the court of Common Pleas. *Roe* ex dim. *Jordan* v. *Ward*. 22

27. An agreement to take a farm, the arable from old Candlemas, the paſture from old Lady-day, and the meadow from old May-day, paying rent half-yearly, at *old Michaelmas* and *Lady-day*, is ſubſtantially a taking of the whole from old Lady-day; and notice to quit, delivered before old Michaelmas, is ſufficient to determine the tenancy. *Doe* ex dim. *Dagget* v. *Snowden*. 23

28. A notice to quit at Lady-day was

was ſerved on the 22d of September, 1792.—The defendant's counſel objected, that the notice to quit was inſufficient, the holding being from Candlemas, and the notice requiring the defendant to quit at Lady-day:—and the plaintiff was nonſuited. *Doe* ex dim. *Rigge* v. *Bell*. 24

29. And where an infant becomes entitled to the reverſion of an eſtate leaſed from year to year, he cannot eject the tenant without giving the ſame notice as the original leſſor muſt have given. *Maddon* ex dim. *Baker* et al. v. *White* et. al. 24

30. Notice to quit, ſerved on the defendant's maid-ſervant at his houſe, which was not ſituated upon the demiſed premiſes, and the contents explained to her at the time: held ſufficient, though there were no evidence that it ever came to the defendant's hands, except as above. *Jones* ex dim. *Griffiths* v. *Mayſh*. 24

31. If a landlord receive rent, due after the expiration of a notice to quit, it is a waiver of that notice. *Goodright* ex dim. *Charter* v. *Cordwent*. 25

32. Alſo a diſtreſs taken for rent, accrued after the expiration of a notice to quit, is a waiver of the notice.—*Zouch* ex dim. *Ward* v. *Willingale*. 26

33. But the mere acceptance of rent by a landlord, for occupation ſubſequent to the time when the tenant ought to have quitted according to the notice given him for that purpoſe, is not, of itſelf, a waiver on the part of the landlord of ſuch notice, but matter of evidence only to be left to the jury, under the circumſtances of the caſe.—*Doe* ex dim. *Cheny* v. *Batten*. 26

34. Parol notice to quit, by a tenant under a parol leaſe, is ſufficient. *Timmins* v. *Rowlinſon*. 29

35. Notice to quit under the ſtatute of 4 *Geo.* 2. may be previous to the expiration of the leaſe. *Cutting* v. *Derby*. 30

36. And one tenant in common may bring an ejectment for his moiety, and make himſelf tenant in common with the leſſee of the other. Ibid. 31

37. And the tenant will be liable to double rent under the ſtat. 4. *Geo.* 2. c. 28. though the notice to quit be only from a perſon appointed receiver by the court of Chancery. *Wilkinſon* v. *Colley*. 31

38. The plaintiff, before the determination of the leaſe, gave the defendant notice to quit at Whitſuntide, 1784; the defendant held over, and double rent became due from Whitſuntide, 1784.—The ſecond count ſtated another notice, ſerved on the 3d of June (after the expiration of the firſt notice to quit at Whitſuntide), to quit at the Martinmas following, *or to pay double rent*—Held that the firſt notice was not waived by the ſecond. *Meſſenger* v. *Armſtrong*. 32

39. The mere relation of landlord and tenant is a ſufficient conſideration for the tenant's promiſe to manage a farm in an huſband like manner.—*Powley* v. *Walker*. 725

40. Juſtices, either of the county from which tenants fraudulently remove goods, or of that in which they are concealed, may convict the offenders in their reſpective counties. Under the ſtat. 11 *Geo.* 2. c. 19. *Rex* v. *Morgan*. 33

See alſo MORTGAGE.

LAND-TAX.

1. A perſon poſſeſſed of a freehold *office* may act as a commiſſioner of the land-tax under the qualification of his office. *Sone* v. *Aſhton*. 33

2. A houſe within the limits of an hoſpital, appropriated to an officer of the hoſpital for the time being, *is not aſſeſſable to the land-tax*. *Harriſon* v. *Butcock* et al. 34

3. Houſes, built on lands embanked from the Thames, in purſuance of 7 *Geo.* 3. c. 37. which veſts thoſe lands in the owners, free from taxes, are not liable to be aſſeſſed to the land-tax. *Williams* v. *Pritchard*. 187

4. A *mandamus* will lie to the commiſſioners of the land-tax *to elect* a clerk to them in the departments for the rates and duties on houſes and windows. *The King* v. *The Commiſſioner of the Land-tax for the pariſh of St. Martin-in-the-Fields*. 220

LEASES.

1. A general parol demiſe at an annual rent, where the bulk of the farm is incloſed, and a ſmall part in the open common fields, is only a leaſe from year to year, and not for ſo long as the uſual round of huſbandry extends. *Roe*, ex dim. *Bree*, v. *Lees*. 2

2. A parol agreement to leaſe lands for four years only, creates a tenancy at will; and, if that tenancy be not determined before the day of the demiſe laid in the declaration, the landlord cannot recover. *Goodtitle* ex dim. *Gallaway* v. *Herbert*. 2

3. Actual entry is not neceſſary to take advantage, by ejectment, of a clauſe in a leaſe to re-enter, for non-payment of rent. *Goodright*, leſſee of *Hare*, v. *Cator*. 5

4. If rent be tendered before the delivery of the declaration in ejectment, the Court will, on motion, ſet aſide the proceedings with coſts. *Goodright*, ex dim. *Stevenſon*, v. *Noright*. 6

5. Where the landlord has a right to re-enter for non-payment of rent, he cannot recover in ejectment at common law, unleſs he demand the rent on the day when it becomes due; nor under the ſtat. 4 *Geo.* 2. c. 28. ſ. 2. if there be a ſufficient diſtreſs on the premiſes. *Doe*, ex dim. *Forſter*, v. *Wandlaſs*. 7

6. If *B.* claiming under *A.* let lands for a year to *C.* and die, and *A.* afterwards bring an ejectment againſt *C.*, *C.* cannot diſpute the title of *A.* *Barwick* v. *Thompſon*, et al. 8

7. The maſter of the rolls may grant as many concurrent leaſes as he pleaſes, during the laſt ſeven years of a former leaſe, and may, at any time, take a ſurrender, and renew for twenty-one years. *Wilſon* v. Sir *Thomas Sewell*, knt. 35

8. The Court were all clearly of opinion, that a teſtamentary guardian of an infant cannot make a leaſe of the infant's lands, and that a leaſe in ſuch caſe is abſolutely void. *Roe*, ex dim. *Parry*, v. *Hodgſon*. 37

9. A feme covert having power to limit her freehold eſtate to ſuch uſes as ſhe, notwithſtanding her coverture, ſhould, by deed or will, executed in the preſence of three witneſſes, appoint: *a leaſe was granted by the huſband and wife, atteſted by two witneſſes only*. The huſband died, after which the wife received rent of the defendant for the premiſes accruing after the huſband's death, and then died: held that, the leaſe being only voidable, her receipt of rent, after her huſband's death, confirmed it. *Doe*, ex dim. *Collins*, v. *Weller*. 38

10. A tenant for life, and the reverſioner, granted a leaſe to *A.*; but the reverſioner being then an infant, did not execute it. *A.* entered and enjoyed, and two years after the death of the tenant for life, the other leſſor (the reverſioner), being then of age, executed the leaſe, and afterwards brought an action againſt the leſſee for breach of covenant: BUT the Court held, that upon the death of the tenant for life, the leaſe became totally void. *Ludford* v. *Barber*. 39

11. A power to make leaſes for years is to be liberally conſtrued. *Right* et al. ex dim. *Francis Baſſet*, eſq. v. *Thomas* et al. 40

12. A power of the jointreſs to make leaſes, not being expreſſed, cannot be implied under a private act of parliament. *Roe*, ex dimiſſ' *Duke of Bolton*, v. *Grantham*. 783

13. Where there is a power to grant leaſes in poſſeſſion, but not by way of reverſion or future intereſt, a leaſe *per verba de præſenti* is not contrary to the power, although the eſtate, at the time of granting the leaſe, was held by tenants at will, or from year to year, if, at the time, they receive directions from the grantor of the leaſe to pay their rent to the leſſee. *Goodtitle*, leſſee of *Clarges*, and Earl *Ferrers*, v. *Funucan*. 44

14. Alſo under a power to leaſe all manors, meſſuages, lands, &c. ſo as there be reſerved as much rent as is now paid for the ſame, ſuch parts of the eſtate enumerated in the power as have never been demiſed may be let. *Ib.*

15. A

15. A leaſe to hold *from the date*, or *from the day of the date*, may include the day of the date, and ſo be conſidered as a leaſe in poſſeſſion, and not to commence in *futuro*. *Pugh* et ux. v. *Duke of Leeds*. 48

16. But if the leaſe of a tenant for life, who has power of leaſing under certain conditions, varies from them in the intereſt demiſed, or the rent reſerved, it cannot be ſupported againſt the remainder-man. *Doe* ex dim. *Pulteney* v. *Lady Cavan*. 57

17. Under a power to a tenant for life to leaſe for years, reſerving the uſual rent and covenants, a leaſe made by him, containing a proviſo, that in caſe the premiſes ſhall be blown down or burned, the leſſor ſhall rebuild, otherwiſe the rent to ceaſe, is void; the jury finding that ſuch a covenant is unuſual. *Doe* ex dim. *Ellis and Medwin* v. *Sandham*. 59

18. So where power was given to the tenant in poſſeſſion to let *all or any part* of the premiſes, ſo as the uſual rents be reſerved, a leaſe of *tithes* which had never been let before, was held void. *T. Pomery*, aſſignee of *J. Pomery* v. *Partington*, et al. executors of *M. Grylls*. 61

19. And under a power of leaſing for one, two, or three lives, or for any term of years determinable on one, two, or three lives, the three lives muſt be certain and co-exiſting. *Doe* ex dim. *William Wyndham* v. *Halcombe*. 67

20. A leaſe void againſt a remainder-man cannot be ſet up by his acceptance of rent. *Jenkins* ex dim. *Yate* v. *Church*. 70

21. So in this caſe it was alſo held that a leaſe void againſt a remainder-man cannot be ſet up by his acceptance of rent, and ſuffering the tenant to make improvements, after his intereſt veſts in poſſeſſion. *Doe, Leſſee of Simpſon*, v. *Butcher*. 70

22. But though a leaſe, granted under a leaſing power, be void, if the remainder-man accept rent, as rent, after the death of the tenant for life, it is an admiſſion that the defendant *is his tenant*, and then he is entitled to notice to quit. *Doe* ex dim. *T. Martin and Jones* v. *Watts*. 72

23. If a tenant for life with power to grant leaſes in poſſeſſion for 21 years at the beſt rent, convey his life eſtate to truſtees to pay an annuity for his life, and the ſurplus to himſelf, the power is not thereby extinguiſhed, but he may ſtill grant a leaſe agreeable to the terms thereof. *Ren leſſee of Hall and others*, v. *Bulkeley*. 830

24. An agreement to grant a leaſe, whereby the leſſor did let and ſet for twenty-one years from a future day, ſhall be a leaſe *in præſenti*, if the circumſtances ſhew the party's intent ſo to be. *Baxter* ex dim. *Abrahall, Eſq.* v. *Browne*. 73

25. A demiſe, *for and during the full end and term* of three, ſix, or nine years, is a leaſe for three years at all events, and either of the parties may put an end to it at that time, or at the end of ſix years, giving reaſonable notice to the other. *Goodright* ex dim. *Hall* v. *Richardſon*. 74

26. A demiſe of premiſes in Weſtminſter, late in the occupation of *A.* particularly deſcribing them, part of which was a yard, does not paſs a cellar ſituate under that yard, which was then in the occupation of *B* another tenant of the leſſor. And the leſſor, in an ejectment brought to recover the cellar, is not eſtopped by his deed from going into evidence, to ſhew that the cellar was not intended to be demiſed. *Doe* ex dim. *Freeland* v. *Burt*. 75

27. A leaſe for lives, to begin from the day of the date thereof, and ſeiſin delivered afterwards, is good, and ſhall not be ſaid to convey a freehold to commence in *futuro*. *Freeman* ex dim. *Vernon alias Bund* v. *Weſt*. 77

28. On a proviſo in a duchy-leaſe, that it ſhall be inrolled with the auditor, the certificate of the auditor on the margin is ſufficient evidence of the inrolment; alſo under-leaſes are not within proviſoes concerning aſſignment. *Kinnerſley* v. *Orpe*, et al. 79

29. The acceptance of a new good leaſe, implies a ſurrender of a former. *Davidſon*

Davidſon ex dim. *Bromley, Eſq.* v. *Stanley.* 60

30. Leaſes by governors of colleges in Ireland, muſt reſerve more than a moiety of the true value, at the peril of the leſſee. *Clements, Eſq.* et al. executors of *Dr. Baldwin* v. *Waller, Eſq.* 81

31. A leaſe of a rectory-houſe, &c. by a rector, becomes void by 13 *Eliz.* c. 20. by his non-reſidence for 80 days; and a ſtranger may take advantage thereof. *Doe* ex dim. *Criſp* v. *Barber.* 82

32. A covenant, by two joint leſſees, if it be joint and ſeveral, ſhall bind the executors of the deceaſed leſſee. *Enys* v. *Donnithorne.* 83

33. A proviſo in a leaſe to enter for a condition broken can only operate during the term. *Johns* v. *Whitley* et al. 84

34. The leſſee of a coal-mine covenanted to pay a moiety of all ſuch ſums of money as the coals there raiſed *ſhould ſell for at the pit's mouth:* and the Court held that he was not liable to pay any part of the money produced by the ſale of the coals elſewhere. *Gerrard* v. *Cliſton,* in error. 86

35. A ſubſequent agreement may, by relation, operate to make a reſervation of rent from the beginning. *M'Leiſh* v. *Tate.* 87

36. The act of the leſſor and his anceſtors, by *repeatedly* inſerting, in different renewals of a leaſe for lives, a covenant to renew, under the ſame rent and covenants, may be held to conſtrue ſuch covenant, though doubtfully worded, a covenant for a perpetual renewal. *Cooke* v. *Booth.* 89

37. A covenant in a leaſe for 61 years, to renew at the end of every 20 years, *for the further term of* 20 *years, to commence at and from the expiration of the term then laſt before granted,* &c. does not authorize the leſſee to claim a further term of 20 years, at the expiration of the laſt term of 20 years in the leaſe, if he has omitted to claim a further term at the end of the firſt and ſecond 20 years in the leaſe. *Rubery* v. *Jervoiſe* et al. 91

38. A covenant not to *aſſign, transfer, ſet over, or otherwiſe do or put away the leaſe or premiſes,* does not extend to an under-leaſe granted for part of the term. *Cruſoe* ex dim. *Blencowe* v. *Bugby.* 92

39. But if a leaſe contain a proviſo, that the leſſee and his adminiſtrators ſhall not *ſet, let,* or *aſſign over,* the adminiſtratrix of the leſſee cannot underlet without incurring a forfeiture. *Roe* ex dim. *Gregſon, widow,* v. *Harriſon.* 93

40. If a leſſee covenant not *to underlet* without conſent of the leſſor, under *hand and ſeal,* with a power of reentry in caſe of a breach, acceptance, by the leſſor, of rent due after the condition broken, with full notice, is a waiver of the forfeiture. *Goodright* ex dim. *Walter* v. *Davids.* 96

41. And if a leſſee, who has covenanted not "*to let, ſet, aſſign, transfer, make over, barter, exchange, or otherwiſe part with the indenture,* &c." with a proviſo that the landlord may, in ſuch caſe, re-enter, gives a warrant of attorney to confeſs judgment; on which the leaſe is taken in execution, and ſold; it is no forfeiture of the leaſe. *But it is otherwiſe if the warrant of attorney was given fraudulently and for the expreſs purpoſe of aſſigning the leaſe.* Same caſe 8 *Ter. Rep.* 30.—See LEASES in the general appendix to this work. *Doe* ex dim. *Mitchinſon* v. *Carter.* 97

LEATHER.

1. An action of debt will lie on 1 *J.* 1. c. 22. ſ. 14. for ſelling leather which had not been ſearched and ſealed. *Shipman* qui tam. v. *Henbeſt.* 101

2. Searchers of leather, appointed under ſtat. 2 *Jac.* 1. c. 22. are authorized to ſeize leather *inſufficiently dried,* in order to carry it before other officers, called triers; but they cannot ſeize any leather which is ſufficiently dried, though *in their judgment it be not ſo;* and if they do, they are liable to

to an action of treſpaſs. *Warne* v. *Varley and two others.* 193

LEET.

The offence of ſelling a loaf of bread ſhort of weight, is not within the juriſdiction of the court leet. *Sir George Colebrooke, bart.* v. *Elliott.* 106

LETTERS.

See POST OFFICE.

LIBEL.

1. An action will lie for publiſhing any thing in writing, which tends to render another ridiculous. *Villers* v. *Monſley.* 110

2. A letter, written to a third perſon, calling the plaintiff "a villain," was held actionable, without proof of ſpecial damage. *Bell* v. *Stone.* 111

3. An information was granted againſt the printer of "*Lloyd*'s Evening Poſt," for a ludicrous paragraph, giving an account of the Earl of *Clanrickard*'s marriage with an actreſs at Dublin, and appearing with her in the boxes with jewels, &c. *The King* v. *Kinnerſley.* 112

4. But expulſion from a quaker's meeting, and reaſons aſſigned in the books, is not a libel. *The King* v. *Hart.* 112

5. An indictment for publiſhing libellous matter, reflecting on the memory of a dead perſon, not alleging that it was done *with a deſign to bring contempt* on the family of the deceaſed; and to ſtir up the hatred of the king's ſubjects againſt them; and to excite his relations to a breach of the peace, cannot be ſupported. *The King* v. *E. Topham.* 112

6. Proof that the defendant gave a bond to the ſtamp-office, for the duties on the advertiſements in a newſpaper, and had occaſionally applied at the ſtamp-office reſpecting the duties, is evidence that he is the publiſher. *Ibid.*

7. Upon an information againſt the defendant for a libel, for that *he*, &c. wickedly, maliciouſly, and ſeditiouſly, did write and publiſh, &c. a certain falſe, ſcandalous, and ſeditious libel "OF AND CONCERNING *his Majeſty's government and the employment of his troops*," according to the tenor and effect following (ſetting forth the libel *verbatim*):—The Court held that the words "*of and concerning*" were a *ſufficient introduction* of the *matter* contained in the libel, and a ſufficient *averment* that it was written "*of and concerning the King's government and the employment of his troops.*" *Rex* v. *Horne.* 115

8. An information for a libel need not charge the offence to have been committed *vi et armis*, or allege that the libellous matter is *falſe*. *The King* v. *Burks.* 124

9. Although the publication of a libel muſt be ſtated in a declaration, yet it may be collected from the whole of it, and needs not any technical form of words. *Baldwin* v. *Elphinſton.* 125

10. In an action for a libel written in a foreign language, the plaintiff muſt ſet forth the libel in the original; and, if he only ſet out a tranſlation of it, the Court will arreſt the judgment. *Zenobio* v. *Axtell.* 127

11. Previous to the ſtat. 32 *Geo.* 3. c. 60. on the trial of an indictment for a libel, the only queſtions for the conſideration of the jury were, the fact of publiſhing, and the truth of the *inuendos*. Whether the ſubject-matter was or was not a libel was a queſtion of law for the conſideration of the Court. *The King* v. *The Dean of St. Aſaph.* 127

12. When a defendant is brought up for judgment, his acts ſubſequent to the trial may be conſidered, either by way of aggravating or mitigating the puniſhment, even though they be ſeparate and diſtinct offences, for which he may be afterwards puniſhed. But in ſuch caſes the Court will take care not to inflict a greater puniſhment than the principal charge itſelf will warrant. *The King* v. *Wathers.* 131

13. Evidence of buying a libel in the ſhop of a known bookſeller is ſufficient *primâ facie* evidence to convict him of publication. *Rex* v. *Almon.* 132

14. Upon an information for print-

ing and publiſhing a ſeditious libel, the jury found the defendant guilty of printing and publiſhing only; and thereupon a *ven. fac. de novo* was ordered. *Rex* v. *Woodfall.* 133

15. The defendant was convicted on an information, for writing a libel againſt Admiral *Knowles*, in the *Critical Review*. And the Court fined him 100l. impriſoned him for three months, and ordered him to find ſecurity for his good behaviour for ſeven years, himſelf in 500l. and two ſureties in 250l. each. *The King* v. *Dr. Smollet.* 137

16. The defendant was convicted on an information filed by the Attorney-general (for printing the *North Briton*, No. 45), and having made affidavit, that Lord *Halifax* gave an implied, though not expreſs, undertaking, in point of honour, to excuſe the printer, if he would deliver up his principal: he was (his affidavit not being contradicted) diſcharged on entering into a recognizance of 200l. to appear when required. *The King* v. *Kearſley*, et al. 137

17. If a juſtification be pleaded to an action for a libel, charging the plaintiff to be a ſwindler, it muſt ſtate the particular inſtances of fraud, by which the defendant means to ſupport it. *J. Anſon* v. *Stuart.* 750

LIEN.

1. A dyer has no lien on goods delivered to him in the courſe of trade, but for the price of the dying. *Green* v. *Farmer.* 137

2. A clerk of aſſize has no lien on the records of the Court for his fees. *The King* v. *Bury.* 140

3. There is no lien on a dog loſt for the expence of his keeping. *Binſtead* v. *Buck.* 140

4. Nor for ſecuring a quantity of timber, which is found floating on a river. *Nicholſon* v. *Chapman.* 140

5. A cuſtomer lodged bills of exchange in the hands of his banker generally, and when the banker advanced money to him, he applied it to the diſcount of ſuch of the bills as happened to be neareſt in value to the ſum advanced, but without any ſpecial agreement to that effect: held that this did not invalidate the banker's general lien upon all the other bills in his hands, but that he might retain them in order to ſecure the payment of his general balance. *Davis*, et al. v. *Bowſher.* 143

6. *A.*, *B.*, *C.* and *D.* were partners in a banking-houſe at Liverpool, and *C.* and *D.* alſo carried on a ſeparate mercantile concern in London; *J. S.* having accepted bills payable at the houſe of *C.* and *D.* employed *A.*, *B.*, *C.* and *D.* to get them paid accordingly, and agreed to depoſit with them good bills indorſed by him, for the purpoſe of enabling them ſo to do; *A.*, *B.*, *C.* and *D.* debited *J. S.* in account for his acceptances, and credited him for all the bills which he depoſited; ſome of the bills ſo depoſited by *J. S.* were remitted by *A.*, *B.*, *C.* and *D.* to *C.* and *D.* upon the general account between the two houſes, and before any of the acceptances of *J. S.* became due both houſes failed, and *J. S.* was obliged to pay his own acceptances; the Court held that the aſſignees of *C.* and *D.* were entitled to retain againſt *J. S.* the bills remitted to them by *A.*, *B.*, *C.* and *D.* They alſo held that it made no difference that one of the bills remitted did not arrive in London till after the bankruptcy of *C.* and *D.* though ſent by *A.*, *B.*, *C.* and *D.* before that event. *Bolton* v. *Puller*, et al. 620

7. If *A.* and *B.* have a general running account, conſiſting of bills drawn by *B.* and *C.* in favour of *A.* and of bills and other ſecurities depoſited by *A.* with *B.*; and, upon the failure of *B.* and *C.*, *A.* be obliged to take up the bills received by him from *B.* whereby the balance of the accounts is in favour of *A.* ſtill he cannot maintain trover for the bills depoſited by him with *B.* unleſs they were ſpecifically appropriated to anſwer *B.*'s drafts on *C.* in favour of *A.* and depoſited for that purpoſe expreſsly. *Bent*, et al. v. *Puller*, et. al. aſſignees of *Caldwell* and Co. 145

8. If

8. If *A.* depoſit goods with *B.* for ſale, and *B.* promiſe to pay the proceeds to *A.* when ſold; *B.* has no lien on them (if not ſold) for the balance of his general account ariſing upon other articles. *Walker*, et al. v. *Birch*, et al. 147

LIGHT-HOUSE DUTIES.

Britiſh ſhips, in paſſing the Eddyſtone, and other light-houſes in the Channel, not touching at any place in Great Britain or Ireland, are not liable to pay the light houſe duties to the Trinity-houſe. *The Trinity-houſe* v. *Sorſbie.* 149

LIMITATIONS (STATUTES OF).

1. If a ſtatute limit the time of bringing an action to ſix months; and being brought within time, it abates by the defendant's death, it muſt be revived againſt the heir, or repreſentative, within ſix months. *Knight* v. *Bate.* 150

2. One tenant in common ſhall not bar the other by the ſtatute of limitations, where there is no adverſe poſſeſſion. *Fairclaim* ex dim. *Empſon* v. *Shackleton.* 151

3. The ſtatute of limitations extends to perſons in Scotland. *King* v. *Walker.* 152

4. If one plaintiff be abroad, and the others in England, the action muſt be brought within ſix years after the cauſe of action ariſes. *Perry*, et al. v. *Jackſon*, bart. 152

5. But the ſtatute of limitations can never begin to run againſt a plaintiff, who is a foreigner, until he comes into this realm. *Strathorſt* v. *Græme*, eſq. 154

6. An attachment of privilege, though informal, being returnable on a general return, is a ſufficient commencement of an action to avoid the ſtatute of limitations. *Leadbeter*, executrix, v. *Markland*, adminiſtratrix. 154

7. But an attachment of privilege is not a continuance of a bill of Middleſex, ſo as to avoid the ſtatute of limitations. *Smith*, et al v. *Bower.* 155

8. And it is not ſufficient to ſhew that a writ was ſued out in time; in order to ſave the ſtatute of limitations, the plaintiff muſt alſo ſhew that it was returned. *Harris*, qui tam. v. *Wadford.* 156

9. But where an action is limited by a ſtatute to be brought within three months, it is ſufficient for the plaintiff to prove a writ ſued out within ſuch time, and his declaration within a year afterwards, without ſhewing ſuch writ returned. *Parſons* v. *King.* 157

10. The limitation of the action to one month, in the ſtat. 26 *Geo.* II. c. 21. for prohibited goods, muſt be after condemnation, provided due diligence be uſed. *Trott*, et al. v. *Welch* and *Swan.* 158

11. And in C.B. it is ſufficient to ſhew a *capias*, which is now the commencement of a ſuit in this Court; and there is no neceſſity to file an *original*, but in caſe of outlawry, &c. *Leader* v. *Moxon.* 158

12. Where a bill of exchange is drawn, payable at a certain future period, the ſtatute of limitations begins to operate only from the time when the bill became due. *Witterſheim* v. *The Counteſs Dowager of Carliſle.* 159

13. An acknowledgment of the debt, though it be but a ſlight one, takes it out of the ſtatute of limitations. *Tea* v. *Fouraker.* 159

14. The acknowledgment of one, out of ſeveral drawers of a joint and ſeveral promiſſory-note, takes it out of the ſtatute of limitations, as againſt the others; and may be given in evidence on a ſeparate action againſt any of the others. *Whitcomb* v. *Whiting.* 159

15. One of two makers of a joint and ſeveral promiſſory-note became a bankrupt, and the payee received a dividend under the commiſſion, on account of the note: held ſufficient to take the caſe out of the ſtatute of limitations. *Jackſon* v. *Fairbank.* 159

16. Alſo, if there be a mutual account of any ſort between the plaintiff and defendant, for any item of which credit has been given within ſix years, that is evidence of an acknowledgment of

of there being ſuch an open account between the parties, and of a promiſe to pay the balance, ſo as take the caſe out of the ſtatute of limitations. *Catling*, et al. executors of *Tuthill*, v. *Skoulding*, et al. 160

17. A letter, written by a defendant (who has pleaded the ſtatute of limitations) to the plaintiff's attorney, on being ſerved with a writ, may be left to the jury to conſider whether it amount to an acknowledgment of the debt, ſo as to take it out of the ſtatute. *Lloyd* v. *Maund*. 161

18. In this caſe the Court held that, after a defendant has obtained an order for time to plead, on the terms of pleading iſſuably, he cannot plead the ſtatute of limitations. *Stadholme*, executor, v. *Hodgſon*. 162

19. But the above caſe was afterwards over-ruled in *Rucker*, et al. v. *Hannay*, bart. *Ibid.*

20. To an action brought by the aſſignees of an inſolvent debtor, to recover money owing to him before his inſolvency, in which the plaintiffs declared that, in conſideration of the money being due to the inſolvent, the defendant promiſed to pay it to them as aſſignees, the defendant pleaded, 1ſt, the general iſſue. 2dly, "That the cauſe of action firſt accrued to the inſolvent before the plaintiffs became aſſignees, and that ſix years had elapſed after the cauſe of action firſt accrued to the inſolvent, and before the ſuing out the writ of the plaintiffs." To this plea there was a general demurrer. PER CUR. The defendant might have pleaded that the debt was firſt due to the inſolvent more than ſix years before the action was brought, and that he had made no *expreſs* promiſe to the plaintiffs within ſix years. The plaintiffs muſt prove an expreſs promiſe on the trial.—Judgment for the plaintiff. *Kinder*, et al. v. *Paris*. 747

21. The Court refuſed to ſet aſide a nonſuit voluntarily ſuffered by the plaintiff, in order to give him power to reply, *de novo*, that the writ of *latitat* iſſued within the ſix years. *Hutchinſon*, executrix, v. *Brice*. 163

LONDON.

1. *Freemen of the city of London have a right to be exempt from the payment of all tolls and port duties throughout England* (except the priſes of wines), *in whatever place they reſide, and though they have obtained their freedom by purchaſe. The Mayor, &c. of London* v. *the Mayor, &c. of Lenne Regis, commonly called King's Lynn in the county of Norfolk*. 163

2. An action of covenant upon a charter-party was tried at the bar by a ſpecial jury of the citizens of London, who all conſented to be ſworn, and waived any privilege as citizens of London, in not being obliged to go out of the city to ſerve on juries. *Lockyer* v. *Eaſt-India Company*. 176

3. A *mandamus* to the mayor and aldermen of London, to admit a perſon to the office of auditor of the chamberlain's and bridgemaſter's accounts, who had ſerved it three years ſucceſſively, and been elected again the fourth by the livery, was refuſed, becauſe the cuſtom of the city appeared to be, *that no perſon ſhould be elected to, or ſerve the ſaid office for more than two years ſucceſſively. The King* v. *the Mayor and Aldermen of London*. 176

4. The corporation of London having a cuſtomary duty on corn imported, it is a good cuſtom, that factors, free of the corporation, ſhall receive to their own uſe that part of the duty which ariſes from corn conſigned to them as factors. *Cockſedge* v. *Fanſhaw*. 177

5. The water-bailiff of the Thames has no right to ſeize engines, or fiſh, in a perſon's own fiſhery, as prohibited by 1 *Eliz.* c. 17. without a previous preſentment on conviction. *Bulbrook* v. *Sir Robert Goodere*, et al. 186

6. Houſes, built on lands embanked from the Thames, in purſuance of 7 *Geo.* 3. c. 37. which veſts thoſe lands in the owners, free from taxes, are not liable to be aſſeſſed to the land-tax. *Williams* v. *Pritchard*. 187

7. Neither are ſuch houſes liable to be aſſeſſed to the paving rates made under the 11th of *Geo.* 3. c. 29. *Eddington* v. *Borman*. 188

8. The builder of a houſe in London,

don, on an entire new foundation, may not erect half his flank or ſide wall on his neighbour's vacant ground. *Barlow* v. *Norman.* 188

9. The 11 *Geo.* 1. c. 28. (*an act ſince repealed*), was held to be confined to party-walls between *houſes*, and did not extend to party-walls between *ſtables*. *Rex* v. *John Pratt.* 189

10. A leſſee for twenty-one years at a pepper-corn rent for the firſt half year, and a rack rent for the reſt of the term, who, by agreement, was to put the premiſes in repair, and covenanted to pay the land-tax, and all other taxes, rates, aſſeſſments, and *impoſitions*, having aſſigned his term for a ſmall ſum in groſs, was held not to be liable to pay the expence of a party-wall, either by the proviſions of the ſtatute or the covenant; but that the charge muſt, in ſuch caſe, be borne by the original landlord. *Southall* v. *Leadbetter.* 189

11. So alſo in this caſe it was held, that the owner of the improved rent, not of the ground rent, is liable to pay the expences of a party-wall, built under the 14 *Geo.* 3. c. 78.: alſo the three months' notice required by ſ. 38. is only neceſſary where the perſon, who, at the time when it is neceſſary to build, &c. is liable to pay, cannot agree with the owner of the adjoining houſe. *Peck* v. *Wood.* 191

12. But if the leſſee of a houſe at a rack-rent, underlet it at an advanced rent, he is liable to contribute to the expences of the party wall. *Sangſter* v. *Birkhead.* 193

13. But the leſſor of a houſe at rack rent (*there being no other perſon entitled to any kind of rent*) is liable to contribute to the expences of a party-wall, though the leſſee has improved the houſe demiſed. *Beardmore* v. *Fox.* 195

14. Wharfs muſt be aſſigned in open places only. *The caſe of the London wharfs.* 196

15. An action againſt a *feme covert*, as ſole trader, may not be removed by *habeas corpus* from the city courts. *Pope* v. *Vaux and wife.* 199

16. A cauſe was removed from the Lord Mayor's court by an *habeas corpus cum cauſâ*, to which a return was made, ſtating a cuſtom under which the defendant was ſued and arreſted: error was ſuggeſted upon the face of the proceedings below; but the Court would not ſtay the *procedendo* merely on that ground, but ſaid they would leave defendant to his writ of error. *Horton*, et al. v. *Beckman*, et al. 199

17. Actions for uſe and occupation cannot be maintained in the court of Conſcience in London. *Woolley* v. *Cloutman.* 202

18. The ſtat. 14 *Geo.* 2. c. 10. which enables certain perſons to ſue for debts under 40s. in the court of Requeſts in London, does not extend to caſes where the plaintiff recovers leſs than 40s. in a ſpecial action on the caſe for the breach of an agreement. *Jonas* v. *Greening.* 203

19. And a citizen and freemen of London, not reſident therein, having a demand under 40s. for goods ſold againſt another citizen and freeman who is reſident, is not bound to ſue in the court of Requeſts, purſuant to the 14 *Geo.* 2. c. 10. *Webb* v. *Brown.* 203

20. So alſo in this caſe it was held, that the court of Requeſts for the city of London has no juriſdiction in a ſuit, unleſs both the plaintiff and defendant be reſident within the city. *Brooks* v. *Moravia.* 204

LORD'S DAY.

1. The ſtatute 29 *Car.* 2. c. 7. does not prohibit a baker baking dinners for his cuſtomers on a Sunday. *The King* v. *John Younger.* 204

2. But this offence can be committed but once in the ſame day; and if a juſtice of the peace proceed to convict an offender in more than one penalty for the ſame day, it is an exceſs of juriſdiction, for which an action will lie before the convictions are quaſhed. *Crepps* v. *Durden.* 205

LOTTERY.

1. On a conviction under 22 *Geo.* 3. c. 47.

c. 47. for inſuring a ticket in the lottery, it muſt be ſtated that the ticket on which the inſurance was made was a ticket in the ſtate lottery. *The King* v. *Edward Trelawney.* 206

2. An unſtamped agreement to ſell a ſhare of a ticket in the lottery before the tickets are depoſited with the commiſſioners, is within the penalty inflicted by the 21ſt ſection of the 22 *Geo.* 3. c. 47. *The King* v. *Samuel Hawkeſworth.* 206

3. The ſale of lottery tickets, by which the purchaſer is to be entitled to all the benefit of them, except the low prizes, is prohibited and made void by 22 *Geo.* 3. c. 47. *Deey* v. *Shee.* 207

4. And the printer of a newſpaper, publiſhing an illegal propoſal for gambling in the lottery, incurs a penalty under the 22 *Geo.* 3. c. 47. ſ. 13. which enacts, that no perſon ſhall ſell the chances of tickets, &c. nor *publiſh any propoſal for it*, under a penalty of 50l. *King* qui tam v. *Smith.* 208

MANDAMUS.

1. A *mandamus* may be granted to the truſtees of a meeting-houſe, to *admit* a diſſenting teacher duly elected. *Rex.* v. *Barker*, et. al. 209

2. But where the miniſter of an endowed diſſenting meeting-houſe had been expelled by a majority of the congregation, the Court refuſed a *mandamus to reſtore* him applied for to enable him to juſtify his conduct, becauſe, it did not appear he had complied with all the requiſites neceſſary to give him a *primâ facie* title. *The King* v. *Fotham*, et al. 210

3. A *mandamus* lies to the keepers of the common ſeal of the univerſity of Cambridge, commanding them to put it to the inſtrument of appointment of their high ſteward, purſuant to a grace paſſed in ſenate. *Rex* v. *Vice-Chancellor, &c. of Exchequer.* 211

4. A *mandamus* will be granted to compel the warden of a college to affix the common ſeal of the college to an anſwer of the fellows, in chancery, contrary to his own ſeparate anſwer put in. *Rex* v. *Dr. Windham.* 214

5. A *mandamus* was granted to the mayor to put the corporate ſeal to the certificate of the election of the recorder, on an affidavit that he had the majority of legal votes; though it was ſtated that the other candidate had the majority at the election, and that the corporation had already certified his election. *The King* v. *The Mayor, &c. of York.* 216

6. In this caſe the Court granted a *mandamus* to compel a mayor and the capital burgeſſes of a corporation to fill up two vacancies, occaſioned by the deaths of two capital burgeſſes, though there was a *quo warranto* information depending againſt the mayor, queſtioning his title. *The King* v. *The Mayor and Burgeſſes of Grampond.* 216

7. The Court will grant a *mandamus* after an election which is colourable and clearly void. *Rex* v. *Mayor, Bailiffs, and Burgeſſes of Cambridge.* 217

8. In rules for a *mandamus* to elect a mayor, a ſubſiſting mayor *de facto* muſt always be a party. *The King* v. *Bankes*, et al. 218

9. A rule for an attachment againſt the defendants, who were capital burgeſſes, for their contempt in not obeying a *mandamus*, was made abſolute on an affidavit of the town-clerk, which ſtated, that ſix days previous to the time appointed he affixed a notice on a ſtone poſt of the Guildhall of the intended election; and alſo ſerved the two defendants, and moſt of the other members of the corporation, *with a copy of the rule*, which had been iſſued reſpecting the notice: that though 16 members attended the meeting, the defendants and three others did not: in conſequence of which, no election could be had. *The King* v. *Joſeph Edyvean and Samuel Spiller.* 219

10. A *mandamus* will lie to the commiſſioners of the land-tax *to elect* a clerk to them in the departments for the rates and duties on houſes and windows. *The King* v. *the Commiſſioners of the Land-tax for the pariſh of St. Martin in the Fields.* 220

11. A

11. A *mandamus* will lie to a rector *to appoint* a parish clerk. *Rex* v. *the rector of St. Anne's, Soho.* 221

12. A *mandamus* will lie to register and certify a dissenting meeting-house. *Rex* v. *Justices and Clerk of the Peace for the county of Derby.* 221

13. A *mandamus* was granted to the corporation of *Grantham*, to permit the lord to hold a court leet, and court baron, in the town-hall. *The King* v. *the Corporation of Grantham.* 222

14. A *mandamus* for administration to the next of kin may be granted, notwithstanding a suit depending his consanguinity be not denied. *The King* v. *Dr. Hay.* 222

15. But a *mandamus* for administration to the next of kin will not be granted if a suit be depending concerning the validity of a will. *Rex* v. *Dr. Hay, on the application of Lovegrove.* 223

16. A *mandamus* will lie *to restore* a recorder. *Rex* v. *the Corporation of Wells.* 224

17. A *mandamus* will lie to restore a parish clerk, removed without sufficient cause: for a parish-clerk is a temporal officer: he holds his office *quamdiu bene se gesserit:* and though the minister may have a power of removing him on a good and sufficient cause, he can never be the sole judge, and remove him *ad libitum.* He must state to the Court a just cause of amotion.—*Rex* v. *Erasmus Warren.* 229

18. A *mandamus* will not lie to the treasurer of a county to reimburse constables monies expended for conveying rogues, vagabonds, and disorderly persons. *Rex* v. *Walter Erle.* 229

19. The Court will not grant a *mandamus* to a ministerial officer to pay over money already paid by him under a proper authority. *The King* v. *Christopher Shaw.* 229

20. So in this case, the Court refused to grant a *mandamus* to a ministerial officer, viz. the treasurer of a county, to obey an order of the court of quarter-sessions; the proper remedy, in case of his refusal to obey such order, being by indictment. *The King* v. *Bristow.* 230

21. The Court will not grant a *mandamus* to restore a person to an office where it is confessed by the person that he was rightly removed. *Rex* v. *Mayor, Aldermen, and capital Burgesses of Uxbridge.* 231

22. So also in this case, a *mandamus* was refused to restore to the office of clerk of the Bridge-house estates in London, though the party was irregularly suspended; it appearing on his own shewing that there was good ground for the supension, if the proceedings had been regular. *The King* v. *the Mayor, Aldermen, and Common Council of London.* 231

23. A *mandamus* to a bishop to license a curate of an augmented curacy, where there was a cross nomination, was refused; because the party had another specific legal remedy by *quare impedit.* *The King* v. *the Bishop of Chester.* 233

24. The Court will not grant a *mandamus* to a bishop to license a lecturer, without the consent of the rector, where such lecturer is supported by voluntary contributions, unless an immemorial custom to elect without such consent be shewn. *The King* v. *the Bishop of London.* 236

25. So also in this case, a *mandamus* to the rector to certify to the bishop the election of a lecturer was refused; there being no immemorial custom in the parish for the lecturer to use the pulpit without the rector's consent, and the lecturer being paid out of the poor-rates. *The King* v. *Field (the rector)* et al. *the Churchwardens of the United Parishes of St. Ann, St. Agnes, and Zachary.* 236

26. In this case a *mandamus* to admit a vestry clerk was refused. *The King* v. *the Churchwardens of Croydon.* 237

27. In this case a *mandamus* to the churchwardens to make a church rate was refused, it being a subject purely of ecclesiastical jurisdiction. *The King* v. *the Churchwardens of St. Peter's, Thetford.* 237

28. The Court will not grant a *mandamus*

damus to the Bank to transfer ſtock, becauſe there is a remedy by an action on the caſe, if they refuſe. *The King, on the proſecution of Parbury and another, executors of Dawes,* v. *the Governor and Company of the Bank of England.* 238

29. A *mandamus* will not lie to compel admiſſion to the degree of barriſter. The only mode of relief is by appeal to the twelve judges, who have a domeſtic juriſdiction over the inns of court. *The King* v. *the Benchers of Gray's Inn, on the proſecution of William Hart.* 239

30. But a *mandamus* to admit a recorder was refuſed in this caſe, becauſe there was a recorder *de facto*, and the party had another remedy by *quo warranto*; though both of them claimed under the ſame election. *The King* v. *the Mayor of Colcheſter.* 240

31. A *mandamus* to the mayor and aldermen of London, to admit a perſon to the office of auditor of the chamberlain's and bridgemaſter's accounts, who had ſerved it three years ſucceſſively, and been elected again the fourth by the livery, was refuſed becauſe the cuſtom of the city appeared to be, *that no perſon ſhould be elected to, or ſerve, the ſaid office for more than two years ſucceſſively.*—*The King* v. *The Mayor and Aldermen of London.* 176

32. A return to a *mandamus* filed after death of party who made it ought to be taken off the file. *Rex* v. *Holmes, Mayor of Wigan.* 241

33. A return to a *mandamus* to admit, or ſhew cauſe to the contrary, may ſhew one or more or any number of cauſes, provided they be conſiſtent. *Wright* v. —— *Fawcett, eſq.* 243

34. A return to a *mandamus* to reſtore *Lewis Cogan* into the place and office of ſexton was, that "*L. C.* was not, according to the ancient cuſtom of the ſaid pariſh, duly elected;" and further, that there was "an ancient cuſtom in the pariſh to remove their ſexton at pleaſure, and that, in purſuance of ſuch a cuſtom, and agreeably thereto, they had actually removed him."—*Rex* v. *The Churchwardens of Taunton St. James.* 244

35. So in this caſe it was held that, if a return to a *mandamus* conſiſt of ſeveral independent matters not inconſiſtent with each other, but part of them good in law, and part bad, the Court may quaſh the return as to ſuch part only as is bad, and put the proſecutor to plead to or traverſe the reſt: but where two cauſes returned are inconſiſtent, the whole is bad. *The King* v. *The Mayor, &c. of Cambridge.* 244

36. So in this caſe it was held that, if ſeveral inconſiſtent cauſes be returned to a *mandamus*, the Court will quaſh the whole return. *The King* v. *The Mayor, &c. of York.* 246

37. On a *mandamus* to reſtore to the office of a capital burgeſs, if the return ſtate the ground of the diſfranchiſement to have been the non-attendance of the proſecutor at a meeting to which he was ſummoned for the election of a capital burgeſs, an averment that the right of ſuch election is in the capital burgeſſes, being the common-council, does not aſſert, with ſufficient certainty, that he had a right to concur in the election, and ought to have obeyed the ſummons, becauſe, conſiſtently with ſuch an averment, he might not have that right, it not appearing thereby that all the capital burgeſſes are members of the common-council. *The King* v. *the Mayor and Burgeſſes of Lyme Regis, on the proſecution of Arthur Raymond.* 250

38. In a return to a *mandamus* to reſtore, if it is ſtated, that the party was removed *by the corporate body at large*, it is unneceſſary to *aver* that the power of removal is veſted in them, becauſe it is *incidental* to them, unleſs given by charter, by-law, &c. to a ſelect party. And an action will lie for a *ſuppreſſio veri* in a return, as well as for an *allegatio falſi*. Alſo when non-reſidence is a ground for removing a corporator, it is unneceſſary to ſummon him previouſly to come and reſide. *The King* v. *the Mayor and Burgeſſes of Lyme Regis, on the proſecution of Francis Fane;*

Fane; *and the ſame* v. *the ſame, on the proſecution of John Luther.* 254

39. A return was in the conjunctive, not duly elected, admitted, and ſworn, and therefore bad; but if the truth would have warranted it, and they had returned not duly elected, *or* admitted, *or* ſworn, it might have been good. *The King* v. *the Mayor and Burgeſſes of Lyme Regis, on the proſecution of David Robert Mitchell.* 260

40. A return to a *mandamus to reſtore an alderman* was in this caſe diſallowed, becauſe it did not ſet forth a total deſertion from the place of which the party was alderman. *Rex* v. *Mayor and Aldermen of Leiceſter.* 260

41. A return (to a *mandamus* to reſtore) was held inſufficient, becauſe it did not ſtate that the party had been ſummoned to anſwer to the charge before he was removed. *The King* v. *G. Gyſkin, D. D.* 262

42. The Court will not quaſh a return to a *mandamus* (which directed an inferior Court to give judgment on an indictment) merely becauſe it ſtates an erroneous judgment given below: but a writ of error muſt be brought to reverſe that judgment. *The King* v. *the Juſtices of the Weſt Riding of Yorkſhire.* 262

43. After verdict on a traverſe to a return to a mandamus made by a corporation, the Court would not allow the defendants to amend the return, by ſetting forth a different conſtitution.—*The King on the Proſecution of W. E Dillon* v. *The Mayor and Burgeſſes of Grampond.* 757

MARINE INSURANCES.

1. A company of ſhip-owners engaged to inſure each other's ſhips, and covenanted *ſeverally*, and not jointly, to pay a certain ſum in caſe of loſs in proportion to their reſpective ſhares, but in caſe of the inſolvency of any one of the members all the others were to be reſponſible: ruled that this contract was void by the ſtat. 6. *Geo.* 1. c. 18. ſ. 12. *Lees* v. *Smith.* 263

2. And where two perſons are engaged in *a partnerſhip* in inſuring ſhips, &c. which is carried on in the name of one of them only, and that one pays the whole of the loſſes: ſuch a partnerſhip being illegal by ſtat. 6 *Geo.* 1. c. 18. he cannot maintain an action againſt the other to recover a ſhare of the money that has been ſo paid.—*Mitchell*, et al. v. *Cockburne.* 265

3. *A.*, *B.* and *C.* became partners in inſuring ſhips (contrary to the ſtat. 6 *Geo.* 1. c. 18. ſ. 12.); but it was agreed that the policies ſhould be underwritten in the name of *A.* only; ſeveral policies were effected, and the premiums received by *C.* and *D.* as brokers: held that *A.* could not recover thoſe premiums from *C.* and *D.*—*Booth*, et al. v. *Hodgſon.* 627

4. If a party in an agreement for inſurances has a loſs, and is contributory to the loſſes of the other parties therein, they muſt be contributory to his. *Reed* v. *Cole.* 267

5. A perſon having a *reſpondentia* intereſt cannot inſure it as an intereſt on goods. *Glover* v. *Black.* 267

6. Seamen's wages and proviſions are not covered by an inſurance on the body of the ſhip. *Robertſon* v. *Ewer.* 270

7. Proviſions ſent out in a ſhip for the uſe of the crew are protected by a policy of aſſurance on the ſhip and furniture. *Brough* v. *Whirmore.* 271

8. And the aſſured cannot recover upon the policy, unleſs the loſs, which has happened, be a direct and immediate conſequence of the peril inſured. *Jones* v. *Schmoll.* 274

9. A policy of inſurance on Eaſt-India ſhips, includes the chance of their being detained in India, and the riſque of the country voyage there. *Salvador* v. *Hopkins, and Heaton* v. *Rucker.* 275

10. An under-writer is bound to know the nature and peculiar circumſtances of the branch of trade to which the policy relates: and, to prove the manner of conducting a particular branch of trade at one place, evidence may be given to ſhew the manner in which the ſame branch is carried on at another

another place. *Noble and another* v. *Kennoway.* 278

11. When an agent effects a policy for his principal reſiding abroad, the act of the 25 *Geo.* 3. c. 44. requires that ſuch agent's name ſhould be inſerted, *eo nomine*, as agent, and under the ſame act it is neceſſary that ſuch agent who effects the policy for his principal reſiding abroad, ſhould himſelf reſide in England. *Pray*, et al. v. *Edie.* 279

12. The ſhip's huſband has no right to inſure for any part-owner, without his particular direction, nor for all the owners in general, without a general direction or ſomething equivalent to it. *French* v. *Backhouſe, and French* v. *Foulſton.* 280

13. *A.* being indebted to *B.* without any order from him, conſigns goods to *C.* to be held for *B.* and indorſes the bill of lading to *C.*; held that *B* had an inſurable intereſt in the goods ſo conſigned. *Hill and another* v. *Secretan.* 280

14. *Jochum Brink Lund*, a merchant in Norway, contracted with the Cudbear Company, to ſupply them with a quantity of moſs; *the plaintiffs were the general agents of Lund* in London: *Lund* ſhipped 574 ſacks of moſs in Norway, and conſigned the ſame to the Cudbear Company in London, with a proper bill of lading and invoice. But the Cudbear Company, after having received through the hands of the plaintiffs (*Lund*'s agents), the bill of lading and invoice, and having a bill preſented to them by the plaintiffs, who had advanced money to *Lund*, for acceptance, refuſe to accept the ſaid bill. or take to the cargo, or inſure the ſame, and returned the bill of lading and invoice to the plaintiffs, and it was held that the plaintiffs' inſurance, though without any order ſo to do, was good. *Wolf* et al. v. *Horncaſtle.* 281

15. A debt which has no reference to the article inſured, and which cannot make a lien on it, will not give an inſurable intereſt. But a debt which ariſes in conſequence of the article inſured, and which would have given a lien on it, does give an inſurable intereſt. *Wolf* et al. v. *Horncaſtle.* 285

16. The produce of Holland, purchaſed in that country during hoſtilities between Holland and Great Britain, by a Britiſh agent reſident there, and ſhipped for Britiſh ſubjects, were inſured by them in this country, and held to be a legal inſurance. *Bell* et al. v. *Gilſon.* 285

17. Commiſſioners appointed by the crown under the authority of an act of parliament which enabled them "*to take into their poſſeſſion and care all Dutch ſhips and effects detained or brought into the ports of Great Britain*, and to manage, ſell and diſpoſe of the ſame to the beſt advantage, according to the inſtructions they ſhould receive from his majeſty and his privy-council," may inſure in their own names ſuch ſhips and effects after ſeizure abroad and while they are in tranſitu to this country. *Crauford* et al. v. *Hunter.* 289

18. And a count ſtating the nature of their truſt and averring the intereſt to be in themſelves as commiſſioners, and another count to the like effect but without any averment of intereſt at all, were both holden good upon demurrer. 289

19. Captors of ſhips ſeized as prize may inſure their intereſt therein, and are not entitled to a return of premium although it be afterwards adjudged to be no prize, and reſtitution be awarded to the owners by the Court of Admiralty. *Boehm* et al. v. *Bell.* 293

20. An inſurance of goods on board of ſhip or ſhips is legal, and the inſured in caſe of a loſs has a right to apply ſuch an inſurance to whatever ſhip he thinks proper, within the terms of it. *Kewley* et al. v. *Ryan.* 296

21. Every re-aſſurance in this country, either by Britiſh ſubjects or foreigners, whether on Britiſh or foreign ſhips, is void by 19 *Geo.* 2. c. 37. unleſs the aſſured be inſolvent, become a bankrupt, or die. *Andre* et al. v. *Fletcher.* 298

22. In the conſtruction of the act 19

19 *Geo.* 2. c. 37. it has been holden, that all insurances made by persons having no interest in the event about which they insure, or without reference to any property on board, are merely wagering policies, and absolutely null and void. *Kent* v. *Bird.* 299

23. An insurance being made without interest, and the premium paid, the insured shall not recover back the premium after the ship has arrived safe. *Foxry and another* v. *Bourdieu.* 300

24. Payment of money into court is only an acknowledgment by the defendant of the contract, and that the plaintiff is entitled to recover the sum so paid: but it does not preclude him from taking any objection to the action beyond that sum; though unless such sum were paid, such objection would be a bar to the whole demand. *Cox and another, executors of Shultz,* v. *Parry.* 302

25. An assurance of a voyage expressly prohibited by the laws of this country, is void. *Johnston and another* v. *Sutton.* 304

26. The exclusive right of trading to the East Indies, granted to the East-India Company by stat. 9 & 10 *W.* 3. has never been put an end to. And though such parts of that act as inflicted penalties, &c. were repealed by stat. 33 *Geo.* 3. c. 52. and though the latter act says that no acts or parts of acts thereby repealed shall be pleaded or set up in bar of any action, &c. it is competent to under-writers who have subscribed policies on ships trading to the East Indies in contravention of the stat. of *Will.* to avail themselves of the illegality of such trading in an action brought on the policies. *Camden* et al. v. *Anderson.* 305

27. A writ of error having been brought in this court, on the above judgment of the court of King's Bench, the case was twice argued, and after time taken to consider, EYRE, Ch. J. delivered the opinion of the Court: in affirmance of the judgment. *Camden* et al. v. *Anderson.* 310

28. If there be any illegality in the commencement of an integral voyage, and an insurance be effected on the latter part of the voyage, which taken by itself would be legal, still the assured cannot recover on the policy. *Wilson* v. *Marryat.* 312

29. Where a policy does not appear on the face of it to be illegal, the Court will not grant a new trial in order to let the defendant into proof that it was so; but he should have shewn it on the trial. *Gist* v. *Mason.* 318

30. Two partners purchased a ship, under a bill of sale, conformable to the stat. 26 *Geo.* 3. c. 60.; afterwards they took in two other partners, but there was no transfer of the ship to them jointly with the others; held that the four partners had not any insurable interest in the freight of the ship. The right to freight results from the right of ownership; and these four partners had neither a legal or an equitable title to the ship. *Camden* et al. v. *Anderson.* 320

31. Where a mate of a ship or a sailor is to receive something at the end of the voyage in lieu of wages, such as slaves; he cannot insure it: nor can he recover the value of such thing in an action against his agent for negligence in not procuring such an insurance. *Webster* v. *D. Tastet.* 321

32. In an action on a policy on a foreign ship, when there is a stipulation that the policy shall be sufficient proof of interest, if there is judgment by default, the plaintiff on the writ of inquiry needs only to prove the defendant's subscription to the policy, without giving any evidence of interest. *Thelluson* v. *Fletcher.* 321

33. The plaintiff's agent shewed to the defendant, an under-writer, the captain's protest containing an account of the loss of the ship insured, demanding payment: held that this did not entitle the defendant to read the protest in evidence in an action on the policy. *Senat* v. *Porter.* 322

34. Insurers are liable to pay the charge of a compromise *bonâ fide* made to prevent the ship from being condemned as lawful prize, or to avoid a greater expence. *Berens* v. *Rucker.* 322

35. If

35. If an armed force board a ſhip, and take part of the cargo, the under-writers are not liable on a count, ſtating the loſs to be by a ſeizure by people to the plaintiffs unknown; for "people" in the policy means the governing power of the country. *Nybitt* et al. v. *Luſhington*. 324

36. Barratry is every ſpecies of fraud or knavery in the maſter or mariners of a ſhip, by which the owners or freighters are injured; and a deviation, if ſuch, is barratry, whether the loſs happen during ſuch fraudulent voyage, or after: but it is otherwiſe, if the deviation be with the privity or conſent of the owners. *Vallejo* et al. v. *Wheeler*. 327

37. Barratry can only be committed againſt the owner of the ſhip, and without his conſent. *Nutt*, et al. v. *Bourdieu*. 330

38. If a ſhip be inſured by the terms of the policy in any lawful trade, and the barratry of the maſter be mentioned as one of the riſks to be borne by the inſurer; the under-writers will be liable for a loſs which happens by the barratry of the maſter by ſmuggling. *Havelock* v. *Hancill*. 332

39. A ſhip being inſured for a voyage, the under-writer is not liable for any loſs ariſing from ſeizure after ſhe has been 24 hours in port; though ſuch ſeizure was in conſequence of an act of ſmuggling committed by the maſter during the voyage. *Lockyer* et al. v. *Offley*. 333

40. A deviation of a veſſel from the voyage inſured through the ignorance of the captain, or from any other motive not fraudulent, though it avoids the policy, does not conſtitute an act of barratry. *Phyn* et al. v. *The Royal Exchange Aſſurance Company*. 335

41. In an action by the aſſured of goods againſt the under-writers for a loſs by the *barratry* of the maſter, proof that the perſon who was deſcribed in the policy as *maſter*, and who was treated with and acted as ſuch, carried the ſhip out of her courſe for fraudulent purpoſes of his own, *prima facie*, is ſufficient to entitle the plaintiff to recover, without ſhewing negatively that he was not the *owner*, or that any other perſon was. Such proof lies on the defendant, wiſhing to avail himſelf of it, to eſtabliſh. *Roſs* v. *Hunter*. 337

42. Where a ſhip was chartered from London to Teneriffe, there to take on board a certain number of pipes of wine, and proceed to the Weſt-India iſlands, for which the owner was to receive freight at the rate of ſo much per pipe; a policy of inſurance on ſuch freight was held to attach from the ſailing of the ſhip from London. *Thompſon* v. *Taylor*. 341

43. The inſurance of a ſhip to Jamaica determines by her mooring 24 hours in any port there, and does not continue till ſhe arrives at her laſt port of delivery. *Camden* v. *Cowley*. 343

44. Where the aſſured do the beſt they can for the benefit of the inſurance, if nevertheleſs the goods are ultimately loſt, the under-writer is liable to pay after any length of time has elapſed between the accident, which was the original cauſe of the loſs, and the time when the demand was made on the inſurer. *Plantamour* v. *Staples*. 343

45. In an action on a policy of inſurance the plaintiff muſt prove that a loſs has happened, and that by the very means ſtated in the declaration. *Kulen Kemp* v. *Vigne*. 345

46. A ſhip homeward-bound to the port of London received a pilot at Orfordneſs, as directed by 5 *Geo.* 2. c. 20. and dropped him before ſhe reached her moorings in the river Thames; after which, before ſhe was ſafely moored, an accident happened, and the veſſel was ſunk: the under-writer on the ſhip and cargo was held diſcharged from his liability on account of there not being any pilot on board at that time; though it did not appear that the loſs was directly imputable to want of ſkill in thoſe who navigated the veſſel. *Law* v. *Hollingſworth*. 348

47. Upon an inſurance on ſlaves againſt perils of the ſea, their death by failure of ſufficient and ſuitable proviſion occaſioned by extraordinary delay in the voyage from bad weather is not a loſs

a loſs within the policy, but a loſs by natural death which cannot be inſured againſt ſince the 30 *Geo.* 3. c. 33. ſ. 8. and 34 *Geo.* 3. c. 80. *Tatham* v. *Hodgſon.* 349

48. By 31 *Geo.* 3. c. 54. ſ. 7. for regulating the African ſlave trade, it is neceſſary that the certificate of the captain's having ſerved as that act requires ſhould be atteſted by the owner or owners of the ſhip or ſhips in which the ſervice was performed. *Farmer* v. *Legg.* 351

49. Upon a policy of inſurance on a ſhip and cargo from Liverpool to Oporto, the inſured being deſirous of putting guns on board the veſſel, and taking out a letter of marque for her, aſked permiſſion of the under-writers, who gave permiſſion, to put guns on board for defence of the ſhip, but peremptorily denied the liberty of taking a letter of marque. Notwithſtanding which a general letter of marque was obtained for the ſhip, and it was held, though no uſe were made of it, that it avoided the inſurance. *Deniſon* v. *Modigliani.* 355

50. But where the aſſured upon a trading voyage took out a letter of marque (but without a certificate, which is neceſſary to its validity) unknown to the under-writers, ſolely with a view to encourage ſeamen to enter, and without any intention of uſing it for the purpoſe of cruizing, though the veſſel was armed for ſelf-defence, this was held not ſuch an alteration of circumſtances as to avoid the policy. *Moſes* et al. v. *Byrom.* 356

51. Alſo if the captain, contrary to the inſtructions of his owner, cruize for and take a prize, and the veſſel is afterwards loſt in conſequence of it, it is an act of barratry, upon which the aſſured may recover againſt the under-writers, although the captain libelled the prize for the benefit of his owner as well as himſelf. 356

52. A valued policy of inſurance is not to be conſidered as a wager policy. *Lewis* et al. v. *Rucker.* 358

53. Inſurance free from average, unleſs general, does not extend to damage received by the goods in a ſtorm. *Wilſon* et al. v. *Smith.* 363

54. The inſured is entitled to receive as for a total loſs, upon a mixed policy of inſurance, of a peculiar ſort and valued policy, if a fair one, being within the exception of ſtat. 19 *Geo.* 2. c. 37. *Da Coſta* v. *Firth.* 365

55. If an inſurance be effected on fruit, and the policy contain the uſual memorandum, "corn, fruit, &c. warranted free from average unleſs general or the ſhip be ſtranded," and the ſhip be in fact ſtranded in the courſe of the voyage, the under-writers are liable for an average loſs ariſing from the perils of the ſeas, though no part of the loſs ariſe from the act of ſtranding. *Burnet* v. *Kenſington.* 366

56. In an action on a policy of inſurance for an average loſs, if the account is ſo complicated that it cannot be adjuſted in court, the jury, by conſent of the parties, may find for a total loſs, the plaintiff entering into a rule to account upon oath for what part of the inſured property he may recover. *Barber* v. *French.* 373

57. Upon a double inſurance, though the inſured is not entitled to two ſatisfactions, yet upon the firſt action he may recover the whole ſum inſured, and may leave the defendant therein to recover a ratable ſatisfaction from the other inſurers. *Newby* v. *Reed.* 373

58. The aſſured upon a valued policy are entitled to recover the whole amount, though part of the cargo only be on board when the accident happens, if the reſt be ready to be ſhipped. *Montgomery* v. *Egginton.* 373

59. A ſhip and goods being inſured for a voyage, if the ſhip is taken and recaptured, and after the recapture the captain, acting fairly for the benefit of his employers, ſells the ſhip and cargo, and thereby puts an end to the voyage, the inſured may abandon and recover as for a total loſs. *Mills* v. *Fletcher.* 373

60. On a valued policy the inſured cannot recover more than the actual loſs

loſs which happened at the time when he choſe to abandon. *Hamilton* v. *Mendes.* 376

61. Owners of ſhips are not entitled to abandon, unleſs at ſome period of the voyage there has been a total loſs. And where the jury have found only an average loſs occaſioned by the perils of the ſea, the Court are precluded from ſaying there has been a total loſs. *Cazalet* et al. v. *St. Barbe.* 383

62. A policy of aſſurance on a ſhip and ſtores "at and from a port" in a foreign country, in the common form againſt arreſts of princes, people, &c. extends to an embargo laid on by the government of that country in the loading port. And if the embargo continue, the aſſured may abandon and recover as for a total loſs. *Rotch* v. *Edie.* 385

63. When the aſſured receive intelligence of ſuch a loſs as entitles them to abandon, they muſt make their election in the firſt inſtance; and if they abandon, they muſt give the under-writers notice in a reaſonable time, otherwiſe they waive their right to abandon, and can only recover as for an average loſs. *Mitchell* et al. v. *Edie.* 390

64. Where repairs are ordered by the under-writers, for the payment of which a bottomry bond is given, and they refuſe to pay it on the arrival of the ſhip, in conſequence of which the ſhip is ſold, they are liable for all the damage which accrues to the owner in conſequence of that refuſal. *Da Coſta* v. *Newnham.* 393

65. Falſe warranty in a policy of inſurance, will vitiate it, though the loſs happen in a manner not affected by that falſity. *Woolmer* et al. v. *Muilman.* 397

66. Concealment of the true port of loading will vitiate a policy of inſurance. *Hodgſon* v. *Richardſon.* 397

67. A concealment of the intention to touch at a particular port will vitiate the policy. *Middlewood* v. *Blakes.* 398

68. What degree of concealment will avoid a policy of inſurance. *Carter* v. *Boehm.* 400

69. If the voyage deſcribed in a policy be "from A. to B. and C." and the ſhip go to C. before B. (though C. be nearer to A. than B. is), it is a deviation, and the plaintiff cannot recover for any ſubſequent loſs, if it be not the regular and ſettled courſe of the voyage to go to C. firſt. *Beatſon* v. *Haworth.* 409

70. If goods are inſured on board a ſhip *from London to Nantz, with liberty to call at Oſtend*, and ſhe is cleared only for Oſtend, but ſails directly for Nantz, that being the known courſe of the trade, in order to ſave certain duties both in England and France, there is no fraud on the under-writer ſo far as to vacate the policy; and if an inſurance is made before the commencement of hoſtilities, but when every body expects a war immediately, the inſured is not bound to give the under-writer notice, though the ſhip do not ſail till after the war takes place, and the under-writer is liable in caſe of *capture*. Neither do the courts in this country take notice of foreign revenue laws. *Planché* et al. v. *Fletcher.* 410

71. A warranty inſerted in a policy of inſurance muſt be *literally* and ſtrictly complied with, whereas a repreſentation of the under-writer need only be *ſubſtantially performed*: but if falſe in a material point it will avoid the policy. *Pawſon* v. *Watſon.* 412

72. So on a warranty to ſail from Jamaica on or before a day certain, if the ſhip departs from her port on that day, with all her cargo and clearances on board, and proceeds to the place of rendezvous in the iſland, expecting to find convoy and proceed immediately, but is detained there by an embargo till after the day, the departure is a compliance with the warranty, although the captain knew of the embargo when he ſailed, the embargo being only till convoy ſhould be ready. *Earle* v. *Harris.* 417

73. In a repreſentation that a ſhip was ſeen ſafe on ſuch a day, and had performed

performed two thirds of her voyage, if it turn out that she had got as far as was represented, but was lost two days before the day mentioned, the mistake is material, and makes the policy void. *Macdowall* v. *Fraser.* 418

74. Any person acting by the orders of the insured, and who is anywise instrumental in procuring the insurance, is bound to disclose all he knows to the under-writer, before the policy is effected; and where any misrepresentation arises from his fraud or negligence, the policy is void. And where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two gave him credit ought to bear the loss. *Fitzherbert* v. *Mather.* 419

75. A representation made to the first under-writer extends to all the others. But a representation, that the ship is *expected* to sail on such a day is not material, so as to vitiate the policy, although it should turn out that she actually sailed six months before. *Barber* v. *Fletcher.* 421

76. What part of a premium must be returned, if a policy of insurance be given up and cancelled, was in this case discussed, but not determined. *Wilson* v. *Ducket.* 422

77. If a ship be driven out of her loading port into another port, and being there, she does the best she can to get to her port of destination, she is not obliged to return to the port from whence she was driven. *Delaney* et al. v. *Stoddart.* 423

78. If an insured ship quit the course described in the policy, from necessity, she must pursue such new voyage of necessity in the direct course, and in the shortest time, otherwise the under-writers will be discharged. *Lavabre* et al. v. *Wilson*; *Bize* v. *Fletcher*; and *Lavabre* et al. v. *Walter.* 425

79. In this case the insurance was on a voyage "from C. to D. on a representation that the ship was first to sail from A. to B. and from B. to C.; the voyage from A. to B. was performed, but that from B. to C. being unavoidably prevented, the ship returned to A., from thence proceeded immediately to C., and in performing the voyage from C. to D. was lost; and this was held a good commencement of the voyage insured." *Driscol* v. *Passmore.* 429

80. Same point. *Driscol* v. *Boril.* 432

81. A liberty "*to cruise six weeks*," in a policy of insurance, means "six weeks *successively*, from the commencement of the cruise." *Syers* et al. v. *Bridge.* 433

82. If a ship insured for one voyage, sails upon another, though she be taken before the dividing point of the two voyages, the policy is discharged. *Wooldridge* v. *Boydell.* 434

83. If a ship insured from a certain time, sail before the time on a different voyage from that insured, the assured cannot recover, though she afterwards get into the course of the voyage described in the policy, and is lost after the day upon which the policy was to have attached. *Way* v. *Modigliani.* 435

84. An insurance was made on goods from the lading of them on board the ship at London, to Liverpool "*lost or not lost*:" at the bottom of the policy was added "*warranted well December 9th*, 1784." Held that, if the ship were well at any time on that day, it was sufficient; and the under-writer consequently liable. *Blackhurst* v. *Cockell.* 437

85. A warranty on the margin of a policy must be strictly followed, as much as if written in the body of the instrument. *Bean* v. *Stupart.* 437

86. The following words were written transversely on the margin of the policy: "In port, 20th of July, 1776."—The ship was proved to have sailed the 18th of July: held that this was clearly a warranty; and though the difference of two days might not make any material difference in the risk, yet as the condition had not been complied with, the under-writer was not liable. *Kenyon* et al. v. *Berthon.* 438

87. Whatever is written in the

margin of a policy of insurance is a warranty, and must be literally complied with. *De Hahn* v. *Hartley*. 439

88. If a ship has been warranted to sail on a particular day, though the ship be delayed, the warranty has not been complied with, and the insurer is discharged from his contract. *Hore* v. *Whitmore*. 440

89. When a ship is warranted to sail on or before a particular day, if she sail from her port of loading, "with all her cargo and clearances on board," to the usual place of rendezvous at another part of the same island, merely for the sake of joining convoy, it is a compliance with the warranty, though she be afterwards detained there by an embargo beyond the day. *Bond* v. *Nutt*. 440

90. So also, a French ship being warranted to sail from Guadaloupe on or before the 31st of December, if she take in all her loading and papers, and leave her port of loading before that day, and sail to another part of the island, in the direct course of her voyage, and merely in the hopes of joining convoy, and to take the governor's dispatches for France, the warranty is complied with, though the governor there should detain her beyond the day, and although it was a condition inserted in one of her clearances, "that she should pass that way to take the orders of government." *Thellusson* v. *Fergusson*. 443

91. The judgment given in the last cause was not satisfactory to about twenty other under-writers upon the same policy, nineteen of whom obtained leave to consolidate their different causes upon the usual terms, in order to bring the question once more into court. Accordingly, in the ensuing sittings the cause came on trial, and there were verdict against the under-writers. *Thellusson* v. *Staples*. 446

92. In a policy of insurance, "sailing with convoy," means "sailing with convoy for the voyage." *Lilly* et al. v. *Ewer*. 448

93. On a policy of insurance on goods on board the ship Little Betsey, on a voyage at and from London to St. Sebastian in Spain, *warranted to depart with convoy for the voyage*. The commander's instructions for the convoy was "to take the vessels bound to Bilboa and St. Sebastian under convoy, and see them in safety *off* Bilboa." At the trial it was objected that the warranty had not been complied with, the convoy being only to Bilboa; but it was left to the jury to determine whether there was not a sufficient convoy within the meaning of the policy, and a verdict was found for the plaintiff. And a rule for a new trial was afterwards refused. *D'Eguino* v. *Bewicke*. 449

94. Sailing orders are necessary to the performance of *a warranty to depart with convoy*, unless particular circumstances exempt the insured from the general rule. *Webb* v. *Thompson*. 451

95. In an insurance on a ship "at and from Hull to Bilboa, *warranted to depart from England with convoy*," the voyages from Hull to Portsmouth where she meets with convoy, and from thence to Bilboa, may be considered as distinct, and in case of a loss between the two latter places, an apportionment and return of premium may be demanded. *Rothwell* v. *Cooke*. 452

96. Under a warranty in a policy of insurance, that the ship and cargo are neutral property, it is sufficient that they are neutral when the risk commences. *Eden* et al. v. *Parkinson*. 453

97. So also in this case it was held, that if goods be insured from A. to B. in a neutral ship, it is sufficient to charge the under-writers, that the ship was neutral when she sailed. *Tyson* et al. v. *Gurney*. 454

98. On an action on a policy of insurance, a condemnation by a foreign court of admiralty is not conclusive evidence that the ship was not neutral, unless it appear that the condemnation went

went upon that ground. *Bernardi* v. *Motteux.* 455

99. In an action on a policy of insurance on goods warranted American, on board a ship from London to Virginia, a sentence of a foreign court, which, after reciting that "forasmuch as the true destination of the vessel was for the English islands, having been hired and loaded at London, and having on board eighty barrels of gunpowder, declares the ship and cargo a good prize," is not conclusive evidence against the warranty of neutrality; because the special grounds assigned for the sentence do not necessarily lead to such a conclusion. *Calvert* v. *Bovill.* 460

100. By the sentence of a French court of admiralty it appeared that the ship insured warranted American had been condemned as enemy's property for want of having on board a role d'equipage, or list of the crew, such as is required by a marine ordinance of France, and adjudged by the court there to be requisite within the meaning of the treaty of commerce between France and America; and this was held to be conclusive evidence against the warranty of neutrality, though in fact the ship was American. *Geyer* v. *Aguilar.* 461

101. A warranty in a policy of insurance that the ship is American property, means that the ship is entitled to all the privileges of an American flag: and if she has no passport on board (which is required by the treaty between France and America) the warranty is not complied with, and the assured cannot recover against the underwriter, though in fact the ship suffers no inconvenience in the voyage from the want of the passport. *Rich* v. *Parker.* 467

102. A warranty of Danish property (Denmark being then a neutral power) in a policy of insurance on ship and goods, was holden to be conclusively disproved by a sentence of a court of Admiralty condemning the ship and cargo, because the master and crew had broken their neutrality in the course of the voyage insured, by forcibly rescuing the ship, which had been seized and carried into port by a belligerent power for the purpose of search. *Garrels* et al. v. *Kensington.* 469

103. On an insurance on goods, to be shipped on board a certain ship, to return part of the premium, "if sails with convoy and arrives." *Simond* et al. v. *Boydel.* 472

104. The insurer on freight agreed to return part of the premium "if the ship sailed with convoy and arrived;" held that the assured were entitled to that return, the ship having sailed with convoy and arrived, though she had been captured and recaptured, and the assured had been obliged to pay for salvage. *Aguilar* et al. v. *Rodgers.* 473

105. If a risque is not run, the insurer shall retain only a proportionable part of the premium. *Stevenson* v. *Snow.* 475

106. Upon a policy "at and from such a port to any other port or place whatsoever for 12 months, at 9 *per cent.* warranted free from capture," the risk is entire; and therefore if once begun, there shall be no return of premium. *Tyrie* v. *Fletcher.* 476

107. So, where the ship was insured for 12 months at the rate of so much per month, though the risk ceased at the end of the two. It was held that there should be no apportionment, or return of premium. *Loraine* v. *Thomlinson.* 479

108. So, if there is an insurance on a ship and goods, "at and from A. to B. during her stay and trade there, at and from thence to her port or ports of discharge in C., and at and from thence back to A.;" it is an entire contract; and if a loss happen at any time after the commencement of the risk, there shall be no apportionment or return of the premium. *Bermon* v. *Woodbridge.* 480

109. On a declaration for a total loss, you may recover an average loss: yet the plaintiff is not tied down to declare only for a total loss; but is at liberty to declare both ways. But it is unnecessary to declare double with re-

ſpect to the ſigning of the policy; that is to ſay, once, as upon a policy ſigned by the defendant himſelf, and again as upon a policy ſigned by his agent for him. *Sarah Nicholſon* v. *Step. Croſt.* 483

110. In an action on a policy of inſurance the declaration ſtated, that after the making of the policy the ſhip ſailed; the evidence was, that ſhe ſailed before; and it was held that the variance was immaterial. *Peppin* v. *Solomons.* 712

MARRIAGE.

1. On a ſuit of jactitation, evidence was given of a ſtrong acknowledgment, and an open avowal of a marriage for eighteen years to plaintiff, but there was no actual proof of the marriage, which was previous to the ſtatute 25 *Geo.* 2. And on appeal to the delegates, their lordſhips were of opinion, that this was evidence of the marriage. *Hervey* v. *Hervey.* 483

2. A bond given by a father on the marriage of his daughter, to pay to the huſband a ſum of money within a limited time after the obligor's death, if any of the iſſue of the marriage ſhould be living at that time, extends to the leaving of grand-children, there being children of the marriage who all died before the obligor. *Haydon* v. *Wilſhere.* 484

3. A note, given fraudulently, to carry on a marriage treaty, ſhall be good againſt the maker, though given without any conſideration. *Monteſiori* v. *Monteſiori.* 485

4. A marriage is void and no ſettlement is gained by it, if celebrated in a chapel erected ſince 26 *Geo.* 2. although marriages may have been *de facto* frequently celebrated there. *The King* v. *the Inhabitants of Northfield.* 486

5. That a marriage in a foreign country muſt be governed by the law of that country where the marriage was had, is in general true: but the marriages in Scotland, of perſons going from hence for that purpoſe, may come under a very different conſideration. *Robinſon* v. *Bland.* 487

See alſo FRAUDULENT CONVEYANCE, MORTGAGE, No. 6. and POWER.

MARQUE, LETTERS OF.

See MARINE INSURANCES, No. 50, 52.

MASTER OF THE ROLLS.

The maſter of the rolls may grant as many concurrent leaſes as he pleaſes, during the laſt ſeven years of a former leaſe, and may, at any time, take a ſurrender, and renew for twenty-one years. *Wilſon, widow,* v. *Sir Thomas Sewell.* 35

MILITIA.

1. The deputy-lieutenants ought to make every enquiry before they approve of a ſubſtitute; and if he have more than one child, he ought to be rejected: but if the deputy-lieutenants do take him, then he becomes a legal ſubſtitute; and the pariſh for which the principal ſerves, muſt bear the expences of maintaining the family of the ſubſtitute. *The King* v. *Willis.* 487

2. But an order for reimburſement, under the ſtat. 33 *Geo.* 3. c. 8. ſ. 3. made upon the pariſh for which a ſubſtitute in the militia ſerves, to indemnify the pariſh in which ſuch ſubſtitute's family ſhall have become chargeable, and been relieved under an order of maintenance, muſt be made by the ſame magiſtrate, and at the ſame time, as the firſt order of maintenance; and notice of ſuch order of reimburſement ought to be ſerved upon the pariſh to be affected by it, before they can be proceeded againſt criminally for diſobedience to it. *The King* v. *the Inhabitants of Ledbury.* 489

3. Such previous orders, as are the foundation of the magiſtrate's authority, muſt be recited, or at leaſt referred to, in an indictment for diſobedience of ſuch authority. *Rex* v. *White and Eling, Overſeers, &c.* 492

MORTGAGE.

1. A mortgagee may recover in ejectment (without giving notice to quit)

quit) againſt a tenant who claims under a leaſe from the mortgagor, granted after the mortgage, without the privity of the mortgagee. *Keech, Leſſee of Warne*, v. *Hall*, et al. 494

2. Alſo, a mortgagee, after giving notice of the mortgage to the tenant in poſſeſſion under a leaſe prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards; and he may diſtrain for it after ſuch notice. *Moſs* v. *Gallimore*, et al. 496

3. If a lord of a manor mortgage the manor in fee to *A.* and afterwards purchaſe copyholds held of the manor, and take ſurrenders of them to himſelf in fee, they ſhall enure to the benefit of the mortgagee; and a ſettlement by the lord of all his eſtate mortgaged to *A.* ſhall paſs the equity of redemption of ſuch ſurrendered copyholds. Alſo if a mortgagor deviſes the mortgaged premiſes, and afterwards pays off the mortgage, and the mortgagee conveys the legal eſtate to a truſtee in truſt for the mortgagor, ſuch a transfer of the legal eſtate ſhall not operate as a revocation of the will. *Doe, leſſee of Sir W. Gibbons, bart.* v. *Pott*, et al. 498

4. A ſecond mortgagee, who takes an aſſignment of a term to attend the inheritance, and has all the title deeds, may recover in ejectment againſt the firſt mortgagee, not having had notice of ſuch prior mortgage. *Goodtitle*, ex dim. *Norris, Hale, Partingdon, and Jeffery and Wife*, v. *Morgan and David*. 505

5. But where a legal term is created for a particular purpoſe, if that purpoſe be ſatisfied, or it be unſatisfied and not connected with the litigating parties, it ſhall never be ſet up between them in ejectment. *Doe* ex dim. *Briſtow* v. *Pegge*. 507

6. One after marriage made a ſettlement of certain premiſes, and three years afterwards mortgaged the ſame to a perſon, who was told that there was a ſettlement; and the Court held the ſettlement as void againſt the mortgagee within the ſtatute 27 *Eliz.* c. 4. *Chapman* ex dim. *Staverton* v. *Emery*. 510

7. There is a diſtinction in the court of chancery, that if 5l. *per cent.* be reſerved for intereſt on a mortgage, with a condition to accept 4l. *per cent.* if punctually paid; this condition muſt be ſtrictly performed; and the debtor ſhall not have relief in equity after the day of payment is elapſed. *Bonafous* v. *Rybot*. 511

8. Where there are two or more mortgages, the Court will not compel a redemption of one, without the reſt. *Roe* ex dim. *Kaye* v. *Soley*. 511

9. The Court will not ſtay the proceedings in an ejectment brought by a mortgagee againſt a mortgagor, on the latter paying principal, intereſt, and coſts, if the latter has agreed to convey the equity of redemption to the mortgagee. *Goodtitle* ex dim. *Tayſum* v. *Pope*. 511

10. A tenant to a mortgagor, who does not give him notice of an ejectment brought by the mortgagee to enforce an attornment, is not liable to the penalties of the 11 *Geo.* 2. c. 19. ſ. 12. for ſecreting ejectments. *Buckley* v. *Buckley*. 512

11. In this caſe the Court referred it to the Maſter to compute what was due for principal and intereſt, upon a mortgage ſecured by covenant, on which this action was brought. *Berthen* v. *Street*. 512

12. A party having a mortgage and alſo a bond, as a ſecurity for the ſame debt, may bring an action on the bond, and arreſt the defendant, pending a ſuit in equity for a foreclоſure. *Burnell* v. *Martin*. 512

MURDER.

On an indictment for murder, if the jury find a ſpecial verdict, it is neceſſary, in order to affect principals in the ſecond degree, to ſtate, either, 1. that they were actually preſent; or, 2. ſome acts done by them at the very time, which unavoidably ſhew that they were preſent; or, 3. that they were of the ſame party, on the ſame purſuit, and under

under the ſame engagements and expectation of mutual defence and ſupport with the perſon who did the fact. *The King* v. *J. Borthwick.* 512

MUSIC.

A muſical compoſition is a writing within the ſtat. 8. *Anne*, c. 19. for the encouragement of learning, by veſting the copies of printed books in the authors or purchaſers of ſuch copies, during the times therein mentioned. *Bach* v. *Longman*, et al. 515

MUTUAL CREDIT.

1. If *A.* depoſit goods with *B.* for ſale, and *B.* promiſe to pay the proceeds to *A.* when ſold; *B.* has no lien on them (if not ſold) for the balance of his general account ariſing upon other articles. *Walker*, et al. *aſſignees of Caldwell and Co. bankrupts*, v. *Birch*, et al. *aſſignees of Greaves and Deniſon, bankrupts.* 147

2. If there be a mutual account of any ſort between the plaintiff and defendant, for any item of which credit has been given within ſix years, that is evidence of an acknowledgment of there being ſuch an open account between the parties, and of a promiſe to pay the balance, ſo as to take the caſe out of the ſtatute of limitations. *Catling*, et al. *executors of Tuthill*, v. *Skoulding*, et al. 160

3. If an officer on the impreſs-ſervice, acting under an impreſs-warrant, duly indorſed, fire upon a veſſel in the uſual manner to bring veſſels to, and hit the haulyards, and thereby kill a man, it is only manſlaughter. *Rex* v. *Rowland Philips.* 515

NAVAL STORES.

A perſon convicted of concealing naval ſtores may be adjudged to pay the penalty of 200l. or be puniſhed corporally, at the election of the Court. *The King* v. *W. Bland.* 515

NEW FOREST.

Conſtruction of the ſtat. of 9 and 10 *Wil.* 3. c. 36. for the increaſe and preſervation of timber in New Foreſt, Hampſhire, which gives the King liberty to incloſe two thouſand acres; (1000 immediately, and the other 1000 at a ſpecified time): and afterwards, 200 in each year, for 20 ſucceſſive years. *Biddlecombe* v. *Kervel.* 517

NEW TRIAL.

1. The Court may in any caſe grant a new trial upon the ground of exceſſive damages. *Ducker* v. *Wood.* 517

2. A new trial was granted in this caſe, ſubordination of witneſſes having been diſcovered ſince the former trial. *Fabrilius* v. *Cock.* 518

3. Diſcovery of new evidence by the attorney of an executor defendant (then abſent from *England*), though in the actual cuſtody of the attorney himſelf, yet not known by him ſo to be, is a ground for a new trial. *Broadhead* v. *Marſhall and Wife.* 518

4. So, if the teſtimony of witneſſes on which a verdict has proceeded be founded on, and derives its credit from, particular circumſtances, and theſe circumſtances be afterwards clearly falſified by affidavit, the Court will grant a new trial. *Liſter* v. *Mundell.* 518

5. A new trial may be granted in ejectment cauſes. *Goodtitle* ex dim. *Alexander* v. *Clayton* et al. 519

6. The Court lean to new trials on behalf of defendants, in the caſe of ejectments, and a good rule for granting or refuſing new trials, is that, upon the whole, ſubſtantial juſtice has not been, or has been done to the parties. *Leſſee of Clymer* v. *Littler.* 519

7. On the trial of an action of treſpaſs, aſſault, and falſe impriſonment, the jury were much divided in their opinions, and wiſhed to have found a ſpecial verdict. But the judge telling them, that what they wiſhed to find would be evidence and not facts, they with ſome reluctance agreed to find a general verdict, and a new trial was afterwards granted. *Rafael* v. *Verelſt* et al. 519

8. In an action on the caſe for diverting the plaintiff's water-courſe, where the jury under circumſtances of aggravation gave 3000l. damages, the Court granted a new trial on the ground

ground that the damages given greatly exceeded the amount of the injury proved. *Pleydell* v. *The Earl of Dorchester.* 521

9. Where the jury have found a verdict for the plaintiff upon a presumption contrary to evidence, the Court will not grant a new trial if the plaintiff be entitled to recover in conscience and equity. *Wilkinson* v. *Payne.* 521

10. Where a verdict in an action for words is clearly against evidence, yet if the damages on a right verdict could have been only trivial, a new trial shall not be granted. *Marsh and Wife* v. *Bower and Wife.* 522

11. The Court will not grant a new trial in a hard case. *Reavely* v. *Mainwaring, esq. Walker,* et al. 522

12. A new trial may be granted after two concurring verdicts. *Goodwin* v. *Gibbons, one, &c.* 523

13. Where there are two contrary verdicts, and the latter is satisfactory to the Court, the losing party is not *entitled* by any rule or practice to a third trial. *Parker* v. *Ansell.* 524

14. After a full trial by a competent jury, if no fresh light can be thrown in, a new trial shall not be granted. *Camden* v. *Cowley.* 524

15. Where a policy does not appear on the face of it to be illegal, the Court will not grant a new trial in order to let the defendant into proof that it was so; but he should have shewn it on the trial. *Gist* v. *Mason* et al. 318

16. In trespass, the defendant prescribed for a way over the close in which, &c. and mistook the *terminus a quo,* in his plea; there was a verdict for the defendant: and the Court refused to grant a new trial, the merits having been tried. *Sampson* v. *Appleyard.* 524

17. But in this case, a new trial was granted, although there was evidence on both sides, because all the witnesses subscribing to a release were not called and examined. *Norris* v. *Freeman.* 525

18. A new trial shall not be granted, because the counsel thought it prudent to omit evidence which they had in their briefs; nor, because another jury, in a cause nearly similar, gave a different verdict. *Spong* v. *Hog.* 526

19. Subsequent declarations of the jury shall not vitiate a general verdict, given according to the merits of the case. *Clark* v. *Stevenson.* 527

20. So also in this case it was held, that a subsequent confession of a juryman to the defendant's attorney, that the jury drew lots which six of them should determine the verdict, not otherwise proved to the Court, is no ground for a new trial, for it is too dangerous to call a verdict in question, deliberately given, upon so loose and slight a suggestion. *Aylett* v. *Jewel.* 528

21. Imprisonment for a few hours and 300l. damages was held not excessive, and a new trial refused; neither will the Court set the verdict aside for a variance between the issue delivered, and the record of *nisi prius* after a defence. *Iæman* v. *Allen* et al. 529

22. So in this case on the trial of an action of trespass, assault, and imprisonment, it was proved for the plaintiff, that he was a journeyman printer, and was taken into custody by the defendant (a king's messenger) upon suspicion of having printed the North Briton, number 45; that the plaintiff kept him in custody about six hours, but used him very civilly by treating him with beef-steaks and beer, so that he suffered very little or no damages; 300l. damages held not excessive. *Huckle* v. *Money.* 530

23. So in this case, on the trial of an action of trespass and false imprisonment under a similar warrant, the plaintiff being an attorney, 1000l. damages were held not excessive. *Arthur Beardmore* v. *Carrington* et al. 532

24. For a trifling assault and battery, 200l. damages were held not excessive, and a new trial was refused. *Grey* v. *Sir A. Grant, bt.* M. P. 535

25. And in this case the Court refused to quash a writ of enquiry, on account

account of exceſſive damages, though the Court acknowledged them to be ſo from the peculiar circumſtances of the caſe. *Benſon* v. *Sir Thomas Frederick, bart.* 535

26. And in this caſe it was admitted to be a general rule, that the Court will not aſide a verdict, in an action for a tort, on account of the ſmallneſs of the damages. *Mauricet* v. *Brecknock.* 536

27. So in this caſe, which was an action for maliciouſly indicting the plaintiff for perjury, 400l. damages held not exceſſive. *Gilbert* v. *Burtenſhaw.* 536

28. The Court will not grant a new trial, in an action for criminal converſation, merely becauſe the damages appear to them to be exceſſive. *Duberley* v. *Gunning.* 537

29. But in an action of aſſault and battery, tried before Lord *Kenyon*, where it appeared in evidence, that the plaintiff, who was a ſervant to the defendant, after having received a ſlight blow from his maſter, for impertinent behaviour, violently beat him; and the jury gave a verdict for the plaintiff with 40l. damages. The verdict was ſet aſide. *Jones* v. *Sparrow.* 540

30. In treſpaſs againſt a cuſtom-houſe-officer, for an unſucceſsful ſearch after prohibited and uncuſtomed goods. Verdict for the plaintiff, with 500l. damages. *Perrot*, B. who tried the cauſe, reported the damages to be very exceſſive, and that he adviſed an application for a new trial, which was moved for—but as it appeared that the preſent defendant had recovered in a former action, a ſmuggling penalty of 300l. againſt the now plaintiff, which he offered to ſet off againſt this 500l. and the preſent defendant refuſed it, the Court diſcharged the rule. *Sharpe* v. *Brice.* 541

31. The Court will not grant a new trial, for exceſſive damages in a caſe of tort; unleſs they be outrageouſly diſproportionate to the nature of the injury, or the circumſtances of the parties, *Leith, bart.* v. *Pope.* 541

32. When there is a bill of exceptions, a new trial ſhall not be moved for on the point of law contained therein. *Fabrigas* v. *Moſtyn.* 543

33. A new trial is never granted in actions upon penal laws. *Foncreau* v. ———. 543

34. So alſo in this caſe, it was held that there ſhall not be a new trial where there is a verdict for a defendant in a criminal proſecution. *Rex* v. *Praed* or *Rex* v. *Edwards.* 543

35. The Court will, under particular circumſtances, permit a motion for a new trial to be made, though the four days be elapſed which are by the rule and practice of the Court limited for making motions of that ſort. *Dickſon* v. *Fiſher.* 544

36. The like point. *Birt* v. *Burlow.* 544

37. A defendant convicted on a criminal proſecution cannot move for a new trial after the firſt four days of the next term; though if it appear to the Court at any time before judgment that injuſtice has been done by the verdict, they will interpoſe, and grant a new trial. *Rex* v. *Daniel Holt.* 545

38. Where a plaintiff refuſes to be nonſuit, contrary to the opinion of the judge: a new trial (if granted) ſhall be without coſts; and if he ſubmits to an erroneous nonſuit, it ſhall be ſet aſide without coſts. *Pochin* v. *Pawley.* 548

39. The caſe of a miſdirection at the trial is not the only caſe in which the Court will award a new trial without coſts. For if the verdict be manifeſtly againſt the juſtice of the caſe, and the judge's direction, it is fit that a new trial ſhould be granted without coſts. *Jackſon* v. *Duchaire.* 548

40. Although, to render a declaration good, it may be neceſſary that it ſhould contain a particular averment, yet if after verdict it be moved to grant a new trial for want thereof, the Court will not grant one if it appear that the juſtice and equity of the cauſe is on the ſide of the verdict. *Chapman* v. *Pickerſgill.* 722

41. So in this caſe though the Court thought

thought that a particular averment was neceſſary, yet it being after a verdict, and the juſtice and equity of the cauſe on the ſide of the verdict, they refuſed to grant a new trial. *Goſlin* v. *Wilcock*. 723

42. The defendant, after a verdict againſt him, obtained a rule for a new trial, which after argument on a ſubſequent day was diſcharged: he then pleaded a plea *puis darrein continuance*, entitled of the term generally; and the Court refuſed to order a ſpecial memorandum of the day when it was filed under theſe circumſtances. *Lovell* v. *Eaſtaff*. 753

NON-RESIDENCE.

A leaſe of a rectory-houſe, &c. by a rector, becomes void by 13 *Eliz.* c. 20. by his non-reſidence for 80 days; and a ſtranger may take advantage thereof. *Doe*, ex dim. *Criſp*, v. *Barber*. 82

NOTICE TO QUIT.

1. A notice to quit "or I ſhall inſiſt on double rent," is good to ſupport an ejectment. *Doe*, leſſee of *Matthews*, et al. v. *Jackſon*, et al. 549

2. But a month's notice is not ſufficient to quit a leaſe from year to year. *Gulliver*, ex dim. *Taſker*, v. *Burr*. 549

3. Half a year's notice to quit poſſeſſion muſt be given to a tenant at will, and before the end of that time an ejectment will not lie to turn him out of the farm. *Parker*, ex dim. *Walker*, v. *Conſtable*. 20

4. And in the caſe of a tenancy from year to year, there muſt be half a year's notice to quit, ending at the expiration of the year. *Right*, ex dim. *Flower*, v. *Darby* and *Briſtow*. 20

5. Notice to quit at Midſummer was given to a tenant holding from Michaelmas, and it was held that he might inſiſt on the inſufficiency of the notice at the trial, though he did not make any objection at the time when it was ſerved. *Oakapple*, ex dim. *Green*, v. *Copous*. 21

6. A notice to quit, ſerved juſt before Michaelmas, 1795, which was to quit "at Lady-day, which will be in the year 1795," was held well. *Doe*, ex dim. *Duke of Bedford*, v. *Kightly*. 21

7. Where a tenant for life grants a leaſe for years, which is void againſt the remainder-man, and the latter before he elects to avoid it, receives rent from the tenant, whereby a tenancy from year to year is created; yet this is with reference to the old term, and, therefore, a half-year's notice to quit from the remainder-man, ending with the old year, is good. *Doe*, ex dim. *Collins*, v. *Weller*. 21

8. The like had been before determined by the court of Common Pleas. *Roe*, ex dim. *Jordan*, v. *Ward*. 22

9. An agreement to take a farm, the arable from old Candlemas, the paſture from old Lady-day, and the meadow from old May-day, paying rent half-yearly, at old Michaelmas and Lady-day, is ſubſtantially a taking of the whole from old Lady-day; and notice to quit, delivered before old Michaelmas, is ſufficient to determine the tenancy. *Doe*, ex dim. *Dagget*, v. *Snowden*. 23

10. A notice to quit at Lady-day was ſerved on the 22d of September, 1792.—The defendant's counſel objected, that the notice to quit was inſufficient, the holding being from Candlemas, and the notice requiring the defendant to quit at Lady-day; and the plaintiff was nonſuited. *Doe*, ex dim. *Rigge*, v. *Bell*. 24

11. And where an infant becomes entitled to the reverſion of an eſtate leaſed from year to year, he cannot eject the tenant without giving the ſame notice as the original leſſor muſt have given. *Maddon*, ex dim. *Baker*, et al. v. *White*, et al. 24

12. Notice to quit had been ſerved on the defendant's maid ſervant at his houſe, which was not ſituated upon the demiſed premiſes, and the contents explained to her at the time: held to be ſufficient. *Jones*, ex dim. *Griffiths*, v. *Marſh*. 24

13. If a landlord receive rent, due after the expiration of a notice to quit, it

it is a waiver of that notice. *Goodright*, ex dim. *Charter*, v. *Corawent*. 25

14. Alſo a diſtreſs taken for rent, accrued after the expiration of a notice to quit, is a waiver of the notice. *Zouch*, ex dim. *Ward*, v. *Willingale*. 26

15 But the mere acceptance of rent by a landlord, for occupation ſubſequent to the time when the tenant ought to have quitted according to the notice given him for that purpoſe, is not, of itſelf, a waiver on the part of the landlord of ſuch notice, but matter of evidence only to be left to the jury, under the circumſtances of the caſe. *Doe*, ex dim. *Cheny*, v. *Batten*. 26

16. Parol notice to quit, by a tenant under a parol leaſe, is ſufficient. *Timmins* v. *Rowlinſon*. 29

17. Notice to quit under the ſtatute of 4 *Geo.* 2. may be previous to the expiration of the leaſe. *Cutting* v. *Derby*. 30

18. Where one entire injury is done to both tenants in common, they ſhall have one entire remedy; but where the injury is ſeparate, they may have ſeveral actions. *The ſame Cauſe*. 31

19. And the tenant will be liable to double rent under the ſtat. 4 *Geo.* 2. c. 28. though the notice to quit be only from a perſon appointed receiver by the court of Chancery. *Wilkinſon* v. *Colley*. 31

20. The plaintiff, before the determination of the leaſe, gave the defendant notice to quit at Whitſuntide, 1784: the defendant held over, and double rent became due from Whitſuntide, 1784. The ſecond count ſtated another notice, ſerved on the 3d of June (after the expiration of the firſt notice to quit at Whitſuntide), to quit at the Martinmas following, or to pay double rent: held that the firſt notice was not waived by the ſecond. *Meſſenger* v. *Armſtrong*. 32

21. A mortgagee may recover in ejectment (without giving notice to quit) againſt a tenant who claims under a leaſe from the mortgagor, granted after the mortgage, without the privity of the mortgagee. *Keech*, leſſee of *Warne*, v. *Hall*. 494

OFFICE AND OFFICERS.

1. A perſon poſſeſſed of a freehold office may act as a commiſſioner of the land-tax under the qualification of his office. *Sone* v. *Aſhton*. 33

2. A jurat of the corporation of Haſtings may be elected town-clerk of that corporation. But the two offices are incompatible, and the acceptance of the latter (though an inferior office) will vacate the former. *Milward* v. *Thatcher*. 549

3. The Court will not grant a *mandamus* to a miniſterial officer to pay over money already paid by him under a proper authority. *The King* v. *Chriſtopher Shaw*. 229

4. The Court will not grant a *mandamus* to reſtore a perſon to an office where it is confeſſed by the perſon that he was rightly removed. *Rex* v. *Mayor*, &c. *of Uxbridge*. 231

5. So alſo in this caſe, a *mandamus* was refuſed to reſtore to the office of clerk of the Bridge-houſe eſtates in London, though the party was irregularly ſuſpended; it appearing on his own ſhewing that there was good ground for the ſuſpenſion, if the proceedings had been regular. *The King* v. *the Mayor*, &c. *of London*. 231

6. In this caſe, the Court held that the future half-pay of an officer is not aſſignable. *Lidderdale* v. *Duke of Montroſe* and *Lord Mulgrave*. 551

7. In an indictment againſt a public officer for a breach of duty, it is ſufficient to ſtate generally that he is ſuch officer, without ſhewing his appointment. *The King* v. *E. J. Holland*, eſq. 552

8. And where a duty is thrown on a body, conſiſting of ſeveral perſons, each is individually liable for a breach of duty, as well for acts of commiſſion as for omiſſion. *Ibid.*

9. Alſo in an indictment againſt a ſervant of the Eaſt-India Company for offences in India, it is ſufficient to charge him with a wilful breach of duty, without adding that it was corrupt. *Ibid.*

10. Likewiſe in an indictment againſt

againſt an officer for diſobedience of orders, it is not neceſſary to aver that the orders have not been revoked, or that they are in force. 552

11. And where a public officer is charged with a breach of duty, which duty ariſes from certain acts within the limits of his government, it is not neceſſary to aver in an indictment againſt him that he had notice of thoſe acts: he is preſumed from his ſituation to know them. *Ibid.*

12. But time and place muſt be added to every material fact in an indictment. And a charge in an indictment againſt an officer with a breach of orders, in not proſecuting a war "with all poſſible vigour and deciſion," is too uncertain, even though the charge be made in the very words of the order given to him. *Ibid.*

OUTLAWRY.

1. An outlawry cannot be reverſed, without giving ſuch bail as the law requires. *Cracraft* v. *Gledowe.* 555

2. The defendant was outlawed, after conviction upon two informations for criminal miſdemeanors. And it was reſolved, 1ſt. The defendant ought not (unleſs under very particular circumſtances) to come in, *gratis*, in proper perſon, at the return-day of the *capias utlagatam:* he ought regularly to come in cuſtody of the ſheriff, by a return of "*cepi corpus.*" *Rex* v. *Wilkes.* 556

3. Outlawry in criminal caſes differs greatly from outlawry in civil caſes. *Ibid.*

4. Wherein that difference conſiſts. *Ibid.*

5. Before 3 *Ann.* a writ of error in any criminal caſe was held to be merely *ex gratiâ*; but ſince 3 *Ann.* it ought not to be denied, in caſes under treaſon and felony, where there is probable error, which the Attorney-general ſhould examine into, before he grants his *fiat:* ſuch *fiat* is previouſly neceſſary to the iſſuing of the writ of error. *Ibid.*

6. But in caſes of treaſon and felony, the king's pleaſure "to deny the writ" is concluſive, be the error ever ſo manifeſt. 556

7. Since 3 *Ann.* it became an important queſtion, in all crimes under treaſon and felony, "What is an error?" And ſince that time, the Court has not given way to trivial objections, though conteſted by the Attorney-general. *Ibid.*

8. Such an information may be brought by the King's Solicitor-general, without ſuggeſting "that the office of Attorney-general is vacant." *Ibid.*

9. Proceſs of outlawry lies upon informations of this kind. *Ibid.*

10. Every offence committed againſt the peace ſubjects the delinquent to the proceſs of outlawry, even though there be no actual force. Force is not the criterion on which the proceſs of exigent was founded at common law. *Ibid.*

11. Proclamations were not neceſſary; they are not required in this caſe, either by common law, or by any ſtatute. *Ibid.*

12. If they had been neceſſary, this return of them is too looſe, being only "I have cauſed public proclamation to be made, in manner and form as I am within commanded." *Ibid.*

13. The firſt exaction was returned to be "at my county-court held at the Three Tuns in Brook-ſtreet, near Holborn, in the county of Middleſex;" and the other four, "at my county-court held at the ſame place." By this return it is ſhewn, and does appear (excluſive of the requiſite technical form), "that this county-court was the county-court of Middleſex, and not of any other county;" and alſo, "that Brook-ſtreet, near Holborn, lies in the county of Middleſex." *Ibid.*

14. But a technical form of words, in the deſcription of the county-court at which an outlaw is exacted, is requiſite: viz. that after the words "at my county-court," ſhould be added the name of the county; and after the word "held," ſhould be added "for the county." The authorities "that

ſuch words are formally neceſſary," begin from 7 *Jac.* 1. as to the former expreſſion, and from 18 *C.* 2. as to the latter. 556

15. For want of theſe technical words the outlawry was reverſed; as the authorities were on the favourable ſide, in a criminal caſe highly penal: though it was acknowledged that there is neither law, reaſon, nor common ſenſe, in requiring them; and that it does moſt manifeſtly appear upon this record, "that the court in queſtion was of and holden for the county of Middleſex." *Ibid.*

16. An outlawry in felony was reverſed, becauſe it appeared on the writ of proclamation and return to it, that the perſon indicted had a day in court after he was outlawed. *G. Barrington* v. *the King.* 576

17. In a record of outlawry, it appeared by the writ of proclamation and the return to it, that the priſoners were required to render themſelves to the ſheriff, ſo that he might have their bodies before the juſtices, &c. at the return of the writ, and held good. *R.* v. *Vandell.* 578

18. If one exigent be awarded againſt the principal and acceſſory together, it is error only as to the latter. *Ibid.*

19. The ſtat. 25 *Ed.* 3. ſt 5. c. 14. does not apply to a court of *oyer* and *terminer* and gaol delivery. *Ibid.*

20. If it appear on the record, that the writ of proclamation was delivered to the ſheriff three months before the return of it, it is ſufficient, though it be not ſo expreſsly alleged. *Ibid.*

21. The writ of proclamation required the ſheriff to proclaim the parties in open court in the ſheriff's county (not ſaying county-court), and held good. *Ibid.*

22. The ſheriff need not allege in his return to the writ of proclamation, that "the perſons proclaimed did not appear and render themſelves," though he muſt in his return to the exigent. *Ibid.*

23. The names of the coroners need not be ſubſcribed to the judgment of outlawry: if it appear on the record that the judgment of outlawry was given by them, it is ſufficient. 578

24. It need not appear on a record of outlawry that the *capias* and exigent were ſealed by the juſtices of *oyer* and *terminer*, &c. *Ibid.*

25. If it be ſtated that the juſtices of our lord the king were aſſigned by letters patent under his ſeal of Great Britain, it will be preſumed to be the great ſeal. *Ibid.*

26. A perſon outlawed on an indictment for ſheep-ſtealing is ouſted of clergy by 14 *Geo.* 2. c. 6. ſ. 1.; "outlawry" being a "conviction" within the meaning of that ſtatute. *Ibid.*

27. The ſheriff muſt ſtate in his return to the writ of exigent, the day and year of each exaction; ſtating, that on ſuch a day, in the 30th year of the reign, he exacted the defendant a third time; that afterwards on ſuch a day (omitting the year) he exacted him a fourth time; and that afterwards, on ſuch a day, in the 30th year aforeſaid, he exacted him a fifth time, is inſufficient, and a good ground for reverſing the outlawry. *The King* v. *J. Almon.* 588

28. It need not be ſtated in expreſs terms on a record of a judgment of outlawry, that a writ of *capias* iſſued againſt the defendant; it is ſufficient if it appear "that the ſheriff was commanded to take the defendant, &c." Neither is it neceſſary, in ſtating every writ, to repeat the day and year when each was iſſued; it will ſuffice if it appear by referring to the preceding parts of the record; as if, after ſtating that the *capias* was returned on ſuch a day, it proceed thus: Whereupon the exigent was awarded; the word whereupon referring to the day when the *capias* was returned. *The King* v. *S. Perry.* 589

29. Special bail muſt be put in, upon appearing to an outlawry, where ſpecial bail was originally required. *Campbell* v. *Daly.* 590

30. A ſheriff's officer, being in poſſeſſion of the tenant's effects under an outlawry, made a diſtreſs for rent, ſold the

the goods ſo diſtrained, and afterwards the outlawry was reverſed: held, that the officer was liable to pay the produce of the goods to the landlord, in an action for money had and received; and that the goods of a tenant are liable to a year's rent, notwithſtanding an outlawry in a civil ſuit. *The Preſident and Scholars of St. John's college, Oxford*, v. *Murcott*. 10

31. The writ of *capias utlagatum*, and the ſheriff's return to it, ought to be filed with the clerk of the exigents. *Reynolds* v. *Adams*. 591

32. If an indictment for felony has been removed here from an inferior court, in order to iſſue proceſs of outlawry upon it, and the party accuſed come in upon the exigent, and be committed for trial, this Court will award a *procedendo*, on the ſtat. 6 *Hen.* 8. c. 6. to carry the record back. *The King* v. *Perry*. 591

OYER.

If oyer is granted of any inſtrument of record, and it is ſet forth, although the party was not entitled to ſuch oyer, yet he ſhall be thereby entitled to take the whole inſtrument as part of his adverſary's plea. *Jeffery* v. *White*. 759

PALATINE.

1. Upon a ſuggeſtion entered by leave of the Court upon the roll, that a fair and impartial trial cannot be had in the county-court of the city of Cheſter, the Court will award the trial to be had in the adjoining county palatine. *The King* v. *the Inhabitants of St. Mary-on-the-Hill, Cheſter*. 591

2. A warrant for a tales, on a trial in a county palatine, muſt come from the king's attorney-general. *Rex* v. *Lambe*. 592

PARDON.

1. The king's ſign manual may be given in evidence by the priſoner, on an indictment for returning from tranſportation; and if not revoked, and the condition be literally, though not ſubſtantially, complied with, it ſhall diſcharge the priſoner from that indictment. *The King* v. *Max. Miller*. 593

2. Pardon by ſign manual, how to be worded and made uſe of. *The King* v. *Beaton*. 594

3. A pardon, if pleaded, muſt be averred to be under the great ſeal. *Bull* v. *Tilt*. 594

PARISH-CLERK.

1. A *mandamus* will lie to a rector, to appoint a pariſh-clerk. *Rex* v. *Rector of St. Anne's, Soho*. 221

2. A *mandamus* will lie to reſtore a pariſh-clerk, removed without ſufficient cauſe: for a pariſh-clerk is a temporal office: he holds his office *quamdiu bene ſe geſſerit*: and though the miniſter may have a power of removing him on a good and ſufficient cauſe, he can never be the ſole judge, and remove him *ad libitum*. He muſt ſtate to the Court a juſt cauſe of amotion. *Rex* v. *Eraſmus Warren*. 229

PARLIAMENT.

1. If a member of parliament be held to ſpecial bail, and it be moved to diſcharge him on a common appearance, the Court can take no evidence of his being a member, but the return of the writ. *Anne Fenwick*, widow, v. *T. Fenwick*, eſq. 595

2. The coſts of iſſuing writs of *diſtringas*, under ſtat. 10 *Geo.* 3. c. 50. are to be paid before appearance, though no iſſues be levied. *Martin* v. *Townſhend* and *Sawbridge*. 595

3. And the ſtat. 10 *Geo.* 3. c. 50. extends to all writs of *diſtringas*, as well thoſe iſſued againſt members of parliament as others. *Raban* v. *Plaiſtowe*. 596

4. It ſeems that peers may be ſued in B.R. by original bill. *Goſling* v. *Lord Weymouth*. 597

5. And if a peer of parliament plead in chief to a bill filed againſt him in the court of King's-bench, he cannot afterwards aſſign for error, that he ought to have been ſued by original writ, and not by bill. *The Earl of Lonſdale* v. *Littledale*. 597. 598

6. *A.* having privilege of parliament, owes *B.* a ſum of money, for which *B.* ſues him; in conſequence of which *C.* enters into a bond together with *A.* conditioned for the payment to *B.* of ſuch ſum as *B.* ſhall recover in the action againſt *A.* in purſuance of the ſtat. 4 *Geo.* 3. c. 33. In that action *B.* obtains judgment, and puts the bond in ſuit againſt *C.* To the action on the bond, *C.*, being under terms by a judge's order to plead iſſuably, may plead in bar that a writ of error is depending on the judgment againſt *A.* *Curling* v. *Innes.* 730

7. The Court refuſed to grant a criminal information againſt a bookſeller for printing, on his own account, a report of the Houſe of Commons, though it reflected on the character of an individual. *The King* v. *J. Wright.* 602

8. The Houſe of Lords having voted the defendant guilty of a breach of privilege, in publiſhing a libel upon the Biſhop of *Landaff*, and having ſentenced him to pay a fine of 100l. and to be impriſoned ſix months, and until ſuch fine was paid, which commitment was returned into this court upon an *habeas corpus* ſued out by the defendant, the Court refuſed to diſcharge him out of cuſtody. *The King* v *Flower.* 603

9. The Court will not grant an information againſt the magiſtrates of a borough, for having diſfranchiſed perſons entitled to their freedom, although ſworn to have been done to ſerve election purpoſes, if the defendants deny that motive, and ſwear that they thought there was a legal ground for the diſfranchiſement, and the ground on which the diſfranchiſement went has not been decided. *The King* v. *Davie*, et al. 606

PARTITION.

1. In *Partition*, a rule to ſhew cauſe was granted, and afterwards made abſolute on affidavit of ſervice, for the Court to proceed to examine the title of the demandant; proceſs having been duly returned, the declaration entered, and no appearance entered by the tenant within fifteen days. Rule abſolute; appointed to proceed on the examination in open court on the morrow. On the morrow, *Walker* for the demandant opened his title, of which abſtracts had been previouſly left with the judges. The ſeveral ſeiſins, deſcents, deviſes, and conveyances, were proved by affidavits. The deeds and wills were produced and read. And no counſel appearing for the tenant, the Earl of *Thanet*, judgment on his default was given for the demandant, to hold in ſeveralty, and a writ of partition was awarded. *Halton* v. *The Earl of Thanet.* 608

2. Afterwards on a writ of partition iſſued to the ſheriff of Derbyſhire; he returned that he had executed the ſame. And hereupon it was moved for final judgment, *quod partitio ſit ſtabilis.* The rule for which was made abſolute, on affidavit of notice to the defendant and the tenants in poſſeſſion. *Ibid.*

3. The 8 and 9 *W.* 3. c. 34. ſ. 1. which directs notice of the writ, with a copy thereof, to be ſerved forty days before the return, in a writ of partition; applies only to caſes of ſigning judgment by default for want of appearance. *Dyer* v. *Bullock.* 609

PARTNERS.

1. To make a man liable as a partner, there muſt either be a contract between him and the oſtenſible perſon to ſhare jointly in the profits and loſs, or he muſt have permitted the other to make uſe of his credit, and to hold him out as one jointly anſwerable with himſelf. *Hoare* et al. v. *Dawes.* 609

2. Money lent to a trader by a partner who retires from buſineſs, at legal intereſt, with an additional annuity for a certain term of years, is not a continuance of the partnerſhip. *Grace* v. *Smith.* 611

3. *A.* and *B.* ſhip-agents at different ports, entered into an agreement to ſhare, in certain proportions, the profits of their reſpective commiſſions, and the diſcount on tradeſmen's bills employed by them in repairing the ſhips

ſhips conſigned to them, &c. It was held, that by this agreement they became *liable*, as partners, to all perſons with whom either contracted as ſuch agent, though the agreement provided that neither ſhould be anſwerable for the acts or loſſes of the other, but each for his own. *Waugh* v. *Carver*, *Carver* and *Gieſler*. 613

4. *A.*, *B.*, *C.* and *D.* were partners in a banking-houſe at Liverpool, and *C.* and *D.* alſo carried on a ſeparate mercantile concern in London; *J. S.* having accepted bills payable at the houſe of *C.* and *D.* employed *A.*, *B.*, *C.* and *D.* to get them paid accordingly, and agreed to depoſit with them good bills indorſed by him, for the purpoſe of enabling them ſo to do; *A.*, *B.*, *C.* and *D.* debited *J. S.* in account for his acceptances, and credited him for all the bills which he depoſited; ſome of the bills ſo depoſited by *J. S.* were remitted by *A.*, *B.*, *C.* and *D.* to *C.* and *D.* upon the general account between the two houſes, and before any of the acceptances of *J. S.* became due both houſes failed, and *J. S.* was obliged to pay his own acceptances; the Court held that the aſſignees of *C.* and *D.* were entitled to retain againſt *J. S.* the bills remitted to them by *A.*, *B.*, *C.* and *D.* They alſo held that it made no difference that one of the bills remitted did not arrive in *London* till after the bankruptcy of *C.* and *D.* though ſent by *A.*, *B.*, *C.* and *D.* before that event. *Bolton* v. *Puller* et al. 620

5. A company of ſhip-owners engaged to inſure each other's ſhips, and covenanted *ſeverally*, and not jointly, to pay a certain ſum in caſe of loſs in proportion to their reſpective ſhares, but in caſe of the inſolvency of any one of the members all the others were to be reſponſible: ruled that this contract was void by the ſtat. 6. *Geo.* 1. c. 18. ſ. 12. *Lees* v. *Smith*. 263

6. And where two perſons are engaged in *a partnerſhip* in inſuring ſhips, &c. which is carried on in the name of one of them only, and that one pays the whole of the loſſes; ſuch a partnerſhip being illegal by ſtat. 6 *Geo.* 1. c. 18. he cannot maintain an action againſt the other to recover a ſhare of the money that has been ſo paid. *Mitchell*, et al. *aſſignees of Robertſon, a bankrupt*, v. *Cockburne, ſurviving aſſignee of Elizabeth Tyler, a bankrupt*. 265

7. *A.*, *B.* and *C.* became partners in inſuring ſhips (contrary to the ſtat. 6. *Geo.* 1. c. 18. ſ. 12.); but it was agreed that the policies ſhould be underwritten in the name of *A.* only; ſeveral policies were effected, and the premiums received by *C.* and *D.* as brokers: held that *A.* could not recover thoſe premiums from *C.* and *D.* *Booth* et al. *aſſignees of G. Browne, a bankrupt*, v. *T. Hodgſon, and E. L. Hodgſon*. 627

8. The plaintiffs, together with *A.* and *B.* being owners of one ſhip, and the defendant of another, a prize was taken, condemned and ſhared by agreement between them; afterwards the ſentence of condemnation was reverſed, and reſtitution awarded, with coſts, which was paid ſolely by the plaintiffs, *A.* and *B.* having in the mean time become bankrupts; and it was held that an action could not be brought by the plaintiffs alone for a moiety of the reſtitution money and of the coſts, becauſe it was either a partnerſhip tranſaction, when *A.* and *B.* ought to be joined; or not, when ſeparate actions ſhould be brought by each of the perſons paying. *Graham* et al. v. *Robertſon*. 628

9. Two partners purchaſed a ſhip, under a bill of ſale, conformable to the ſtat. 26 *Geo.* 3. c. 60; afterwards they took in two other partners, but there was no transfer of the ſhip to them jointly with the others; held that the four partners had not any inſurable intereſt in the freight of the ſhip. The right to freight reſults from the right of ownerſhip; and theſe four partners had neither a legal nor an equitable title to the ſhip. *Camden* et al. v. *Anderſon*. 320

10. If *two* are *partners*, as *attornies* and *conveyancers*, and *one* receive money

ney to be laid out on mortgage, the *other* is *liable* for the amount, though his partner gave *a ſeparate receipt* for it. *Willet* v. *Chambers.* 629

11. One of two partners applied truſt-money in the trade with the privity of the other partner; afterwards they ſeparated, and the partnerſhip effects were aſſigned over to the firſt who took on him the debts; this was held to be no payment in diſcharge of the other partner, but both were liable to make good the truſt money. *Smith* et al. v. *Robert and Thomas Jameſon.* 632

12. An act ſubſequent to the time of delivering goods on a contract may be admitted as evidence to ſhew that the goods were delivered on a partnerſhip account, if it were doubtful at the time of the contract: but if it clearly appear that no partnerſhip exiſted at the time of the contract, no ſubſequent act by any perſon, who may afterwards become a partner (not even an acknowledgment that he is liable, or his accepting a bill of exchange drawn on them as partners for the very goods), will make him liable in an action for goods ſold and delivered; though he will be liable in an action on the bill of exchange. *Saville* v. *J. Robertſon and Hutchinſon.* 634

13. A promiſe in writing, directed to *A.*, *B.* and *C.*, a houſe in trade, to pay for goods to be furniſhed to another, cannot be enforced in an action by *B.* and *C.* to recover the value of goods furniſhed after *A.* had withdrawn from the partnerſhip. *Myers* et al. v. *Edge.* 642

14. One partner cannot bind the other partners by deed. *Harriſon* v. *Jackſon, Sykes, and Ruſhforth.* 643

15. But if one partner execute a deed for himſelf and his partner, by the authority of his partner and in his preſence, it is a good execution, though only ſealed once. *Ball* v. *Dunſterville*, et al. 644

16. On the diſſolution of a partnerſhip between *A.*, *B.* and *C.* a power given to *A.* to receive all debts owing to, and to pay thoſe owing from the late partnerſhip, does *not authorize* him to *indorſe a bill of exchange in the name of the partnerſhip*, though drawn by him in that name, and accepted by a debtor of the partnerſhip, after the diſſolution: ſo that the indorſee *cannot maintain an action on the bill* againſt *A.*, *C.* and *B.* as partners. Neither can ſuch indorſee maintain an *action againſt them for money paid* to the uſe of the partnerſhip, though in point of fact the money raiſed by diſcounting a note which he had given (in diſcounting the bill), be applied by *A.* to the payment of a debt due from the partnerſhip. *Kilgour* v. *Finlyſon, Galbreath, and Harper.* 644

17. To *aſſumpſit* by ſeveral partners, the defendant may plead in bar the bankruptcy of one of them. *Eckhardt* et al. v. *Wilſon.* 646

PARTY WALL.

See BUILDINGS.

PAUPER.

A proſecutor cannot proſecute *in formâ pauperis*, without ſpecial cauſe. *Rex* v. *Clarke*, et al. 647

PAYMENT.

A. ſold goods to *B.*, for which the latter was to pay by a bill at three months, *B.* gave *A.* a check on his bankers (who were alſo the bankers of *A.*) requiring them to pay *A.* on demand, in a bill at three months; *A.* paid the check into the bankers, and took no bill from them: but the amount was transferred in the banker's books from *B.*'s account to *A.*'s with the knowledge of both; the bankers failed before the check became due; and it was held that *A.* could not recover the value of the goods againſt *B.* *Bolton* v. *Richard.* 647

PAYMENT OF MONEY INTO COURT.

1. Payment of money into court is only an acknowledgment by the defendant of the contract, and that the plaintiff is entitled to recover the ſum ſo

ſo paid: but it does not preclude him from taking any objection to the action beyond that ſum; though unleſs ſuch ſum were paid, ſuch objection would be a bar to the whole demand. *Cox and another, Executors of Shultz*, v. *Parry*. 302

PAWN-BROKER.

A pawn-broker has no lien on plate after the death of a tenant for life, who pawned it with him, as againſt the remainder-man, although the pawnee had no notice of the ſettlement. *Hoare* et al. v. *Parker*. 649

PEERS.

1. It ſeems that peers may be ſued in B. R. by original bill. *Goſling* v. *Lord Weymouth*. 597

2. And if a peer of parliament plead in chief to a bill filed againſt him in the court of King's-Bench, he cannot afterwards aſſign for error, that he ought to have been ſued by original writ, and not by bill. *The Earl of Lonſdale* v. *Littledale*. 597, 598

PENAL ACTIONS.

A new trial is never granted in actions upon penal laws. *Fonereau* v. ——. 543

PERJURY.

1. To found an indictment for perjury, the requiſite circumſtances are theſe; *the oath muſt be taken in a judicial proceeding, before a competent juriſdiction; and it muſt be material to the queſtion depending, and falſe*. *The King* v. *E. Aylett*. 650

2. In the indictment there muſt be an allegation of *time* and *place*, which are ſometimes material and neceſſary to be laid with preciſion, and ſometimes not. *Ibid.*

3. A complaint having been made *ore tenus* by a ſolicitor, before the chancellor, in the court of Chancery, of an arreſt in returning home after the hearing of a cauſe, the indictment ſtated that "*at and upon the hearing of the ſaid complaint*," the defendant depoſed, &c.; this is a ſufficient averment that the complaint was heard. 650

4. The complaint of the defendant being that he was taken before he got to his own houſe in the pariſh of St. Martin in the Fields, innuendo, his houſe in the Haymarket, in St. Martin's, &c. The innuendo is only a more particular deſcription of the ſame houſe, and good. *Ibid.*

5. The oath being that the defendant was arreſted upon the ſteps of his own door, an innuendo that it was the outer door, is good. *Ibid.*

6. Where time is not material, it need not be poſitively averred, and if under a *videlicet*, may be rejected. *Ib.*

7. An indictment for perjury aſſigned on an affidavit ſworn before the Court need not ſtate, nor is it neceſſary to prove, that the affidavit was filed of record or exhibited to the Court, or in any manner uſed by the party. *The King* v. *George Croſsley one, &c.* 655

8. In an indictment for perjury committed at an Admiralty Seſſion, where the commiſſion was directed to *A.*, *B.* and *C.* and others not named, of whom *A.*, *B.* and *C.* were amongſt others to be one; the Court will take it to mean that if either of the perſons named of the quorum were preſent, it would be ſufficient. Stating that at ſuch a court *J. K.* was in due form of law tried upon a certain indictment then and there depending againſt him for murder; and that at and upon the ſaid trial, it then and there became and was made a material queſtion whether, &c. are ſufficient averments that the perjury was committed on the trial of *J. K.* for the murder, and that the queſtion on which the perjury was aſſigned was material on that trial. *The King* v. *Dowlin*. 657

9. A new trial was granted in this caſe, ſubornation of witneſſes having been diſcovered ſince the former trial. *Fabrilius* v. *Cock*. 518

10. Damage 400l. in an action for maliciouſly indicting the plaintiff for perjury, held not exceſſive. *Gilbert* v. *Burtenſhaw*. 536

11. In perjury, upon an anſwer in

Chancery, there is no need to prove the identity of the perſon, or the actual ſwearing. *Rex* v. *John Morris.* 661

12. A witneſs being indicted for perjury is no reaſon for poſtponing judgment againſt a perſon convicted. *Rex* v. *Thomas Haydon.* 661

13. A convict for perjury cannot be diſcharged as an inſolvent debtor. *Rex* v. *Norris.* 662

14. The defendants being convicted of perjury, received judgment, to be, each of them, impriſoned ſix months, to ſtand twice in the pillory, with a paper on their heads denoting the crime, once at Weſtminſter-Hall gate, and once at Charing-Croſs; and to be tranſported to America for ſeven years. *The King* v. *Nucys and Galey.* 662

PHYSICIANS.

1. Candidates to be admitted of the college, are to be examined by the *comitia minora*, then propoſed to the *comitia majora*, and elected by them, before they can claim to be admitted. *Rex* v. *Aſkew.* 662

2. It was left in this caſe undetermined, whether the licentiates in phyſic have in general a right to demand admiſſion into the college. *Rex* v. *College of Phyſicians.* 675

3. But in this caſe, it was finally decided that a doctor of phyſic, who has been licenſed by the College of Phyſicians to practiſe phyſic in London and within ſeven miles, cannot claim as a matter of right to be examined by the College in order to his being admitted a fellow of the college. *The King* v. *the Preſident and College of Phyſicians.* 684

PLANTATIONS.

1. A country conquered by the Britiſh arms becomes a dominion of the king, in right of his crown; and, therefore, neceſſarily ſubject to the legiſlature, the parliament of Great Britain. *Campbell* v. *Hall.* 688, 691

2. The conquered inhabitants, once received under the king's protection, become ſubjects, and are to be univerſally conſidered in that light, not as enemies or aliens. *Ibid.*

3. The articles of capitulation upon which the country is ſurrendered, and the articles of peace by which it is ceded, are ſacred and inviolable according to their true intent and meaning. 691

4. The law and legiſlative government of every dominion, equally effects all perſons and all property within the limits thereof; and is the rule of deciſion for all queſtions which ariſe there. Whoever purchaſes, lives, or ſues there, puts himſelf under the law of the place. An Engliſhman in Ireland, Minorca, the Iſle of Man, or the Plantations, has no privilege diſtinct from the natives. *Ibid.*

5. The laws of a conquered country continue in force, until they are altered by the conqueror: the abſurd exception as to Pagans, mentioned in *Calvin*'s caſe, ſhews the univerſality and antiquity of the maxim. For that diſtinction could not exiſt before the chriſtian æra; and in all probability aroſe from the mad enthuſiaſm of the Croiſades. In the preſent caſe, the capitulation expreſsly provides and agrees, that they ſhall continue to be governed by their own laws, until his majeſty's further pleaſure be known. *Ibid.*

6. If the king (without the concurrence of parliament) has a power to alter the old and to introduce new laws in a conquered country, this legiſlation being ſubordinate, that is, ſubordinate to his own authority in parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for inſtance, from the laws of trade, or from the power of parliament, or give him privileges excluſive of his other ſubjects, and ſo in many other inſtances which might be put. *Ibid.*

PLATE.

See PAWN-BROKER.

PLEADING.

1. The Court will cenſure an unneceſſary length of pleading. *Yates* v. *Carliſle*, et al. 695, 696

2. A declaration muſt be entitled of the term when the writ is returnable; though

though in certain cases, according to the practice of the Court, it need not actually be filed till the next term.—*Smith* v. *Muller*. 696

3. The title of the declaration in this case was made agreeable to the truth of the fact. *Wilkes, esq.* v. *the Earl of Halifax*. 697

4. Where in debt on bond by an administrator, the declaration alleged that administration was granted by the bishop of Lichfield and Coventry, and the venue in the margin was laid in London, but the bond was stated to be made at Derby, which is within the diocese; the Court, on a general demurrer, held that to be sufficient; and that the bad venue laid in the margin was cured by the stat. of Jeofails. *Mellor* v. *Barber*. 698

5. In declarations the county aforesaid, where more than one is named, always refers to the margin. *Sutton* v. *Fenn*. 698

6. If an action be brought against a tenant for double rent, for holding over after the expiration of his term, and a regular notice to quit, under the circumstances of having held the premises for two or three years under a parol demise for twenty-one years, the holding must be stated in the declaration according to the legal operation of it, as a tenancy at will. *Clayton* v. *Blakey*. 3

7. In an action against the sheriff, for taking goods without leaving a year's rent, the declaration need not state all the particulars of the demise, but if it does, and they are not proved as stated, there shall be a nonsuit.—*Bristow* v. *Wright and Pugh, Sheriff of Middlesex*. 12

8. In an action against a tenant for performing his agreements, the estate of the lessor is an immaterial averment, if the tenant has had the fruit of his lease. An agreement to leave a farm as he found it, is an agreement to leave it in tenantable repair, if he found it so; and will maintain a declaration so laid. *Winn* v. *White*. 15

9. Although the publication of a libel must be stated in a declaration, yet it may be collected from the whole of it, and needs not any technical form of words. *Baldwin* v. *Elphinston, esq.* 125

10. What is sufficient certainty in a declaration. *John Connor* v. *John Connor*. 699

11. In an inferior court the declaration must allege that the money was had and received within the jurisdiction, as well as that the defendant promised to pay within it. Also a court of error cannot award a *venire de novo* when the proceedings originate in an inferior court: and therefore if any one count in the declaration be bad, and the judgment be general, it must be reversed in *toto*. *Trevor* v. *Wall* 700

12. Declaration, that the defendant and another made their promissory note, by which they jointly or severally promised to pay, is good. *Rees* v. *Abbott*. 700

13. In an action against the defendant for negligence as an attorney, in not prosecuting a debtor of the plaintiff's to judgment, the return of the writ on which the debtor was arrested, being laid to be in the 25th year, &c. and the writ itself appearing to have been returnable in the 24th year, &c. this was held to be a fatal variance; even though the day of the return was alleged in the declaration under a *videlicet*. *Green* v. *Rennett*. 701

14. By stat. 28 *Eliz* c. 4. sheriffs are liable to a penalty for taking more than a certain sum on executions "upon the body, lands, goods, or chattels." A declaration on this act in reciting the statute, stated it thus, "body, lands, goods, and chattels;" and this was held to be a fatal variance in arrest of judgment. *King* v. *Marsack*. 701

15. In an action for an amercement in a court-leet, if the declaration state the court to have been holden before the steward of the manor, and the evidence proves it to have been holden before the deputy steward, it is a material variance. *Wyvill Clark* v. *Shepherd*. 704

16. In an action on a judgment, if the declaration state the judgment to have been recovered in a term different from that which appears on the record,

it is a failure of record. It is alſo a variance, if the declaration ſtates the judgment againſt one defendant only, when it was againſt more than one. *Raſtall* v. *Stratton.* 704

17. The declaration being againſt the defendant as aſſignee of all the eſtate, &c. in certain premiſes: and the evidence that he was aſſignee of part only; was held to be a fatal variance. *Hare* v. *Cator.* 705

18. A writ ſued out by plaintiffs as executors, and declaration by them in their own right, was held a ſufficient variance for diſcharging the defendant out of cuſtody on filing common bail. *Douglas* v. *Irlam.* 706

19. An allegation in a plea, that "*A.* by his writing ſold the aftermath of land to *B.*," is not proved by evidence that at an auction held for the purpoſe of ſelling it, *B.* was the purchaſer, that *B.* gave a promiſſory note for the ſum, and that *B.*'s name was written (by *A.*'s agent) in the printed catalogue as the buyer. *Symonds* v. *Ball.* 706

20. But a declaration ſtating it to be for maliciouſly indicting at the general quarter ſeſſions, inſtead of general ſeſſions, is good; the word quarter being only ſurpluſage. *Buſby* v. *Watſon.* 707

21. A preſcription for common of paſture for a certain number of ſheep on A. every year at all times of the year, is well laid, though the evidence which proves the right of common, proves alſo that the tenant of a certain farm has a right to have the ſheep folded at night on his farm, after they have fed on the common during the day. *Brook* v. *Willet.* 708

22. In an action of bribery at an election, where the declaration ſet forth the precept from the ſheriff to the portreeve of a borough, the improper inſertion of the word "*if*" in ſuch precept is not a fatal variance, but it will be rejected as ſurpluſage. *Francis King* v. *Samuel Pippet.* 709

23. In an action for bribery on the ſtatute 2 *Geo.* 2. c. 24. it is not a material variance if the declaration ſtate the precept to have iſſued to the bailiffs of the borough, but the precept produced in evidence is directed *to the bailiff.* *Warre* v. *Harbin.* 711

24. This was an action for debt on the ſtatute 9 *An.* c. 9. ſ. 32. 35. againſt the defendant for not inſerting in an indenture of apprenticeſhip the true ſum received by him from an apprentice, as the conſideration money. *Burleigh* v. *Stibbs.* 711

25. The plaintiff in this action was a ſailor, and declared on a contract for 52l. 10s. for run-money. At the trial, a note was given in evidence, by which the defendant agreed to allow the plaintiff the above ſum; together with a pint of rum per day; added to the note after ſignature, held no material variance. *Baptiſte* v. *Cobbold.* 711

26. In an action on a policy of inſurance the declaration ſtated, that after the making of the policy the ſhip ſailed; the evidence was that ſhe ſailed before; and it was held that the variance was immaterial. *Peppin* v. *Solomon.* 712

27. Proof that the defendant's boat run down the plaintiff's in the halfway reach in the Thames will ſupport an allegation, that the boat was run down in the Thames near the halfway reach, in a declaration in an action on the caſe for negligence. *Drewry* v. *Twiſs.* 713

28. In aſſumpſit brought by an adminiſtrator *de bonis non,* the promiſe may be laid to have been made to the firſt adminiſtrator. *Hirſt* v. *Smith.* 714

29. The Court will not, on motion, permit a defendant to take advantage of a variance between the ſum mentioned in the *ac etiam* part of the latitat and the declaration. *Turing* v. *Jones.* 714

30. In debt upon a bond; after the rule to plead was out, it was moved, that the defendant might have leave to plead two pleas; 1ſt, Performance of the condition of the bond; 2dly, That no ſuch letters of adminiſtration, as are ſet forth in the declaration, were ever granted to the plaintiff.—Held that

that the defendant cannot plead the ſecond plea without craving oyer of the letters of adminiſtration, and ſetting the ſame out in that plea. *Garrard* v *Early*. 714

31. The dippers at Tunbridge-Wells all joined; and, with their huſbands, declared in an action againſt the defendant for exerciſing the buſineſs of a dipper, not being duly appointed and approved according to a private ſtatute, and held well. *Weller* et al. v. *Baker*. 715

32. In this caſe it was determined, that caſe on the cuſtom of the realm againſt a carrier and trover, may be joined. *Dickſon* v. *Cliſton*. 720

33. But a count upon a common aſſumpſit for goods ſold, money lent, money had and received, and ſuch-like counts (which are mere nonfeaſances in non-payment of money), cannot be joined with a count grounded upon a tort or miſfeaſance as trover. *Maſt* v. *Goodſon*. 720

34. And the common way of declaring againſt a carrier now is in aſſumpſit, to which trover cannot be joined. *Brown* v. *Dixon*. 721

35. The rule of judging whether two counts can be joined, by conſidering whether the ſame judgment can be given on both, is not true in its extent; but by adding another requiſite it is univerſally true; for wherever the ſame plea may be pleaded, and the ſame judgment given on two counts, they may be joined in the ſame declaration. *Brown* v. *Dixon*. 721

36. In a ſpecial action upon the caſe for diſturbing the plaintiff in his right of common and right to cut and take ruſhes upon the common for litter for his cattle; there was added a count in trover for two waggon loads of the ruſhes. *Beau* v. *Bloom*. 721

37. The firſt count of this declaration was trover for a dog; the ſecond count was in ſubſtance, that the plaintiff, at the requeſt of the defendant, had delivered to the defendant a certain ſpaniel dog, to be ſeen and viewed, and to be returned in a reaſonable time, but that the defendant did not return the dog, but took and carried it away to places unknown to the plaintiff, and kept and detained the ſame, &c. until the ſaid defendant, by and through his great negligence and careleſſneſs, loſt the ſaid ſpaniel, &c. and held well. *Brown* v. *Dixon*. 721

38. The want of pledges to proſecute, is mere matter of form, and cannot be taken advantage of in error, although the defendant may demur. *How* v. *Denin*. 722

39. Although, to render a declaration good, it may be neceſſary that it ſhould contain a particular averment, yet if after verdict it be moved to grant a new trial for want thereof, the Court will not grant one if it appear that the juſtice and equity of the cauſe is on the ſide of the verdict. *Chapman* v. *Pickerſgill*. 722

40. The like point. *Goſlin* v. *Wilcock*. 723

41. In an action on the 34 *Geo.* 3. c. 23. for pirating a pattern for printing callico, the omiſſion of an averment in the declaration "that the day of firſt publiſhing the pattern was printed at each end of the piece of callico" (which together with the name of the proprietor is required by that ſtatute, the monopoly being limited for three months from the day of firſt publiſhing the pattern,) was holden to be aided by verdict; it being ſtated in the declaration that the defendants pirated the pattern within the term of three months from the day of the firſt publiſhing thereof, and while the plaintiffs were entitled to have the ſole right of printing the ſame, &c. *Mackmurdo and another* v. *Smith and others*. 723

42. The mere relation of landlord and tenant is a ſufficient conſideration for the tenant's promiſe to manage a farm in an huſband-like manner. *Powley* v. *Walker*. 725

43 After a defence made on a writ of enquiry, the defendant is not allowed to take advantage of a miſtake in the declaration. *Freeland* v. *Hunt*. 726

44. In caſe for reſcuing a debtor taken upon meſne proceſs ſued out of the Palace court, it was holden not to be

be ſufficient ground for arreſting the judgment after verdict, that it was not alleged that the cauſe of action in the inferior court aroſe within the juriſdiction, or that it was not alleged that the party below did not appear at the return of the writ. *Bentley* v. *Donnelly and Benton.* 726

45. If a declaration on a bail-bond conclude: "Whereby an action hath accrued to the plaintiff to demand and have of the principal" (inſtead of the bail), and ſtate non-payment by the principal; it is bad on a ſpecial demurrer. *Morgan* v. *Sargent.* 727

46. But the omiſſion of "and thereupon the ſaid *I. S* complains" in the beginning of a declaration of treſpaſs on the caſe is no cauſe of ſpecial demurrer. *Dobſon* v. *Sir Wm. Herne.* 728

47. Ancient demeſne muſt be pleaded within the firſt four days of the term. *Denn on the demiſe of Wroot* v. *Fenn.* 728

48. *Riens in arrere* is a good plea to an action of debt for rent. *Warner* et al. v. *Theobald.* 729

49. *A.* having privilege of parliament, owes *B.* a ſum of money, for which *B.* ſues him; in conſequence of which *C.* enters into a bond together with *A.* conditioned for the payment to *B.* of ſuch ſum as *B.* ſhall recover in the action againſt *A.* in purſuance of the ſtat. 4 *Geo.* 3. c. 33. In that action *B.* obtains judgment, and puts the bond in ſuit againſt *C.* To the action on the bond, *C.*, being under terms by a judge's order to plead iſſuably, may plead in bar that writ of error is depending on the judgment againſt *A.* *Curling* v. *Innes.* 730

50. To treſpaſs for an aſſault and battery, the defendant may plead that the plaintiff with force and arms and with a ſtrong hand endeavoured forcibly to break and enter the defendant's cloſe, whereupon the defendant reſiſted and oppoſed ſuch entrance, &c. and if any damage happened to the plaintiff it was in the defence of the poſſeſſion of the ſaid cloſe. *Weaver* v. *Bush.* 730

51. When a defendant living within the juriſdiction of the Court of Requeſts of Weſtminſter, is ſued in one of the ſuperior courts for a debt under 40*s.* he may plead the 23 *Geo.* 2. c. 27. in bar. But if he omit to do ſo, the Court will not after verdict either enter a ſuggeſtion on the record that the defendant lived within the juriſdiction or ſtay the proceedings. *Taylor* v. *Blair.* 731

52. Whoever claims an eaſement muſt plead it ſpecially. *Hawkins, eſq.* v. *Wallis, eſq.* 732

53. In treſpaſs, a plea of juſtification, ſtating that a public highway led from another highway (leading from A. to B.) in, through, over, and along the *locus in quo* to a certain other highway (leading from C. to D.) was well ſupported by evidence proving that the way in queſtion led from the *terminos a quo*, viz. the way leading from A. to B. over the *locus in quo*, to a different way called E., and along that way into the way leading from C. to D., the *terminus ad quem*. In pleading a public highway, it is not neceſſary to ſtate any *termini*. *Rowe* v. *Bardin.* 732

54. It is ſufficient, in pleading a public highway, to allege, that it is a common public highway, without ſhewing how it became ſo, or that it has been ſo time immemorial. *Aſpindall* v. *Brown.* 735

55. A plea of preſcription for common in a que eſtate, is good after verdict, though it be not in expreſs terms alleged that the owners of the eſtate have uſed it from time immemorial. *Clark* v. *King* et al. 736

56. If to an action of treſpaſs in the common called A. the defendant plead that A. and B. commons lie open to each other, and then preſcribe for a right in both commons, the plaintiff muſt traverſe the whole preſcription. *Morewood* v. *Wood* et al. 736

57. In pleading a right to enter a common to dig for and carry away ſand and gravel for the repairs of a houſe, it is neceſſary to allege that the houſe was out of repair, that the party entered for the purpoſe of digging for and carrying away ſand and gravel for the

the neceſſary repairs of that houſe, and that the materials were uſed for that purpoſe. *Peppin* v. *Shakeſpear*. 737

58. Wherever a particular eſtate is pleaded it muſt be ſhewn, and derived out of, and from the fee. *Johns* v. *Whitley* et al. 738

59. A deed may be pleaded as loſt by time and accident, without profert. *Read* v. *Ann Brookman*. 741

60. So in this caſe, where in ſetting forth a conveyance it was ſtated that a releaſe was cancelled by the ſeal of the releaſor being taken off and deſtroyed, and that part of the deed was deſtroyed or loſt, with a profert of the reſidue, it was holden to be good pleading. *Bolton* v. *the Biſhop of Carliſle, the Earl of Lonſdale, and Smith*. 745

61. To an action brought by the aſſignees of an inſolvent debtor, to recover money owing to him before his inſolvency, in which the plaintiffs declared that in conſideration of the money being due to the inſolvent, the defendant promiſed to pay it to them as aſſignees, the defendant pleaded, 1ſt, the general iſſue. 2dly, "That the cauſe of action firſt accrued to the inſolvent before the plaintiffs became aſſignees, and that ſix years had elapſed after the cauſe of action firſt accrued to the inſolvent, and before the ſuing out the writ of the plaintiffs." To this plea there was a general demurrer. PER CUR. The defendant might have pleaded that the debt was firſt due to the inſolvent more than ſix years before the action was brought, and that he had made no expreſs promiſe to the plaintiffs, within ſix years. And the plaintiffs muſt prove an expreſs promiſe at the trial. Judgment for the plaintiffs. *Kinder and another* v. *Paris*. 747

62. A judgment for the defendant in trover is not pleadable in bar of an action on the caſe for the value of the ſame goods. *Hitchin and others, aſſignees*, v. *Campbell*. 749

63. A ſuperſedeas obtained after judgment cannot be pleaded in bar to an action on ſuch judgment. *Topping* v. *Ryan*. 749

64. If a juſtification be pleaded to an action for a libel, charging the plaintiff to be a ſwindler, it muſt ſtate the particular inſtances of fraud, by which the defendant means to ſupport it. *J. Anſon* v. *Stuart*. 750

65. The defendant, after a verdict againſt him, obtained a rule for a new trial, which after argument on a ſubſequent day was diſcharged: he then pleaded a plea *puis darien* continuance, entitled of the term generally; and the Court refuſed to order a ſpecial memorandum of the day when it was filed under theſe circumſtances. *Lovell* v. *Eaſtaff*. 753

66. Where in an action of *aſſumpſit* on a bill of exchange with the uſual money counts, the defendant pleads *nil debet* to the count on the bill, but does not plead at all to the other counts, after a verdict for the plaintiff, the defendant ſhall not take advantage of his own miſpleading in arreſt of judgment. *Harvey* v. *Richards*. 753

67. The Court will, after verdict, over-rule an objection which they would have liſtened to, upon demurrer. *Weſton* v. *Maſon*, *and Weſton* v. *Chapman*. 754

68. Alſo, after a demurrer to a declaration of two counts againſt two defendants, becauſe one of them was not named in the laſt count, the plaintiff cannot enter a *nolle proſequi* on that count, and proceed on the other. *Drummond* v. *Dorant* et al. 755

69. There is no rule in pleading more certain than that if a party can trace back the vices in the pleadings to the firſt fault, he has a right to take advantage of it on demurrer. *Tippet* et al. v. *May* et al. 756

70. It is no cauſe for a demurrer that an aſſignment of a choſe in action is not by deed. This was *aſſumpſit* on a contract by three. Plea, the bankruptcy of one of them before the action brought. Replication, that before his bankruptcy he aſſigned his intereſt in the contract to the other two. *Howel* et al. v. *Mac Ivers* et al. 756

71. After

71. After verdict on a traverse to a return to a *mandamus* made by a corporation, the Court would not allow the defendants to amend the return, by setting forth a different constitution. *The King* v. *the Mayor and Burgesses of Grampond.* 757

72. Judgment shall not be arrested on behalf of the defendant, because in joining issue the plaintiff says the defendant likewise, instead of the plaintiff likewise. *Harvey* v. *Peake.* 759

73. If oyer is granted of any instrument of record, and it is set forth, although the party was not entitled to such oyer, yet he shall be thereby entitled to take the whole instrument as part of his adversary's plea. *Jeffery* v. *White.* 759

74. To a plea to a *sci. fa.* against bail, that the principal died before the return of any *ca. sa.* a replication stating a particular *ca. sa.* and that the principal was alive at the return of that *ca. sa.* ought to conclude to the court. *Chandler* v. *Roberts* et al. bail of *White.* 760

75. The like point. *Henderson* v. *Witby*, et al. 761

76. If the replication, denying the whole substance of the plea, conclude with a verification, it will be bad, upon special demurrer. *Boyce* v. *Whitaker.* 762

77. If a defendant plead to debt on bond, that the plaintiff won money of him at cards, and that the bond was given for securing payment of it, to which the plaintiff replies, that it was given for securing the payment of money justly due, and not for securing the payment of money won; the replication may either conclude to the country, or with an averment. *Hedges* v. *Sandon.* 764

78. In debt, on an annuity bond, defendant pleaded no such memorial as the statute requires; to which plaintiff replied, that there was a memorial which contained the names of the parties, &c. and the consideration for which the annuity was granted; and the defendant rejoined that the consideration is untruly alleged by the memorial to have been paid to both obligors, for that one of them did not receive any part of it: held that the rejoinder was bad on two grounds: 1st, That it was a departure from the plea; 2d, That it alleged no matter inconsistent with the allegations in the memorial. *Praed* v. *the Duchess of Cumberland.* 765, 766

79. In an indictment against a receiver of stolen goods for a misdemeanor it is not necessary to aver that the principal has not been convicted. *The King* v. *J. Baxter.* 767

80. *As follows*, is a sufficient averment of the tenor of a forged receipt, in an indictment: and it is only necessary to aver a general intent to defraud *A. B.* without setting out the manner in which that fraud was to be effected. *The King* v. *Robert Powell.* 768

81. In an indictment, the words, "*in manner and form following, that is to say*," do not bind the party to recite the instrument, &c. *verbatim*, nor render mere formal omissions or mistakes fatal. And if a clerk of the peace, in drawing an indictment, introduce unnecessary recitals, the Court will order him to pay the expence thereby incurred. *The King* v. *May.* 769

82. Variance in the word under-wood for under*stood* was held not material. *Rex* v. *Beach.* 770

See also MARINE INSURANCES, No. 110.

PLEDGES.

See PLEADING.

POST-HORSES.

1. The letting of a horse to hire for the purpose of going upon business from one town to another, and back again, in the compass of a day's journey, is not such a letting to hire as subjects the owner of the horse to the penalty imposed by the 25 *Geo.* 3. c. 51. s. 4. though he has not the licence which persons letting horses to hire for the purpose of travelling post are required to take out by that statute; for the words *travelling post* in that act are to be construed according to the popular acceptation of them. *The King* v. *Andrew Tooley.* 771

2. But a person who lets a horse to hire, to carry a private express, must take

take out a licence under the 25 *Geo.* 3. c. 51. ſ. 4. which impoſes a tax on horſes let to hire for the purpoſe of travelling poſt. *The King* v. *John Webber.* 772

3. But the poſt-horſe duty impoſed by 25 *Geo.* 3. c. 51. is not to be paid for horſes employed in forwarding public expreſſes on the ſervice of government. *The King* v. *James Cook.* 773

4. In an action for penalties on the poſt-horſe act brought by the farmer of the tax, it is not neceſſary for the plaintiff to give in evidence his appointment by the lords of the Treaſury, or the commiſſioners of the ſtamp duties authoriſed by them. Proof that the defendant has accounted with him, as farmer, for the duties, is ſufficient. *Radford* qui tam v. *M'Intoſh.* 774

5. It is not neceſſary to prove a licence having been granted in fact, for that other evidence would be ſufficient againſt the defendant, as that he had written up over the door "Licenſed to let poſt-horſes." *Radford* qui tam v. *Briggs.* 776

6. In an action againſt a perſon who farms the poſt-horſe duties under the ſtat. 27 *Geo.* 3. c. 26. for a neglect of duty, it is neceſſary to aver that he is the farmer appointed under and by virtue of that act. Alleging that he is the collector of the rates and duties recited in that act is not ſufficient. *Short* v. *Pruen.* 777

7. In compounding a penal action on the poſt-horſe act (which gives coſts to the proſecutor), the proſecutor was allowed to receive the deficient duties (not amounting to 40s.) and full coſts of ſuit, though together exceeding the 40s. paid to the crown. *North* qui tam v. *Smart.* 778

POST-OFFICE.

1. The ſtat. 9 *Ann.* c. 10. ſ. 40. which inflicts a penalty of 20l. on perſons who willingly open, or detain, letters, after they have been delivered at the poſt-office, only extends to perſons in the employment of the poſt-office. *Martin* v. *Ford.* 779

2. A priſoner acquitted on a charge of felony committed as a ſorter and charger of letters, cannot be convicted on another count charging him generally as a perſon employed in the poſt-office, under the ſtat. 7 *Geo.* 3. *The King* v. *Shaw.* 780

3. The ſtatute 9 *Ann.* c. 10. which erected the penny poſt-office, and confines the limits of its delivery to "the cities of London and Weſtminſter, the borough of Southwark, and the parts adjacent," includes the inhabitants of Old-ſtreet. *Jones* v. *Walker.* 781

POUND.

A horſe cannot be diſtrained, *damage feaſant*, and led to pound, if there be a rider upon him. *Storey* v. *Robinſon.* 783

POWER.

1. A power of the jointreſs to make leaſes, not being expreſſed, cannot be implied under a private act of parliament. *Roe*, ex dim. *Duke of Bolton*, v. *Grantham.* 783

2. A power to make leaſes for years is to be liberally conſtrued. *Right* et al. *Francis Baſſet*, eſq. v. *Thomas* et al. 40

3. Where there is a power to grant leaſes in poſſeſſion, but not by way of reverſion or future intereſt, a leaſe *per verba de præſenti* is not contrary to the power, although the eſtate, at the time of granting the leaſe, was held by tenants at will, or from year to year, if, at the time, they receive directions from the grantor of the leaſe to pay their rent to the leſſee. *Goodtitle*, leſſee of *Clarges*, and *Earl Ferrers*, v. *Funucan.* 44

4. Alſo, under a power to leaſe all manors, meſſuages, lands, &c. ſo as there be reſerved as much rent as is now paid for the ſame, ſuch parts of the eſtate enumerated in the power as have never been demiſed may be let. *Ibid.*

5. But if the leaſe of a tenant for life, who has power of leaſing under certain conditions, varies from them in the intereſt demiſed, or the rent reſerved, it cannot be ſupported againſt

the remainder-man. *Doe*, ex dim. *Pulteney*, v. *Lady Cavan*. 57

6. Under a power to a tenant for life to leaſe for years, reſerving the uſual rent and covenants, a leaſe made by him, containing a proviſo, that in caſe the premiſes ſhall be blown down or burned, the leſſor ſhall rebuild, otherwiſe the rent to ceaſe, is void; the jury finding that ſuch a covenant is unuſual. *Doe*, ex dim. *Ellis* and *Medwin*, v. *Sandham*. 59

7. So where power was given to the tenant in poſſeſſion to let all or any part of the premiſes, ſo as the uſual rents be reſerved, a leaſe of tithes, which had never been let before, was held void. *T. Pomery*, aſſignee of *J. Pomery*, v. *Partington*, et al. executors of *M. Grylls*. 61

8. And under a power of leaſing for one, two, or three lives, or for any term of years determinable on one, two, or three lives, the three lives muſt be certain and co-exiſting. *Doe*, ex dim. *William Wyndham*, v. *Halcombe*. 67

9. A leaſe void againſt a remainder-man cannot be ſet up by his acceptance of rent. *Jenkins*, ex dim. *Yate*, v. *Church*. 70

10. So in this caſe it was alſo held, that a leaſe void againſt a remainder-man cannot be ſet up by his acceptance of rent, and ſuffering the tenant to make improvements, after his intereſt veſts in poſſeſſion. *Doe*, leſſee of *Simpſon*, v. *Butcher*. 70

11. But though a leaſe, granted under a leaſing power, be void, if the remainder-man accept rent, as rent, after the death of the tenant for life, it is an admiſſion that the defendant is his tenant, and then he is entitled to notice to quit. *Doe*, ex dim. *T. Martin* and *Jones*, v. *Watts*. 72

12. A demiſe for three, ſix, or nine years, is a leaſe for three years at all events, and it is in the election of either of the parties to put an end to it at that time, or at the end of ſix years, giving reaſonable notice to the other. *Goodright*, ex dim. *Hall*, v. *Richardſon*. 74

13. How far a power ſhall be well executed, where it is exceeded. *Adams* v. *Adams* et al. 783

14. Every execution of a power muſt have a reference to the original inſtrument creating that power: and whoever claims under the execution muſt make title under the power itſelf. *Robinſon* v. *Hardcaſtle* et al. 788

15. A power to make a life eſtate to the wife may be executed at different times. *Zouch*, ex dimiſſ. *Woolſton*, v. *Woolſton* et al. 794

16. A power given to *an executrix* to raiſe a portion for a younger child does not extend to real eſtates, of which ſhe was alſo truſtee. And a power to raiſe portions may be executed at ſeveral times, provided the firſt execution be not meant as a complete execution, and that the party, in the whole execution, do not tranſgreſs the limits of the power. *Doe on the demiſe of Mary Rebecca Milborne* v. *Chriſtopher Milborne*. 801

17. A common law power, to *appoint* by *deed*, executed in the preſence of two witneſſes, is ill executed by a will: but it is otherwiſe, if the power be to appoint by *any writing* or *inſtrument*, or other *general term*. *The Earl of Darlington* v. *Pulteney*. 804

18. A power under a marriage ſettlement, to appoint to the children of the marriage, is ſtrictly confined to thoſe children. *Goodtitle, on the demiſe of Ruſſel, clerk, and two others*, v. *Weal, widow, and others*. 810

19. Under a power of appointing a real eſtate "to the uſe of ſuch child *and* children, &c." (and where in default of appointment, the eſtate was ſettled "to the uſe of all and every the child and children"), an excluſive appointment to one is good. *Swift, on the demiſe of Huntley and wife*, v. *Gregſon*. 812

20. An excluſive appointment, under a power of appointing "to and amongſt ſuch of his relations," was held good. *Spring, on the demiſe of Titcher*, v. *Biles*. 815

21. If there be a power under a marriage ſettlement to give to the children of the marriage, in ſuch ſhares,

ſhares, &c. and for ſuch eſtate, &c. and there is but one child of the marriage, ſuch child muſt have the whole eſtate which was ſettled. *Roe, on the demiſe of Thomas Buxton and Mary his wife*, v. *T. Dunt.* 818

22. By deed and fine an eſtate was limited to the uſe of the huſband for life, remainder to truſtees and their heirs during his life to preſerve contingent remainders, remainder to the wife for life, remainder to the truſtees and their heirs (not ſaying "during her life"), in truſt to ſupport the contingent uſes and eſtates thereinafter-limited, remainder to the firſt and other ſons in tail, remainder to the wife in tail, remainder in default of iſſue to ſuch perſons and for ſuch eſtates as ſhe ſhould appoint, &c.;—held that the truſtees took a legal eſtate in fee after the determination of the wife's life eſtate, and that all the ſubſequent limitations were truſt eſtates; it was held alſo that an appointment by the wife to the uſe of the right heirs of the huſband, could not unite with the antecedent life eſtate of the huſband, but could only give an equitable eſtate to the perſon who at his death ſhould anſwer the deſcription of his right heir. *Venables and Elizabeth his wife* v. *R. Morris and Edwards.* 819

23. *A.* deviſed to *B.* his wife for life, and empowered her to deviſe the ſame to any one or more of his child or children in ſuch manner, ſhare, and proportion, as ſhe ſhould appoint, "but ſo as the ſaid eſtate ſhould not be divided, but tranſmitted whole and entire to his heirs;" and in another part (after deviſing an adjoining eſtate in the ſame way) he added, that his will was that "they ſhould be conſidered *as one eſtate, and be tranſmitted entire to his family*," and in default of appointment to his own right heirs; *B.* by will deviſed and appointed to their ſon *C.* for life, remainder to truſtees to preſerve contingent remainders, remainder to the firſt and other ſons of *C.* in tail general; remainder to the daughters of *C.* in tail general; and with like limitations to *D.* and *E.* two other children; all the children, *C.*, *D.* and *E.* were alive when *A.* deviſed; *Quære*, what eſtates did they ſeverally take? *Per Lord Kenyon*, Ch. J. and *Groſe*, J. they reſpectively took eſtates in tail general; *per Aſhhurſt and Buller*, Juſtices, they reſpectively took life eſtates, with remainders in tail to their reſpective children. *Griffith* v. *Harriſon.* 822

24. A power to appoint a ſchool-maſter to an ancient foundation given to the vicar and churchwardens (of whom there were eleven), and in caſe of their neglect in appointing them to devolve to two corporate bodies in ſucceſſion, and to reſult in the dernier reſort to the ſame vicar and churchwardens, to whom alſo the general power of managing the truſt was committed, is well executed by the vicar and a majority of the churchwardens; eſpecially if ſuch an election be ſupported by uſage. *Withnell, clerk*, v. *Gartham.* 832

25. If a power of a public nature be committed to ſeveral, who all meet for the purpoſe of executing it, the act of the majority will bind the minority. *Grindley and another* v. *Barker and others.* 837

PRACTICE.

A *capias* is the commencement of a ſuit in B. and there is no neceſſity to file an original, but in caſe of outlawry, &c. *Leader* v. *Moxon.* 158

See NEW TRIAL, No. 13.

PRESCRIPTION.

1. A plea of preſcription for common in a que eſtate, is good after verdict, though it be not in expreſs terms alleged that the owners of the eſtate have uſed it from time immemorial.—*Clark* v. *King.* 736

2. If to an action of treſpaſs in the common called A. the defendant plead that A. and B. commons lie open to each other, and then preſcribe for a right in both commons, the plaintiff muſt traverſe the whole preſcription. *Morewood* v. *Wood*, et al. 736

3. In pleading a right to enter a common to dig for and carry away ſand and gravel for the repairs of a houſe, it is neceſſary to allege that the houſe

was out of repair, that the party entered for the purpoſe of digging for and carrying away ſand and gravel for the neceſſary repairs of that houſe, and that the materials were uſed for that purpoſe. *Peppin* v. *Shakeſpear*, et al. 737

4. A preſcription for common of paſture for a certain number of ſheep on A. every year at all times of the year, is well laid, though the evidence which proves the right of common, proves alſo that the tenant of a certain farm has a right to have the ſheep folded at night on his farm, after they have fed on the common during the day.—*Brook* v. *Willet*. 708

PRESSING.

See MURDER.

PRINTED GOODS.

In an action on the 34 *Geo.* 3. c. 23. for pirating a pattern for printing callico, the omiſſion of an averment in the declaration "that the day of firſt publiſhing the pattern was printed at each end of the piece of callico" (which together with the name of the proprietor is required by that ſtatute, the monopoly being limited for three months from the day of firſt publiſhing the pattern), was holden to be aided by verdict; it being ſtated in the declaration that the defendants pirated the pattern within the term of three months from the day of the firſt publiſhing thereof, and while the plaintiffs were entitled to have the ſole right of printing the ſame, &c. *Mackmurdo and another*, v. *Smith and others*. 723

PRINTER.

The printer of a newſpaper, publiſhing an illegal propoſal for gambling in the lottery, incurs a penalty under the 22 *Geo.* 3. c. 47. ſ. 13. which enacts, that no perſon ſhall ſell the chances of tickets, &c. nor publiſh any propoſal for it, under a penalty of 50l. *King* qui tam v. *Smith*. 208

PRIZES.

Captors of ſhips ſeized as prize may inſure their intereſt therein, and are not entitled to a return of premium although it be afterwards adjudged to be no prize, and reſtitution be awarded to the owners by the Court of Admiralty. *Boehm* et al. v. *Bell*. 293

See alſo PARTNERS, No. 8.

PROCEDENDO.

If an indictment for felony has been removed into B. R. from an inferior court, in order to iſſue proceſs of outlawry upon it, and the party accuſed come in upon the exigent, and be committed for trial, this Court will award a *procedendo*, on the ſtat. 6 *Hen.* 8. c. 6. to carry the record back. *The King* v. *Perry*. 591

PROVISIONS.

Proviſions ſent out in a ſhip for the uſe of the crew are protected by a policy of aſſurance on the ſhip and furniture. *Brough* v. *Whirmore*. 271

PROVISO.

A proviſo in a leaſe to enter for a condition broken can only operate during the term. *Johns* v. *Whitley*, et al. 84

QUAKERS.

Expulſion from a quaker's meeting, and reaſons aſſigned in the books, is not a libel. *The King* v. *Hart*. 112

RECEIVERS OF STOLEN GOODS.

In an indictment againſt a receiver of ſtolen goods for a miſdemeanor, it is not neceſſary to aver that the principal has not been convicted. *The King* v. *J. Baxter*. 767

RECORDER.

1. A *mandamus* will lie to reſtore a recorder. *Rex* v. *the Corporation of Wells*. 224

2. A *mandamus* to admit a recorder was refuſed in this caſe, becauſe there was a recorder *de facto*, and the party had another remedy by *quo warranto*; though both of them claimed under the ſame election. *The King* v. *the Mayor of Colcheſter*. 240

RELATIONS.

An exclusive appointment, under a power of appointing "to and amongst such of his relations," was held good. *Spring, on the demise of Titcher,* v. *Biles and another.* 815

RESPONDENTIA.

A person having a *respondentia* interest cannot insure it as an interest on goods. *Glover* v. *Black.* 267

RETURN.

See MANDAMUS, No. 32. *et seq.*

RIENS IN ARRERE.

Riens in arrere is a good plea to an action of debt for rent. *Warner* et al. v. *Theobald.* 729

RIVERS.

If timber on the banks of a river, be accidentally loosened and carried away by the tide, there is no lien for voluntarily conveying it to a place of safety. *Nicholson* v. *Chapman.* 140

SCOTLAND.

1. The statute of limitations extends to persons in Scotland. *King* v. *Walker.* 152

2. A marriage in a foreign country must be governed by the law of that country where the marriage was had, but the marriages in Scotland, of persons going from hence for that purpose, may come under a very different consideration. *Robinson* v. *Bland.* 487

SEAMEN.

Seamen's wages and provisions are not covered by an insurance on the body of the ship. *Robertson* v. *Ewer.* 270

SESSIONS.

A declaration stating it to be for maliciously indicting at the general quarter sessions, instead of general sessions, is good, the word quarter being only surplusage. *Busby* v. *Watson.* 707

SET-OFF.

Declaration in *assumpsit* against three. Two of the defendants pleaded a debt of record by way of set-off, without taking any notice of the third. The plaintiffs replied *nul tiel record,* and gave a day to produce the record to the two defendants, who pleaded, but entered no suggestion on the roll respecting the third. To this there was a general demurrer, and joinder. The Court held that the plaintiffs, having replied to a plea by two of the defendants without taking notice of the third, against whom they declared, had made a discontinuance. *Tippet* et al. v. *May* et al. 756

SETTLEMENT.

See FRAUDULENT CONVEYANCE, MARRIAGE, POWER.

SHERIFFS.

By stat. 28 *Eliz.* c. 4. sheriffs are liable to a penalty for taking more than a certain sum on executions "upon the body, lands, goods, *or* chattels." A declaration on this act in reciting the statute, stated it thus, "body, lands, goods, *and* chattels;" and this was held to be a fatal variance in arrest of judgment. *King* v. *Marjack.* 701

SHIPS.

British ships, in passing the Eddystone, and other light-houses in the Channel, not touching at any place in Great Britain or Ireland, are not liable to pay the light-house duties to the Trinity-house. *The Trinity-house* v. *Sorybie.* 149

SHIPS HUSBAND.

See MARINE INSURANCE, No. 12.

SLAVES.

1. Where a mate of a ship or a sailor is to receive at the end of the voyage in lieu of wages slaves, he cannot insure them: for slaves are not the subject of insurance. *Webster* v. *De Tastet.* 321

2. Upon an insurance on slaves against

againſt perils of the ſea, their death by failure of ſufficient and ſuitable proviſion occaſioned by extraordinary delay in the voyage from bad weather is not a loſs within the policy, but a loſs by natural death which cannot be inſured againſt ſince the 30 *Geo.* 3. c. 33. ſ. 8. and 34. *Geo.* 3. c. 80. *Tatham* v. *Hodgſon.* 349

3. By 31 *Geo.* 3. c. 54. ſ. 7. for regulating the African ſlave trade, it is neceſſary that the certificate of the captain's having ſerved as that act requires ſhould be atteſted by the owner or owners of the ſhip or ſhips in which the ſervice was performed. *Farmer* v. *Legg.* 351

SMUGGLING.

See MARINE INSURANCES, No. 38.

STATUTE OF FRAUDS.

A promiſe in writing, directed to *A.*, *B.* and *C.* a houſe in trade, to pay for goods to be furniſhed to another, cannot be enforced in an action by *B.* and *C.* to recover the value of goods furniſhed after *A.* had withdrawn from the partnerſhip. *Myers*, et al. v. *Edge.* 642

SUBURBS.

See POST OFFICE, No. 3.

SUPERSEDEAS.

A ſuperſedeas obtained after judgment cannot be pleaded in bar to an action on ſuch judgment. *Topping* v. *Ryan.* 749

SURRENDER.

The acceptance of a new good leaſe, implies a ſurrender of a former. *Daviſon*, ex dim. *Bromley, eſq.* v. *Stanley.* 80

TENANT IN COMMON.

One tenant in common ſhall not bar the other by the ſtatute of limitations, where there is no adverſe poſſeſſion. *Fairclaim*, ex dim. *Empſon* v. *Shackleton.* 151

TENANT FOR LIFE.

A pawn-broker has no lien on plate after the death of a tenant for life, who pawned it with him, as againſt the remainder-man, although the pawnee had no notice of the ſettlement. *Hoare*, et al. v. *Parker.* 649

TERM OF YEARS.

1. A ſecond mortgagee, who takes an aſſignment of a term to attend the inheritance, and has all the title deeds, may recover in ejectment againſt the firſt mortgagee, not having had notice of ſuch prior mortgage. *Goodtitle*, ex dim. *Norris*, et al. v. *Morgan*, et al. 505

2. But where a legal term is created for a particular purpoſe, if that purpoſe be ſatisfied, or it be unſatisfied and not connected with the litigating parties, it ſhall never be ſet up between them in ejectment. *Doe* ex dim. *Briſtow* v. *Pegge.* 507

THAMES.

See LONDON, No. 5, 6.

TOLLS.

Freemen of the city of London have a right to be exempt from the payment of all tolls and port duties throughout England (except the priſes of wines), in whatever place they reſide, and though they have obtained their freedom by purchaſe. *The Mayor, &c. of London*, v. *the Mayor, &c. of Lenne Regis, commonly called King's Lynn, in the county of Norfolk.* 163

TROVER.

A judgment for the defendant in trover is not pleadable in bar of an action on the caſe for the value of the ſame goods. *Hitchin and others, aſſignees*, v. *Campbell.* 749

See alſo PLEADING.

TRUSTS.

One of two partners applied truſt-money in the trade with the privity of the other partner; afterwards they ſeparated, and the partnerſhip effects were aſſigned over to the firſt who took on him the debts; this was held to be no payment in diſcharge of the other partner, but both were liable to make good the

the truſt-money. *Smith* et al. v. *Robert and Thomas Jameſon.* 632

VAGRANTS.

See CONSTABLE.

VARIANCE.

See PLEADING.

VENIRE FACIES DE NOVO.

Upon an information for printing and publiſhing a ſeditious libel, the jury found the defendant guilty of printing and publiſhing only; and thereupon a *ven. fac. de novo,* was ordered. *Rex* v. *Woodfall.* 133

See alſo INFERIOR COURTS, No. 1.

VENUE.

1. Where in debt on bond by an adminiſtrator, the declaration alleged that adminiſtration was granted by the biſhop of Lichfield and Coventry, and the venue in the margin was laid in London, but the bond was ſtated to be made at Derby, which is within the dioceſe; the Court, on a general demurrer, held that to be ſufficient; and that the bad venue laid in the margin was cured by the ſtat. of Jeofails. *Mellor, adminiſtrator of Mellor,* v. *Barber.* 698

2. In declarations, the county aforeſaid, where more than one is named, always refers to the margin. *Sutton* v. *Fenn.* 698

VESTRY CLERK.

In this caſe a *mandamus* to admit a veſtry clerk was refuſed. *The King* v. *the Churchwardens of Croydon.* 237

UNIVERSITIES.

1. A *mandamus* lies to the keepers of the common ſeal of the univerſity of Cambridge, commanding them to put it to the inſtrument of appointment of their high ſteward, purſuant to a grace paſſed in ſenate. *Rex* v. *Vice-Chancellor, &c. of Cambridge.* 211

2. A *mandamus* will be granted to compel the warden of a college to affix the common ſeal of the college to an anſwer of the fellows, in chancery, contrary to his own ſeparate anſwer put in. *Rex* v. *Dr. Windham.* 214

WATER BAILIFF.

See LONDON, No. 5.

WAY-GOING CROP.

A cuſtom that tenants, whether by parol or deed, ſhall have the way-going crop after the expiration of their terms, is good. *Wiggleſworth* v. *Dalliſon,* et al. 18

WHARFS.

Wharfs muſt be aſſigned in open places only. *The caſe of the London wharfs.* 19

WIFE.

See BARON AND FEME, POWER.

WILLS.

1. If a mortgagor deviſes the mortgaged premiſes, and afterwards pays off the mortgage, and the mortgagee conveys the legal eſtate to a truſtee in truſt for the mortgagor, ſuch a transfer of the legal eſtate ſhall not operate as a revocation of the will. *Doe, leſſee of Gibbons,* v. *Pott.* 498, 499

2. A common law power, to appoint by deed, executed in the preſence of two witneſſes, is ill executed by a will; but it is otherwiſe, if the power be to appoint by any writing or inſtrument, or other general term. *The Earl of Darlington* v. *Pulteney.* 804

WRIT OF ENQUIRY.

After a defence made on a writ of enquiry, the defendant is not allowed to take advantage of a miſtake in the declaration. *Freeland* v. *Hunt.* 726

END OF THE FOURTH VOLUME.

T. Daviſon,
White-Friars.